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CALIFORNIA REPORTER

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SECOND SERIES

216 Cal. 18

McKINNEY v. SARGENT et al.

Sac. 4555.

Supreme Court of California.

July 15, 1932.

Rehearing Denied Aug. 12, 1932.

1. Sales ⇐197.

Without contrary agreement, destruction of subject of executory sales contract throws loss on seller, dissolves contract, and renders buyer in possession liable for use.

2. Sales ⇐197.

Whether written executory sales contract was executed when subject of it was destroyed depends primarily on parties' intention as evidenced by contract.

3. Sales ⇐218½.

Where facts are not disputed, question whether executory sales contract was executed when subject of it was destroyed is one of law.

4. Sales ⇐197.

Until executory sales contract is executed by performance of necessary act or condition, it remains ineffective.

5. Sales ⇐201(1).

Destruction of hotel in buyer's possession before delivery of sale agreement imposed loss on sellers, and entitled buyer to return of partial payment (Civ. Code, § 1626).

In Bank.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by Ella E. McKinney against Ann Sargent and others. From a judgment for defendants, plaintiff appeals.

Reversed.

B. C. Hawkins and Hawkins & Hawkins, all of Modesto, for appellant.

L. L. Dennett, of Modesto, for respondents.

TYLER, Justice pro tem.

Action to recover the sum of $1,050 paid under an executory contract of sale of personal property.

[1] The case was twice heard in the court below. The first judgment was in favor of plaintiff in the sum of $487.45. A new trial was granted, and judgment then went in favor of defendants, respondents herein. This appeal is from the latter judgment, and it is taken upon the judgment roll alone. It appears therefrom that on July 6, 1927, defendants were the owners of the business known as the Latz Hotel, in the city of Modesto, together with all the furniture and other personal property connected with the operation thereof, and a leasehold interest of the premises. On said last-mentioned day plaintiff, Ella E. McKinney, entered into negotiations with defendants for the purchase of the same. Pursuant to such negotiations, the parties went to the office of one E. H. Zion, an attorney at law, and had him prepare a contract of sale which the parties signed. The agreement was left with the attorney in escrow, with instructions to deliver it to plaintiff when she had performed an act provided for by the terms of said agreement, which required that she clear the title to certain real property owned by her, and execute a mortgage thereon in favor of defendants as security for the payment of the balance of the purchase price; a small deposit being made at the time. Before the title to the real property was cleared and before either the mortgage or said instrument of sale was delivered by the escrow holder, the building in which the rooming house was located was destroyed by fire, and all of the property which was the subject-matter of the sale, with the exception of some slight salvage of the value of $35, ceased to exist. Defendant vendors carried insurance on the property amounting to the sum of $2,540. The purchase price agreed upon by the parties for the business was the sum of $3,500, and at the time of its destruction plaintiff had paid on account thereof the sum of $1,050, the amount for which she here sues. The agreement of sale provided that the destruction of the property by fire or otherwise should not relieve plaintiff from liability to pay the purchase price agreed to be paid. It also provided, however, that the agreement was not a contract of sale, and that title to the property should remain in defendant vendors until full performance of the conditions thereof. It was plaintiff's contention below, and is here, that title to the destroyed property never passed, for the reason that the written instrument was never delivered and therefore never became effective, and that, this being so, title to the destroyed property was at all times in defendants, and the loss followed the title and must therefore be borne by defendants who are bound to return to plaintiff all moneys paid under the contract. It is an elementary law of sales, in the absence of special agreement to the contrary, that, under an executory contract of sale, the

loss falls on the vendor as the risk accompanies the title. In such case the vendor is excused from the performance of his contract by reason of the destruction of the thing, but he cannot retain money already paid on account of the proposed purchase, or recover the moneys remaining unpaid. Under such circumstances the buyer cannot be compelled to pay the price, and, if he has paid, it may be recovered. Although the purchaser is not liable to the vendor for the purchase price, he must account for profits made by him from a use of the property while in his possession under agreement of sale. Kirtley v. Perham, 176 Cal. 333, 168 P. 351. Respondents do not dispute the correctness of this principle, but they claim that the written instrument, though not delivered, was carried into effect by the conduct of the parties in partly performing it.

In this connection the record shows that on July 7, 1927, the day after the agreement was signed, plaintiff went into possession of the premises and complied with all of the terms and provisions of the contract, and received the rents accruing from the business from said day to the 10th day of January, 1928, when the premises were destroyed, except that she failed to have the title to the property, upon which she had given a mortgage, cleared as provided for in the escrow agreement. It also shows that defendants had performed all of the acts and done all of the things required to be done by them under the terms of the contract; that besides delivering possession they paid off, as they had agreed to do, a chattel mortgage upon said business so agreed to be sold.

The trial court found that under these circumstances it was not true as alleged that no contract for the purchase of said property was ever completed between plaintiff and defendants, and that it was not true that the consideration for such contract had failed totally or at all.

[2-4] As conclusions of law the court found, in substance, that the contract was duly and legally executed by the plaintiff and defendants, and that, having entered into possession of the premises, plaintiff was bound by the terms of the contract, one of which was to the effect that the destruction of the property by fire or otherwise should not relieve the vendee from liability to pay the agreed purchase price. In reaching this conclusion we are of the opinion that the trial court committed error. Whether or not the contract had become executed at the time of the destruction of the property depends upon the intention of the parties. If the transaction is as here, evidenced by an instrument in writing, the intention of the parties is to be determined primarily by reference to the written document. Hull v. Ray, 80 Cal. App. 284, 251 P. 810. In such a case, where the facts are not disputed, the question whether the agreement becomes operative is one of law for the court to decide. An executory contract is converted into an executed one by the performance of the act or the fulfillment of the condition which is necessary for this purpose. Until then the agreement does not become effective. This rule, however, is subject to the general rule previously stated, that the question is one of intention of the parties. Here there is nothing in the record to show that any waiver of the terms of the agreement with reference to the conditions under which the contract would become effective was ever made.

[5] It is true that the vendee went into possession and began to make payments in accordance with the terms of the contract, and defendants performed certain conditions they had undertaken to perform, but the contract provided they should do these very things, and still under the terms of the escrow agreement the contract was not to become effective until plaintiff had cleared the title to her real property and mortgaged it to defendants to secure the purchase price, a condition which was never fulfilled. A contract in writing takes effect only upon its delivery to the party in whose favor it is made. Civ. Code, § 1626. Undoubtedly defendants were of the opinion that the terms of the agreement would be carried out when they agreed that plaintiff should go into possession, but they did nothing that deprived them of the protection afforded to them by the escrow agreement, which provided that no delivery of the agreement of sale should be had until the conditions above recited were performed by plaintiff. The delivery never having been made, the agreement was inchoate and incomplete and never became effective. The provision contained therein, that the destruction of the property by fire or otherwise would not excuse payment, had therefore no binding force or effect. This being so, the title remained in the vendors, and the case is controlled by the rule above stated, that the loss follows the title.

From what we have said, it follows that appellant is entitled to the return of the amount of her payments, less the profit, if any, she may have derived from the use of defendants' property.

For the reasons given, the judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; PRESTON, J.; SEAWELL, J.

216 Cal. 14

FISH v. FISH et al.

L. A. 13399.

Supreme Court of California.

July 14, 1932.

1. Appeal and error ⇐71(4).

Order allowing receiver's account fixing fees of receiver and attorney and directing sale of property to pay fees *held* final and appealable.

2. Appeal and error ⇐71(4).

Reservation of right to disallow any sale made by commissioner did not render interlocutory order directing sale and fixing fees of receiver and attorney.

3. Appeal and error ⇐458(2).

Appellant who appealed from final order and gave adequate stay bond *held* entitled to have threatened sale stayed pending appeal.

In Bank.

Suit by Grace E. Fish against Frank N. Fish, wherein William A. Jacobson was appointed receiver, and Arthur S. Guerin was named as the receiver's attorney. From an order allowing and settling receiver's account, fixing fees of receiver and his attorney, directing sale of certain property in receiver's hands to pay fees, directing disposition of balance of proceeds, and ordering discharge of receiver and release of his surety, plaintiff appeals. On appellant's application for writ of supersedeas to stay sale by commissioner pending appeal.

Writ granted.

L. B. Stanton, of Los Angeles, for appellant.

Arthur S. Guerin, of Los Angeles, for respondents.

WASTE, C. J.

Application for a writ of supersedeas.

Petitioner brought this action for separate maintenance and division of property. Respondent Jacobson was appointed receiver and respondent Guerin was named as his attorney. The defendant husband failed to appear in the action, but by private arrangement the property rights of the spouses were fully settled. The receiver thereupon filed his report and final account with the trial court, praying that the same be allowed and settled, that the disposition of the property in his hands be directed, and that his compensation and that of his attorney be fixed and payment thereof ordered. Petitioner appeared in opposition to the settlement of the account and denied that the receiver had taken possession of certain properties listed in his report, denied that $1,000 constituted fair or reasonable compensation for the receiver, denied that the reasonable value of the services of his attorney was $2,500 or any sum in excess of $100. It was further urged in opposition to the settlement of the account that the receiver never at any time had in his possession property of a value to exceed $3,500 and that there had been an understanding and agreement between the parties as to the receiver's compensation, which agreement petitioner had at all times lived up to.

At the conclusion of the hearing thereon the trial court made its minute order and thereafter made and entered its formal order allowing and settling the receiver's account, fixing his compensation and that of his attorney, directing a named commissioner to sell, subject to confirmation, certain property in the receiver's hands to pay said fees, directing the disposition to be made of the balance of the proceeds derived from such sale, and ordering the discharge of the receiver and the release of his surety. Petitioner duly noticed an appeal to this court from such order and posted an adequate and proper stay bond.

Alleging that the court below, through its commissioner, threatens to sell the property pending the determination of such appeal, plaintiff filed her application herein for a writ of supersedeas. An order was issued upon such application directing the trial court, its commissioner, and the receiver and his attorney to show cause why a supersedeas should not issue as prayed for. On the return day the respondents orally demurred to the petition and by way of brief subsequently filed urged, principally upon the authority of Illinois Trust & Sav. Bank v. Pacific Ry. Co., 99 Cal. 407, 33 P. 1132, that the order appealed from is merely interlocutory in character and therefore nonappealable. For this reason they contend that a supersedeas should not issue.

[1] We cannot accept respondents' solution of the problem presented. Decisions recognizing the right of appeal from an order, where that right does not rest upon the express provisions of section 963 of the Code of Civil Procedure, are numerous and proceed upon the theory that the order is in effect a final judgment against a party in a collateral proceeding growing out of the action; that is to say, is so far independent of the suit itself as to be substantially a final decree for the purpose of an appeal, although there has been no final decree in the action. Anglo-Calif. Bank v. Superior Court, 153 Cal. 753, 96 P. 803. Orders requiring the payment of money by the party complaining, or the doing of an act by or against him, are usually regarded as final as against such party and may be appealed from by him. Colma Veg. Ass'n v. Superior Court, 75 Cal. App. 91, 95,

242 P. 82. The order here appealed from not only allowed and settled the receiver's account, but, over petitioner's opposition, fixed the receiver's compensation and that of his attorney at a stated sum and provided for a sale of the receivership property to pay the same. Petitioner, as plaintiff in the principal action, has an interest in the receivership property and is vitally affected by any decree disposing of the same. The order for the sale of the receivership property, for the purpose designated, is certainly an order "for the doing of an act against" petitioner, because, if carried into execution, it will deprive her of a portion of the property or the proceeds derived from the sale thereof. We are of the opinion, therefore, that the order is in effect final as to the matters therein determined and may be appealed from.

Substantially the same character of order was held to be appealable in the following cases: Los Angeles v. Los Angeles C. Water Co., 134 Cal. 121, 122, 124, 66 P. 198; Grant v. Superior Court, 106 Cal. 324, 39 P. 604; Grant v. L. A. & P. Ry. Co., 116 Cal. 71, 47 P. 872; Leeper v. Superior Court, 62 Cal. App. 736, 739, 217 P. 811.

The order entered in Illinois Trust & Savings Bank v. Pac. Ry. Co., supra, which case is relied on by respondents, has been properly distinguished from the type of order here under consideration on the ground that it did not direct "the payment of any money, or the performance of any act by or against" the complaining party, and therefore lacked one of the essential elements of a final judgment. This distinction is pointed out in Los Angeles v. Los Angeles C. Water Co., supra, page 124 of 134 Cal., 66 P. 198, 200, and in Free Gold Mining Co. v. Spiers, 135 Cal. 130, 131, 67 P. 61.

[2] We find no merit in respondents' further contention that the order here involved is interlocutory and nonappealable because it reserves to the trial court the right to confirm or disallow any sale made by the commissioner therein named. A similar reservation appeared in the order under consideration in Leeper v. Superior Court, supra, but the order was nevertheless properly held to be in effect a final judgment and therefore appealable. Obviously, such a reservation does not affect the finality of that portion of the order fixing the compensation of the receiver and his attorney and directing a sale of the property to pay the same.

[3] Having duly presented an appeal to this court from the order above designated and having filed a proper and adequate stay bond in the trial court, it follows from what has been said herein that the petitioner is entitled to the assistance of the reviewing court to effect such stay pending the determination of the appeal.

For the foregoing reasons, respondents' demurrer to the petition is overruled and a writ of supersedeas directed to be issued.

We concur: SEAWELL, J.; SHENK, J.; CURTIS, J.; LANGDON, J.; TYLER, Justice pro tem.

124 Cal.App. 655

WILSON v. WILSON.

Civ. 8533.

District Court of Appeal, First District, Division 1, California.

July 9, 1932.

1. Divorce ⇐127(4).

Where there is no collusion, and defendant's testimony, though conflicting with plaintiff's in many details, in more important matters is corroborative thereof, and plaintiff's testimony is also corroborated by other testimony, corroboration is sufficient (Civ. Code § 130; Code Civ. Proc. § 2079).

2. Divorce ⇐136.

That defendant has vigorously contested divorce action dispels idea of collusion.

3. Divorce ⇐129(9).

Adultery as ground of divorce may be proved by circumstantial, as well as by direct, evidence.

4. Divorce ⇐127(4).

In divorce action, corroboration of every act sworn to by plaintiff is not required, but evidence tending to confirm plaintiff's testimony on considerable number of material facts is sufficient (Civ. Code § 130; Code Civ. Proc. § 2079).

5. Divorce ⇐115.

Testimony respecting admissions by defendant of adultery charged and of disposition to commit such act, though insufficient alone to authorize divorce, *held* admissible (Civ. Code, § 130; Code Civ. Proc. § 2079).

6. Divorce ⇐184(6).

Weight of testimony tending to show adulterous disposition as ground for divorce *held* question for trial court.

7. Divorce ⇐129(16).

Evidence *held* sufficient to entitle husband to divorce for wife's adultery.

8. Divorce ⇐184(6, 7).

Credibility of witnesses and weight to be given their testimony in divorce action were questions for trial court.

9. Divorce ⇐130.

Evidence *held* not to sustain defendant wife's charges of mental suffering resulting

from vile epithets applied to her by husband suing for divorce on ground of wife's adultery.

10. Divorce ⇐298(6).

Presumptively, mother is entitled to custody of children of tender years.

11. Divorce ⇐298(1).

Controlling consideration in awarding custody of children in divorce action is children's welfare.

12. Divorce ⇐312.

Question of awarding children's custody in divorce action is for trial court, whose conclusion will not be set aside in absence of clear abuse of discretion.

13. Divorce ⇐298(3).

Awarding custody of two minor children to husband granted divorce for wife's adultery, with provision permitting wife to visit children at reasonable times, *held* for best interests of children and fair to spouses.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action for divorce by Winfred T. Wilson against Florence E. H. Wilson, wherein defendant filed a cross-complaint. From an interlocutory judgment for plaintiff, defendant appeals.

Affirmed.

Harry I. Stafford and Edward A. Cunha, both of San Francisco, and Allen C. Cunha, of Oakland, for appellant.

Andros, Hengstler & Dorr, of San Francisco, for respondent.

PER CURIAM.

An appeal from an interlocutory decree of divorce.

Plaintiff charged defendant with adultery committed with two persons named in his complaint, and also with extreme cruelty. Defendant denied the charges, and as a separate defense alleged condonation, and also by way of cross-complaint charged the plaintiff with extreme cruelty toward her. There was also in issue the validity of an agreement settling their property rights.

The trial court found the complaint to be true and the allegations of the answer and cross-complaint to be untrue. It also found the said agreement to be valid and binding. An interlocutory decree of divorce was awarded the plaintiff, and he was also given the custody of the two minor children of the marriage.

Defendant contends that certain of the findings are unsupported; namely, the findings that she committed adultery and was guilty of extreme cruelty, and that the court erred in awarding the custody of the children to the plaintiff.

As to the first charge, plaintiff testified that, while he was residing in Oakland, his wife and children were temporarily occupying a house at Saratoga, where he visited her weekly. On the occasion alleged he arrived at Saratoga at night, and found his wife's and another automobile parked in the driveway of his house. The house doors were locked, but he forced his way in and found his wife with a certain man named Fry, both being partially dressed. Fry attempted to hide under a bed. Plaintiff then charged his wife with adultery, which she admitted, and Fry stated: "Well, I guess I went too far with your wife." A brother of plaintiff testified that defendant admitted the above facts to him, stating, however, that she had not committed adultery on that occasion, but that such had been her intention but for the arrival of her husband. At the trial defendant admitted that Fry was with her on the occasion testified to by plaintiff and that he kissed her, but she denied any acts of adultery. Fry also testified that he was present on that occasion, and that he kissed the defendant, but denied any other improper acts. Defendant contends that there was insufficient corroboration of plaintiff's testimony to justify a finding that she committed adultery with Fry.

[1, 2] No divorce can be granted upon the uncorroborated statement, admission, or testimony of the parties (Civ. Code, § 130); and in an action for divorce on the ground of adultery a confession of adultery, whether in or out of the pleadings, is not of itself sufficient to justify a judgment of divorce (Code Civ. Proc. § 2079). It has been held, however, that the principal object of the rule requiring corroboration is to prevent collusion; and, where it is clear that there is no collusion, and the defendant's testimony, though conflicting with that of plaintiff in many of its details, in the more important matters was corroborative of the plaintiff's testimony, which was also corroborated in certain respects by other testimony, the corroboration is sufficient. Smith v. Smith, 119 Cal. 183, 48 P. 730, 51 P. 183; Andrews v. Andrews, 120 Cal. 184, 52 P. 298; McMullin v. McMullin, 140 Cal. 112, 119, 73 P. 808. And it has been held that the fact that a defendant has vigorously contested the suit dispels any idea of collusion between the parties in the procurement of the divorce. Hill v. Hill, 106 Cal. App. 309, 289 P. 227.

[3-6] Adultery may be proved by circumstantial evidence as well as by direct evidence (Aston v. Aston, 14 Cal. App. 323, 111 P. 1035); and in divorce actions corroboration of every act sworn to by plaintiff is not required, but evidence, circumstantial or direct, tending to confirm plaintiff's testimony upon a consid-

erable number of material facts, is sufficient (Percy v. Percy, 188 Cal. 765, 207 P. 369). In Koenigstein v. Koenigstein, 53 Cal. App. 673, 200 P. 730, it was held that in proving adultery by indirect evidence a criminal disposition or desire in both the mind of the defendant and the particeps criminis, and an opportunity to commit the crime, must be shown; and proof of an adulterous disposition on the part of the defendant and an alleged paramour, coupled with an opportunity for them to commit the offense, has generally been held sufficient. 19 Cor. Jur. Divorce, § 357, p. 139. Here we have testimony of admissions by defendant both of the act charged and the disposition to commit such act. Such testimony, while not sufficient alone, was admissible (9 Cal. Jur. Divorce and Separation, p. 643), and is corroborated by that of Fry that, with the exception of defendant's children, who were on an upper floor, he was alone in the house with defendant on the night alleged, and, without apparent objection on her part, indulged in familiarities. These facts tended to show an adulterous inclination in both, and his testimony was properly considered in determining the fact of adultery; its weight being a question for the trial court. 19 Cor. Jur. Divorce, § 364, p. 141; 9 Cal. Jur. Divorce and Separation, § 128, p. 780; Brenot v. Brenot, 102 Cal. 294, 36 P. 672.

[7, 8] The second charge of adultery involved defendant's conduct with one Prest. It was testified by the owner of an apartment house in Los Angeles that defendant occupied one of the apartments in company with Prest for about a month, and this was corroborated by a real estate agent who rented the premises to the couple and who testified that defendant was introduced to him as Prest's wife. Another witness testified that defendant and Prest lived in an apartment adjoining the one occupied by him. In addition, detectives testified to an occasion when defendant entered Prest's room in a house in Oakland. The detectives were in an adjoining room. They entered shortly afterwards and found the two together. Defendant was lying upon a bed with her clothing disarranged. The deposition of Prest was also taken. He testified that in company with defendant he visited Los Angeles and lived there with her for some time. He admitted having sexual relations with her there and elsewhere. The taking of his deposition having been continued for a few days, upon its resumption he denied the truth of his previous statements. Defendant admitted at the trial that she was in Los Angeles at the time testified to and that she lived at the apartment house mentioned; also that she was there introduced as Mrs. Prest. She denied, however, any misconduct with Prest. There were also introduced in evidence letters written by defendant to Prest containing words of endearment and suggestion. Defendant contends that the evidence of Prest and the detectives was entitled to but slight weight, and that the testimony as a whole was insufficient to support a finding of adultery.

The credibility of the witnesses and the weight to be given their testimony were questions for the trial court, and the evidence, which the court believed, was ample to sustain the charge. The evidence supporting the charges of adultery also sustained plaintiff's allegations of extreme cruelty.

[9] The court found that defendant's allegations of cruelty on the part of her husband were untrue. The cruelty alleged consisted of physical violence and the application of vile epithets. This was testified to by defendant, and she was corroborated by another witness. The plaintiff denied the alleged physical violence, but admitted that on the occasion when Fry was found in his home he applied to his wife epithets which would be calculated under ordinary circumstances to cause his wife extreme mental suffering; but the court no doubt believed the circumstances were such as to excuse his conduct; and, in addition, it was testified that on the following day defendant stated that she had no fault to find with her husband. The facts were sufficient to show an absence of mental suffering on this account.

A few days after the incident at Saratoga, the parties entered into an agreement settling their property rights. There was no community property of the marriage, and the agreement required plaintiff to pay defendant $100 a month for two years.

This promise was accepted in full satisfaction of all claims against him. The court found that the agreement was made voluntarily and without fraud, duress, menace, or undue influence, and the record discloses nothing which would necessitate a contrary conclusion. These findings are also supported by the evidence.

[10-13] The court awarded the custody and care of the two minor children to plaintiff for a period of six months, further provision being made that defendant might visit them at all reasonable times and have them with her for one day each week; also that, if defendant should visit Sacramento during any week, she might have them with her for two days. The children are a girl and a boy, aged six and four years, respectively. While presumptively a mother is entitled to the custody of children of tender years (Luck v. Luck, 92 Cal. 653, 28 P. 787), nevertheless the controlling consideration is the children's welfare, and this question is one for the trial court, whose conclusion will not be set aside in the absence of a clear abuse of discretion (Bancroft v. Bancroft, 178 Cal. 352, 173 P. 582; Cammack v. Cammack, 205 Cal. 674, 272 P. 288). Here,

In view of the facts, the award was not only for the best interests of the children, but fair to the spouses, and we see no reason for disturbing it.

The conclusions of the trial court are fairly sustained by the evidence, and no error has been shown which would warrant the reversal of the judgment.

The judgment is affirmed.

124 Cal.App. 646

PRENTICE v. ZUMWALT.

Civ. 4509.

District Court of Appeal, Third District, California.

July 8, 1932.

Rehearing Denied Aug. 6, 1932.

1. Replevin ⇐72.

In replevin for farm machinery, evidence *held* to sustain finding that defendant seized and retained machinery unlawfully, oppressively, and maliciously.

Evidence disclosed that plaintiff returned a binding machine which he had bought from defendant because it would not work; that $365 represented by an unsecured note remained unpaid on the purchase price after defendant resold the machine; that defendant purchased from the bank a $500 note secured by the mortgage on the farm machinery in controversy, and then without notice to plaintiff sent four men to seize the farm machinery over plaintiff's protest; and that thereafter defendant refused plaintiff's tender of the mortgage indebtedness, defendant's intention clearly being to use the secured note and mortgage to enforce the payment of the unsecured disputed one.

2. Replevin ⇐81.

It was necessary for replevisor to establish malice in fact to sustain judgment for exemplary damages (Civ. Code, § 3294).

3. Replevin ⇐75.

Statute relating to damages from breach of contract entitled replevisor of farm machinery to such damages as would fully compensate him for detriment proximately caused by unlawful seizure and detention (Civ. Code, § 3300).

4. Replevin ⇐81.

Replevisor *held* entitled to exemplary damages in reasonable amount within jury's discretion for farm machinery seized and unlawfully, oppressively, and maliciously retained (Civ. Code, § 3294).

5. Replevin ⇐81.

Replevisor *held* entitled to exemplary damages for defendant's retaining, after replevisor's tender of mortgage indebtedness, property seized under mortgage even though seizure was legal (Civ. Code, § 3294).

6. Chattel mortgages ⇐237.

Replevisor's tender of full indebtedness, secured by mortgage under which replevied property was seized, to defendant who refused it without qualification, *held* valid tender (Code Civ. Proc. § 2076).

7. Pleading ⇐126.

Where replevisor alleged that value of use of property detained was $25 for each day it was detained, defendant's denial that value was $25 per day for each day it was detained constituted admission that plaintiff's loss was $24.99 for each such day.

8. Pleading ⇐409(4).

Replevisor voluntarily offering evidence of amount of loss pleaded waived defendant's negative pregnant admission as to amount of loss.

9. Damages ⇐220.

Form of verdict in replevin *held* not invalid because it failed to segregate actual damages from exemplary damages.

10. Replevin ⇐82.

Evidence *held* to support $400 verdict as actual damages replevisor sustained from detention of his farm machinery.

Evidence disclosed that the replevisor was about to commence leveling a five-acre tract of land the day after the machinery was taken, for the purpose of preparing it for planting alfalfa, which would have taken about ten or fifteen days; that he was deprived of the use of his tractor and other farm machinery for nineteen days; that it would cost him $25 a day to rent machinery necessary to carry on his work; that he spent $40 for trucks and employed two men to return the machinery; and that one of the castings was broken.

11. Replevin ⇐81.

$1,150 punitive damages for detention of farm machinery *held* not excessive under evidence.

12. Appeal and error ⇐1004(1).

Although there should be reasonable proportion between punitive damages and actual damages allowed replevisor, jury has discretion with regard thereto which will not be disturbed unless sum allowed is clearly excessive.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Replevin by Frank Prentice against I. G. Zumwalt. From the judgment for plaintiff, defendant appeals.

Affirmed.

U. W. Brown and Alva A. King, both of Colusa, for appellant.

George R. Freeman, of Willows, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The plaintiff brought suit to replevin farm machinery alleged to have been unlawfully, oppressively, and maliciously seized and held by the defendant. The jury returned a verdict in favor of the plaintiff for $1,550. A judgment was rendered accordingly. From this judgment the defendant has appealed.

It is contended the judgment is not supported by the evidence; that the plaintiff is not entitled to recover possession of the property for the reason that the farm implements were lawfully taken by the defendant, and the plaintiff failed to tender the necessary amount to release the lien pursuant to which they were seized; and that the amount of punitive damages which was allowed is excessive.

The defendant owns and operates a farm implement business at Colusa. His son, George Zumwalt, is employed in the business with the authority to accept and collect debts which are due to the enterprise. The defendant is a farmer who lives near Willows. In 1927 the plaintiff bought from the defendant upon an executory contract a binding machine. Part payment was made on the purchase price thereof. The following June it was returned by the plaintiff for the reason that he was unable to operate it successfully. The defendant subsequently resold the machine. A balance of $365, represented by an unsecured promissory note, remained unpaid upon this binder. This note was retained by the defendant. The plaintiff refused to pay it. At the same time the plaintiff owed the defendant another bill on open book account, for the purchase of other farm machinery. The plaintiff made a payment of $400 on this last-mentioned account, insisting that it be credited to that account. The bookkeeper gave him a receipt for this sum, applying the payment as requested. The defendant disregarded this demand, and, without the plaintiff's knowledge, credited the payment to the repudiated note of $365 and accumulated interest. The plaintiff also owed the Bank of Willows the sum of $500 represented by a promissory note secured by chattel mortgage on the farm machinery which is involved in this suit. The mortgage contained a clause authorizing the mortgagee, "at its option * * * (to) remove and sell and dispose of the same (mortgaged machinery) at public or private sale without any previous demand of performance or note to the mortgagor of any such sale whatsoever, notice of sale and demand of performance being hereby expressly waived by said mortgagor."

On October 18, 1930, without the plaintiff's knowledge, the defendant purchased this note and mortgage from the Bank of Willows, stating that he was about to bring suit against the plaintiff on the balance of the $365 note, and desired to attach the machinery described in the chattel mortgage; that he wanted to prevent the first lien of the chattel mortgage from defeating the validity of his proposed attachment. The indorsement on the bank note shows that a payment had been made to the bank the day before it was purchased by the defendant, leaving a balance due thereon of $457.76. Having acquired this bank note and mortgage, the defendant wrote the plaintiff demanding the payment of the other repudiated note for $365 which he held. The plaintiff and defendant met and conferred regarding this unsecured note. Nothing was said about the Bank of Willows' note and mortgage. They were not mentioned. The plaintiff flatly refused to pay the unsecured note, saying that the machine which he had returned "would not work."

Without previous notice or demand upon the plaintiff to pay the Bank of Willows' note, the defendant, on April 2, 1931, sent four men and two trucks to the plaintiff's ranch with directions to seize and bring back the machinery. Over the strenuous protest of the plaintiff, the machinery was loaded and hauled away. During the time consumed in loading the machinery, the plaintiff hastened to his neighbor, Mr. C. F. Mason, and arranged to borrow from him the sum of $475 with which to pay the defendant in full for the Bank of Willows' note. Mason went with the plaintiff and tendered the check in payment of the note. The workmen refused to accept it, saying they had no authority to do so, but, on the contrary, were directed to bring the machinery back. The plaintiff then tried to communicate with the defendant by telephone. He was unable to do so, but succeeded in communicating with his son, George, offering to pay the Bank of Willows' note in full. George refused the tender. The machinery was then hauled away. The following day the plaintiff and his neighbor, Mason, took $510 in cash to the defendant's place of business and offered to pay the note in full. George again refused the offer. The plaintiff said he offered to pay "whatever the face of the mortgage was, plus the interest. I figured the mortgage, interest and everything would hardly be $500." The evidence is undisputed that Mason then had $470 in cash, and the plaintiff had $40 additional. In none of these conferences regarding the payment of the

bank note did any of the parties object to the amount tendered or the manner of the proposed payment.

April 6, 1931, the plaintiff's attorney wrote to the defendant reciting the circumstance of the arbitrary taking of the machinery, and the offer to pay the full amount of the mortgaged indebtedness. He then said: "Notwithstanding your unlawful taking of his property, Mr. Prentice is still willing to pay you the amount due on the promissory note above mentioned." That same day the defendant purports to have sold the machinery, valued at about $1,600, to his son George, for $515. April 8th the defendant's attorney answered the above-mentioned letter, saying that the plaintiff still owed the defendant a balance of $406.78 on the unsecured note which was in dispute, upon which he had commenced a suit in the justice's court for $299.99, and that "all Zumwalt wants is the amount of the mortgage together with the amount sued on in the Justice's Court. He will not ask for the expenses of going after the machinery and bringing it down here, but Prentice will have to take the machinery from here to his own place."

The clear import of this letter is that the defendant was using the secured bank note and mortgage to enforce the payment of the disputed note. It amounted to a refusal to surrender possession of the machinery even upon full payment of the secured debt unless the plaintiff also paid the note which was in dispute. The defendant was therefore unlawfully using a secured debt as a club to enforce the payment of another disputed claim. The tender was refused and the machinery was retained.

The plaintiff then commenced this suit to replevin the property and to secure actual and exemplary damages based upon the unlawful, oppressive, and malicious seizing and retaining of the farm machinery. A bond was furnished and the machinery was returned. A jury found a verdict of $1,550 in favor of the plaintiff. A judgment for that amount was accordingly rendered. From this judgment the defendant has appealed.

[1-4] The jury was warranted in assuming from the evidence that the defendant seized and retained the plaintiff's farm machinery unlawfully, arbitrarily, oppressively, and maliciously. It was necessary for the plaintiff to establish the existence of malice in fact, on the part of the defendant, to sustain a judgment for exemplary damages for seizing and retaining the farm machinery. 8 Cal. Jur. 865, § 108. Section 3300 of the Civil Code entitled the plaintiff to such an amount of actual damages as would fully compensate him for the detriment proximately caused by the unlawful seizure and detention of the machinery. He was entitled to exemplary damages, in a reasonable amount within the discretion of the jury, pursuant to section 3294 of the Civil Code, which provides that:

"In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

[5] The appellant asserts that, since the above-quoted clause of the mortgage authorized the holder thereof, in the event of default, to "remove and sell" the property without demand for payment or notice, his taking of the machinery was lawful, and may not furnish the basis for exemplary damages. It is, however, apparent that, while this harsh clause of the mortgage may have rendered the seizing of the machinery technically legal, the withholding thereof, after a valid adequate tender was made of the full amount for which the property became security, caused the lien to become automatically discharged, and the refusal to thereafter surrender the possession of the property to become illegal. Bogue v. Roeth 98 Cal. App. 257, 261, 276 P. 1071; 26 R. C. L. 654, § 39. A refusal to surrender the possession of the property when an adequate valid tender was made, rendered the defendant liable for all damages which accrued therefrom.

The implied finding of the jury that the defendant's conduct in seizing and illegally retaining the farm machinery was prompted by implied malice, finds ample support in the evidence. The jury had a right to presume that he invested nearly $500 in purchasing the Bank of Willows' note because it contained a harsh clause of which he might take advantage to wrongfully enforce the payment of another disputed claim. He kept the purchase of this note a secret from the plaintiff. He seized the mortgaged property for a technical breach thereof without demand of payment and without notice. He directed his employees to "get the property." He sent four able-bodied men and two trucks to make sure they would not be prevented from taking the machinery from the plaintiff. He refused a tender of the full amount of money due on this secured indebtedness. In effect, his attorney admitted in his letter of April 8th that they were holding the property, not alone to secure the mortgaged indebtedness, but as an oppressive means of arbitrarily enforcing the payment of another disputed note. After notice of an offer to pay the entire debt secured by the mortgage, he sold the property, without notice, to his

son for about a third of its value. These circumstances furnish adequate evidence of implied malice and oppression.

[6] The record discloses ample evidence of a valid tender of the full amount which was due upon the Bank of Willows' note secured by chattel mortgage. From the indorsement on the note it appears there was but $457.76 due thereon October 17, 1930, with 8 per cent. interest from that date. This aggregated the sum of $474.56 which was due June 2, 1931, when the machinery was seized and the first tender was made. The check was for the sum of $475. The plaintiff said he also had with him about $40 in cash of his own in addition thereto. Neither the amount of the tender nor the manner of the proposed payment was objected to. The following day a tender in cash of the full amount of the indebtedness which was due on the note was made to George Zumwalt, who refused it without qualification. The tender was therefore adequate and valid. Section 2076 of the Code of Civil Procedure provides:

"The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards."

[7, 8] In response to the defendant's contention that the evidence is insufficient to show that actual damages were sustained, the plaintiff asserts that the answer which was filed in this case admits the accruing of actual damages in the sum of $25 a day for each day the plaintiff was deprived of the use of the machinery. The complaint alleges: "That plaintiff has been deprived of the use of said property and that the value of the use thereof to plaintiff is the sum of $25.00 per day for each day the same is detained from him." In his answer to this allegation the defendant "denies that the value of the use of said personal property to plaintiff is the sum of $25.00 per day, for each day the same was detained from him, or that the plaintiff suffered any damage at all by reason thereof." It is claimed this language constitutes an admission that plaintiff's loss by reason of detaining the property was $24.99 for each day he was deprived of the use thereof. This is a correct construction of the pleadings. 8 Cal. Jur. 894. But the defect in the answer in this regard was waived by the plaintiff in the present case, by voluntarily offering evidence of the actual loss sustained on that account. This procedure on his part amounted to an admission that the pleadings actually tendered the issue of the value of the loss of time during which the machinery was detained from the owner. The plaintiff may therefore not rely on the technical defect in the denial which is contained in the answer. 49 C. J. 843, § 1244; 21 Cal. Jur. 273, § 190.

[9-12] The form of the verdict is not invalid because it fails to segregate the amount of actual damages from the sum which is allowed as exemplary damages. There is ample evidence of actual damages which are not disproportionate in amount to the balance of the verdict which represents the exemplary damages allowed. Clark v. McClurg (Cal. Sup.) 4 P.(2d) 149. The plaintiff testified he was about to commence leveling a five-acre tract of land, the day after the machinery was taken, for the purpose of preparing it for planting to alfalfa; that he was deprived of the use of his tractor and other farm machinery for a period of nineteen days; and that it would cost him $25 a day to rent the machinery necessary to carry on the work. It also appears the plaintiff expended $40 additional to hire trucks with which to return the machinery; that one of the castings was broken; and that he employed two men for one day in returning the machinery. On cross-examination the plaintiff admitted it might not have required more than ten or fifteen days to level the alfalfa land. There is, nevertheless, substantial evidence to support a verdict of at least $400 actual damages which were sustained by the plaintiff. This leaves a balance of $1,150 which represents the amount of punitive damages which was allowed by the jury. We are unable to say this amount of punitive damages is disproportionate to the amount of actual damages which is sustained by the record. While it is true there should be a reasonable proportion between the amount of exemplary damages which is allowed and the sum of actual damages, there is a discretion reposed in the jury with regard to the amount which is allowed which will not be disturbed on appeal unless the sum clearly appears to be excessive. Wilkinson v. Singh, 93 Cal. App. 345, 269 P. 705; 8 Cal. Jur. 866, § 109. Under the circumstances of this case, the amount of exemplary damages which was allowed by the jury does not appear to be excessive.

The judgment is affirmed.

We concur: PARKER, Justice pro tem.; PLUMMER, Acting P. J.

124 Cal.App. 628

RISKIND et ux. v. FRANK MELINE CO., Inc., et al.

Civ. 4567.

District Court of Appeal, Third District, California.

July 5, 1932.

1. Appeal and error ⇐1032(1).

Validity of order, permitting filing of amended complaint nunc pro tunc, pursuant to parties' stipulation, need not be considered on appeal, in absence of showing that defendant was prejudiced, objected thereto, moved to strike out amended complaint or vacate order, asked additional time to answer, or objected to trial begun thereon over two weeks afterward.

2. Pleading ⇐245(1).

Trial court had power to permit filing of amended complaint, on which defendants' attorneys had indorsed their consent, several months after cause was at issue.

3. Vendor and purchaser ⇐37(6).

Vendors' false statements that land across street from lots sold had been purchased for terminal market, and arrangements completed for erection thereof, *held* material representations of existing facts, justifying rescission of contract.

4. Vendor and purchaser ⇐37(1).

Material false representation, relied on by party to whom made, supports judgment rescinding contract.

5. Pleading ⇐252(2).

Amended complaint supersedes original pleading.

Appeal from Superior Court, Los Angeles County; Robert B. Lambert, Judge.

Suit by Michael Riskind and wife against the Frank Meline Company, Inc., Adolph C. Fera, and others. From a judgment for plaintiffs against named defendants, defendant Fera appeals.

Affirmed.

P. W. Thomson, of Los Angeles (Paul Washburn, of counsel), for appellant.

Irving S. Baltimore and A. Feldman, both of Los Angeles, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiffs had judgment for the rescission of a certain contract for the purchase of real estate in the county of Los Angeles, and against the defendant Adolph C. Fera, in the sum of $10,186, and against the Frank Meline Company, Inc., in the sum of $1,550, with interest at the rate of 7 per cent. per annum from October 12, 1927. From this judgment the defendant Adolph C. Fera appeals.

The appeal is based upon the judgment roll alone.

The findings of fact disclose that, within two years prior to the filing of the complaint, the plaintiff Michael Riskind entered into a contract with the Frank Meline Company, Inc., a corporation, for the purchase of lots 8 and 9 in block 23, tract 6783, in the county of Los Angeles; that subsequent to the execution of this agreement the defendants caused to be assigned to the plaintiff an agreement of sale of said real property, executed on the 6th day of January, 1927, between Oliver Wylie and Sarah E. Wylie, as sellers, and Adolph C. Fera, as purchaser; that the conditional contract of sale of said premises provided for the payment of $27,000, upon which at the time of the assignment unto plaintiffs there remained a balance due of $20,250, payable in semiannual installments of $5,062.50 each, commencing with January 16, 1928; that under and pursuant to said agreement the plaintiffs paid to the defendants the sum of $10,750 on or about the 16th day of January, 1927, and made further payments against said property in the sum of $235.68; that of the sum of $10,750 paid as aforesaid, $1,550 of said payment was retained by the Frank Meline Company for their services as agent of Adolph C. Fera.

It is further found that the defendants represented the value of said property as in excess of $31,000, and that the reasonable market value of said premises at said time was not in excess of $22,500.

It is further found that the defendants, prior to the entering into the agreement just referred to, falsely and fraudulently represented to the plaintiffs that a terminal market would be erected directly across the street from said property, at an investment of $250,000; that land therefor had been purchased; that plans therefor had been completed; that said work was actually commenced on or about March 1, 1927, and that the same would be completed by the end of the year 1927; that all arrangements had been completed for the erection of said market; that a bond issue for the building of said market had been underwritten by a Chicago concern; and that the erection of said market would greatly enhance the value of the property involved in this action.

The court further found that all of said representations were false; that the plaintiffs relied thereon, and were induced thereby to make the purchase. Judgment went for rescission and for the return of the payments made on the contracts.

As grounds for reversal, the appellant alleges error on the part of the trial court in permitting the filing of an amended com-

plaint nunc pro tunc, and that the complaint as filed does not state a cause of action. Practically the greater portion of the appellant's argument is directed to the alleged error of the court with reference to the filing of an amended complaint.

The record shows that the original complaint was filed on the 28th day of January, 1928, that the defendants demurred thereto, and same was overruled, and that the defendant and appellant Fera filed an answer thereto on the 21st day of March, 1928. Thereafter it appears that the plaintiff prepared for filing an amended complaint and served the same upon the appellant on the 20th day of March, 1928, the amended complaint bearing the following indorsement: "The undersigned, attorneys for defendant Adolph C. Fera and Mabel J. Fera, hereby agrees and consents to the filing of the within amended complaint. Dated March 20, 1928. (Signed) P. W. Thomson, Attorney for said defendants." By some means not disclosed in the record, the amended complaint was not filed, and thereafter, on the 26th day of December, 1929, the court in which said action was pending made and entered the following order: "It appearing to be a proper case therefor, it is hereby ordered that the within amended complaint may be filed, and that same be filed nunc pro tunc as of March 22, 1928. Dated, this 26th day of December, 1929. (Signed) Elliot Craig, Presiding Judge."

The record shows that on the 3d day of April, 1928, a stipulation was entered into between the attorneys representing the plaintiffs and P. W. Thomson, representing the appellant in this action, to the effect that the answer theretofore filed by said defendants might be deemed and considered as the answer by said defendants to the plaintiffs' amended complaint.

The action came on for trial on the 15th day of January, 1930, and resulted in a judgment in favor of the plaintiffs, as above stated.

[1] The appellant now contends that the nunc pro tunc order of the court was void, and that the court had no power to antedate the filing of the amended complaint, or to permit the filing of an amended complaint which would antedate the actual date of its filing. The record shows, first, a consent to the filing of the amended complaint on the part of the attorney for the appellant. If we agree with the appellant that that consent went only to the fact that the amended complaint should be immediately filed, our attention has not been called to a single fact which shows that the appellant has been in any way prejudiced by the delay in filing of the amended complaint to the filing of which consent had been given. Further, if it be conceded that the nunc pro tunc order of the court as to the date of the filing of the amended complaint, in so far as it admitted the amended complaint to speak as and of a date prior to its actual filing, nevertheless there is nothing in the record which shows that the appellant made any objection thereto, interposed any motion to strike out the amended complaint or vacate the nunc pro tunc order, nor ask for any additional time to file any further or other answer thereto, than as evidenced by the stipulation to which we have above referred.

We do not need to pass upon the validity of the nunc pro tunc part of the court's order. The appellant stipulated, as we have said, for the filing of the amended complaint, and, if it be considered as filed only as and of the date of the court's order in December, 1929, it appears that the trial of the action was not begun until more than half a month thereafter, and here, again, the record is entirely silent as to any objection being entered or made by the appellant against the trial court proceeding with the trial of the action based upon the plaintiff's amended complaint.

[2] We do not need to cite authorities to the effect that the trial court had the power to permit the plaintiff to file an amended complaint during the month of December, 1929. The fact that the cause had been at issue for a number of months in no wise militated against the authority of the court to permit the filing of an amended pleading upon application therefor, so that whether the amended complaint speaks as and of March 22, 1928, or December, 1929, is wholly immaterial.

[3, 4] Paragraph 6 of the amended complaint contains allegations of statements made by the defendants, found by the court to be false and to have been fraudulently made to induce the plaintiffs to enter into the contracts heretofore referred to. With reference to the property across the street which was to be improved by a market and so enhance the value of the lots involved in this action, the complaint alleges the following fraudulent and false statements: "That the land therefor had been purchased; plans therefor completed; that arrangements had been completed for the erection of the market; that a bond issue for the building of said market had been underwritten by Peabody Hoeteling & Company of Chicago; that many of the tenants of the then-existing wholesale Terminal Market at Seventh and Central avenue, Los Angeles, California, whose leases had but a short time to run, had executed leases on the new market." Only a quotation of the foregoing statements is necessary to demonstrate that they are expressions of facts as then existing, and not of mere opinions, and were not mere "sales talks," as claimed by the appellant, or immaterial representations. The plain-

tiffs could not, by looking at the property, discover the falsity of the statements set forth in the amended complaint, and found by the trial court to have been made. The cases cited by the appellant as representations of buildings in course of construction, where the purchaser has an opportunity to see for himself, are not pertinent here, and it would serve no useful purpose to review them. Every one of the representations which we have quoted were of such a character that examination of the premises would not disclose their falsity. The law is well settled that, where a material representation relied upon is found to be false, it is sufficient to support the judgment. This court so held in the case of Stone v. McCarty, 64 Cal. App. 158, 220 P. 690. See cases cited on page 167 of 64 Cal. App., 220 P. 690, 693. To the same effect is the case of Jackson v. Meinhardt, 99 Cal. App. 283, 278 P. 462. See, also, Mitchell v. Tuttle, 102 Cal. App. 16, 182 P. 534. In the opinion in the Mitchell Case, supra, a number of authorities are cited upholding the rule which we have just set forth.

[5] It is well-settled law that the filing of an amended complaint supersedes the original pleading and requires no citation of authorities.

The judgment is affirmed.

We concur: PRESTON, P. J.; PARKER, Justice pro tem.

124 Cal.App. 642

In re SPITLY'S ESTATE.

CITIZENS' NAT. TRUST & SAVINGS BANK OF LOS ANGELES v. RILEY, Controller, et al.

Civ. 8440.

District Court of Appeal, Second District, Division 2, California.

July 6, 1932.

Rehearing Denied Aug. 5, 1932.

Hearing Denied by Supreme Court Sept. 2, 1932.

1. Taxation ⇐895(4).

Value of securities for inheritance tax purposes is their value at time of decedent's death, subsequent appreciation or depreciation in value being immaterial.

2. Taxation ⇐895(1).

For inheritance tax purposes, term "clear market price" is synonymous with term "fair market price" (St. 1921, pp. 1501, 1515, §§ 2, 16, as amended by St. 1929, p. 1835, 1848).

"Fair market price" means not only that the price be ascertained by sales, but that the sales so made and the subject-matter of the sales are to be considered.

[Ed. Note.—For other definitions of "Clear Market Value" and "Fair Market Price," see Words and Phrases.]

3. Taxation ⇐895(5).

Evidence of current prices upon stock exchange is admissible to prove value of stock shares for inheritance tax purposes (St. 1921, pp. 1501, 1515, §§ 2, 16, as amended by St. 1929, pp. 1835, 1848).

4. Taxation ⇐895(5).

Prices of securities upon stock exchange *held* not conclusive proof of their value for inheritance tax purposes, and could be shown as based on false reports of company's financial condition (St. 1921, pp. 1501, 1515, §§ 2, 16, as amended by St. 1929, pp. 1835, 1848).

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Proceedings by the Citizens' National Trust & Savings Bank of Los Angeles, as executor of the estate of Charles W. Spitly, deceased, on objections to the report of the inheritance tax appraiser, opposed by Ray L. Riley, Controller of the State of California, and another. From a judgment sustaining a demurrer to the objections to the report, objector appeals.

Reversed, with directions.

Todd W. Johnson and Philip D. Johnston, both of Los Angeles, for appellant.

David Tannenbaum and Charles M. Cassin, both of Los Angeles, and W. H. H. Gentry, of Sacramento, for respondents.

FRICKE, Justice pro tem.

Appellant, as executor of the estate of Charles W. Spitly, deceased, filed objections to the report of the inheritance tax appraiser, directing the objections against the valuation by the appraiser of 2,400 shares of preferred and 22,300 shares of the common stock of the Richfield Oil Company and against the amount of the inheritance tax fixed as the result of such valuations. Respondent interposed a general demurrer to the objections, and the demurrer was sustained without leave to amend.

The appraiser valued the preferred stock at $21⅞ per share and the common stock at $25⅝ per share. Basically it was contended by the objections filed by appellant that these figures did not represent the fair market value for the purpose of computing the inheritance tax, while respondent contends

that these figures, being the prices at which the securities sold on the stock exchange, represent their market value and are conclusive. The filed objections recite that the appraised values were the sale prices of such shares on the stock exchange on the date of decedent's death, but allege further that the sales on the stock exchange were made at such prices "on the basis of erroneous, false and misleading information about the affairs and financial condition" of the Richfield Oil Company, whose published financial statements grossly overstated its assets, net income, and profits, and understated its liabilities, and that had the true facts been known the stock, both preferred and common, would have sold at a price not in excess of $4 per share. The objections also allege that on the date of decedent's death the price of the shares on the stock exchange was inflated and artificially stimulated as the result of the operations of a pool.

[1] The value of the securities in question is their value at the time of the death of the decedent, and any subsequent appreciation of depreciation in their value is immaterial so far as the issues here are concerned. Estate of Hite, 159 Cal. 392, 395, 113 P. 1072, 32 L. R. A. (N. S.) 1167, Ann. Cas. 1912C, 1014; Riley v. Howard, 193 Cal. 522, 528, 226 P. 393; Estate of Miller, 184 Cal. 674, 686, 195 P. 413, 16 A. L. R. 694. The arguments of counsel based upon the decline in the stock market prices of the stock after decedent's death are, therefore, inapplicable.

[2] The California Inheritance Tax Act provides that the tax shall be "upon the market value" of the property upon which the tax is imposed (section 2 as amended by St. 1929, p. 1835), and that the appraiser shall report to the court the "clear market value" (section 16 as amended by St. 1929, p. 1848). The term "clear market price" is synonymous with the term "fair market price" (In re Dupignac's Estate, 123 Misc. 21, 204 N. Y. S. 273), and "fair market price" means not only that the price be ascertained by sales, but that the sales so made and the subject matter of the sales are to be considered. Walter v. Duffy (C. C. A.) 287 F. 41.

[3, 4] Appellant does not contend, nor do we hold, that the value of corporate shares may not be proved by evidence of the prices current upon the stock exchange. Such evidence is admissible to prove the value of stock shares (People v. Schwarz, 78 Cal. App. 561, 578, 248 P. 990), but we are aware of no authority which holds that stock exchange prices are conclusive evidence of value. Appellant does contend, however, that where, as here, the value is based solely upon stock exchange prices, such valuation may be objected to and successfully attacked by proof that such stock exchange prices are the result of misinformation disseminated by the corporation whose shares are under consideration, the result of pool selling or buying, intended to cause and causing sales at purely speculative prices, or a combination of both factors. It may be conceded that there is no universal touchstone for determining the value of shares of stock applicable to all cases. If information, believed by those who receive it to be true, but which is in fact substantially false and misleading, caused prospective buyers and sellers of a corporate security to form similar erroneous conclusions as to the value of the stock and, relying thereon, a substantial number of sales were made on that basis, the selling price on the stock exchange would not be a proper index of the true value of the security, and the same might be said if the selling price was the result of deliberate juggling, wash sales, or other device intended to fix the buying and selling prices at a figure other than the true value of the security. The standard of market value as a true criterion of value rests on the premise that voluntary buyers and sellers, familiar with the factors of value, have formed opinions as to the value of the property sold which they themselves consider of a reliability sufficient to induce their parting with their money and property. Where, however, it appears that buyers and sellers in their market dealings have formed their opinions as a result of their reliance upon information as to the factors of value, which information is in fact false and untrue, then such opinions are false opinions and the sales made pursuant to such opinions cannot be considered as correctly indicating the value of the property and any value based upon such sales would be a false value.

In Phillips v. United States (D. C.) 12 F. (2d) 598, 601, the court defines "fair market value" "to be the value of the property in money as between one who wishes to purchase and one who wishes to sell; the price at which a seller is willing to sell at a fair price, and a buyer willing to buy at a fair price, *both having reasonable knowledge of the facts.*" (Italics ours.) In Heiner v. Crosby (C. C. A.) 24 F.(2d) 191, 193, the court says: "Sales made at a particular time and place may be significant, but the price paid is not necessarily decisive of fair market price or value. The fact of sales, in itself and without regard to the circumstances under which the sales were made, does not conclusively establish either statutory fair market price or value. Sales made under peculiar and unusual circumstances, such as sales of small lots, forced sales, and sales in a restricted market, may neither signify a fair market price or value, nor serve as the basis on which to determine the amount of gain derived from the sale." See, also, Ray Consol. Copper Co. v. U. S., 268 U. S. 373,

45 S. Ct. 526, 69 L. Ed. 1003; Walter v. Duffy (C. C. A.) 287 F. 41, and cases there cited.

The effect of the ruling of the trial court, sustaining, without leave to amend, the objections to the report of the inheritance tax appraiser, is tantamount to a ruling that proof of the value of shares of stock in a corporation by evidence of the prices of that security upon the stock exchange is so conclusive that it cannot be attacked by proof that such prices were not based upon the true factors of value, but rested upon the slimy foundation of false statements and a manipulation of the stock market. With this we cannot agree.

The judgment is reversed, with directions to the trial court to overrule the demurrer.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

124 Cal.App. 680

GUHO v. CITY OF SAN DIEGO.

Civ. 966.

District Court of Appeal, Fourth District, California.

July 11, 1932.

Rehearing Denied Aug. 5, 1932.

1. Appeal and error ⇐161.

Generally, one may not accept fruits of judgment and at same time appeal from same.

2. Appeal and error ⇐162(3).

Where appellant is concededly entitled to thing which he has accepted, he may appeal from judgment where appeal only relates to additional claim.

3. Appeal and error ⇐162(1).

Where plaintiff accepted amount of judgment, appeal from whole of judgment *held* dismissed, since election to enjoy fruits of judgment was waiver of right to appeal from judgment which could not be reversed without reversing it all.

4. Appeal and error ⇐162(1).

Acceptance of amount of judgment satisfied of record *held* waiver of right to appeal.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by M. N. Guho against the City of San Diego, a municipal corporation. Judgment in favor of plaintiff. On motion to dismiss appeal by plaintiff.

Appeal dismissed.

Welburn Mayock and Ralph C. Curren, both of Los Angeles, for appellant.

C. L. Byers, City Atty., H. B. Daniel, Asst. City Atty., and Gilmore Tillman, Deputy City Atty., all of San Diego, for respondent.

BARNARD, P. J.

This is a motion to dismiss an appeal upon the ground that the judgment appealed from has been paid and fully satisfied.

In a complaint containing only one count, the plaintiff sought to recover a balance of $10,484.91 for certain work done for the defendant city under a written contract, the further sum of $16,759.82 for extra work alleged to have been done in connection with the work covered by the contract, and an additional $10,193.15 for damages alleged to have been caused by the interference of the defendant's agents with the work in question, making a total demand of $37,437.88. The defendant admitted that it owed a portion of the contract price and tendered into court $10,379.18, which amount the plaintiff refused to accept. At the close of the plaintiff's case, the defendant moved for a directed verdict for the amount previously tendered, and "for the purposes of this motion only" conceded that interest on this amount should be allowed for about one year. While the matter of interest on the amount tendered was in dispute, the defendant contending that the plaintiff was not entitled to interest thereon, since he had refused to accept the same when it first became due, the inclusion of such interest in the amount of a directed verdict being thus authorized, the court directed a verdict for an amount covering the $10,379.18, plus interest in the sum of $726.54. The jury returned a verdict as directed, and judgment was entered for $11,105.72 and costs, on October 28, 1931.

On October 31, 1931, the plaintiff was notified that the amount of the judgment would be paid upon the receipt of a duly executed satisfaction of judgment. On November 2, 1931, the plaintiff's attorney sent a satisfaction of the judgment to the attorney for the defendant, authorizing him to file the same when he had forwarded the amount of the judgment and costs, and further stating "we hope you will do all that you can to assist us in obtaining the money at the earliest possible date." The amount of the judgment and costs was paid to, and accepted by, the plaintiff's attorney, and on November 14, 1931, there was filed in the clerk's office an instrument which, omitting the formal heading and the acknowledgment, reads as follows:

"No. 66718.

"Satisfaction of Judgment.

"The Judgment herein having been paid, full satisfaction is hereby acknowledged of said Judgment entered Oct. 28 '31 in Book 87 Page 8, of Judgments, in favor of M. N. Guho and against City of San Diego and the Clerk is hereby authorized and directed to enter full satisfaction of record in said action.

"Dated Nov. 2nd, 1931.

"Ralph C. Curren

"Welburn Mayock & Ralph C. Curren

"Welburn Mayock

"Attorneys for Judgment Creditor."

Subsequently, on December 16, 1931, a notice of appeal was filed by the plaintiff, being the appeal to which this motion is directed.

[1, 2] As a general rule, a party may not accept the fruits of a judgment and at the same time appeal from the same. Estate of Ayers, 175 Cal. 187, 165 P. 528, and cases there cited. An exception to this rule is recognized where the appellant is conceded to be entitled to the thing which he has accepted and where the appeal only relates to an additional claim on his part. San Bernardino County v. Riverside County, 135 Cal. 618, 67 P. 1047; Walnut Irr. Dist. v. Burke, 158 Cal. 165, 110 P. 517, 518. The appellant here claims to be within this exception to the general rule.

It may first be observed that the appellant, in accepting the amount paid, has received more than the amount to which he was concededly entitled, in that he has received $726.54 interest and his costs of suit. If the respondent was correct in its contention that the appellant had improperly refused to accept the correct balance when the same became due, the appellant was not entitled to this interest. While this interest was included in the amount of the directed verdict, this was conceded by the respondent for the purpose of that motion only, and it was never admitted by the respondent that the appellant would be entitled to the same, except in connection with this particular judgment. In taking an appeal after accepting payment of the judgment entered under these circumstances, it is not true that the appellant is, in fact, appealing only after receiving something to which he is concededly entitled, and about which there is no controversy. If the appeal were to be considered and the judgment should be reversed upon the ground that the motion for a directed verdict should not have been granted, upon a rehearing of the case, it might be found that the appellant was entitled only to the amount tendered into court, in which event he would neither be entitled to the interest nor the costs which he has received.

In Walnut Irr. Dist. v. Burke, supra, the following rule was quoted with approval: "If all the provisions of a judgment are connected and dependent, so that a part cannot be reversed without a reversal of the whole, a party cannot proceed to enforce such portions of the judgment as are in his favor, and appeal from the part which is against him. In such case the right to proceed on the judgment and enjoy its fruits, and the right to appeal, are not concurrent, but wholly inconsistent, and an election to assert one right is a waiver and renunciation of the other."

[3] In the case before us, the appellant, in his notice of appeal, states that he appeals from the judgment "and from the whole of said judgment." The judgment was entered upon a directed verdict for a specific amount, and the judgment cannot be reversed without reversing it all, and the appeal was taken from the whole thereof. Under the rule thus stated, we are unable to see how the judgment in question can now be separated in the manner contended for by appellant.

A further rule is thus quoted and approved in Storke v. Storke, 132 Cal. 349, 64 P. 578, 580: "'A party may also waive his right to appeal from a judgment or order by acts which are wholly inconsistent with the assertion of the right. Thus, if all the provisions of a judgment are connected and dependent, so that a part cannot be reversed without a reversal of the whole, a party cannot proceed to enforce such portions of the judgment as are in his favor, and appeal from the part which is against him.'"

[4] If it be assumed that this appellant had the right to accept the amount paid and thereafter appeal from the judgment, we think he waived this right by accepting such payment upon condition that he satisfy the judgment and by executing and authorizing to be filed a full and complete satisfaction thereof. As was said in Estate of Baby, 87 Cal. 200, 25 P. 405, 22 Am. St. Rep. 239, "when a judgment has been satisfied, it has passed beyond review, for the satisfaction thereof is the last act and end of the proceeding." In our opinion, the acts of this appellant are inconsistent with the retention of a right of appeal. The judgment having been satisfied of record, nothing remained from which to appeal.

For the reasons given, the appeal is dismissed.

We concur: MARKS, J.; V. N. THOMPSON, Justice pro tem.

124 Cal.App. 692

Ex parte PEDROSIAN.

Cr. 70.

District Court of Appeal, Fourth District, California.

July 12, 1932.

1. Municipal corporations ⇐607.

Ordinance providing for removal of rubbish, granting exclusive right of its removal in designated zone, and preventing accumulation thereof in large quantities *held* valid exercise of police power.

Such ordinance was a valid exercise of the police power because considerations of public health and safety suggest the prompt removal of rubbish, because the exercise of the police power in timely prevention of a nuisance is preferable to its use for purposes of abatement after a nuisance has come into existence, and because the police power develops, within reason, to meet the changed conditions of a developing commonwealth.

2. Municipal corporations ⇐589.

Police power is coextensive with necessities of situation and as broad as public welfare.

3. Municipal corporations ⇐607.

Ordinance governing rubbish removal, defining "rubbish" as "waste material and refuse of every character collected or accumulated within city, except garbage," *held* not invalid for uncertainty in defining "rubbish."

Such definition is not uncertain by being sufficiently comprehensive to include material of value over which the police power of the city does not extend, because the provisions of another ordinance show what substances are excluded as garbage, because there was no dispute between citizens of the municipality, and the official rubbish collector as to what constituted rubbish, and because the definition of rubbish as "waste material or refuse" comprehends an abandonment of the property as valueless. "Refuse" generally is that which is refused or rejected; anything worthless or useless.

[Ed. Note.—For other definitions of "Refuse," see Words and Phrases.]

4. Municipal corporations ⇐607.

Any action by city to avoid fire hazard of accumulated rubbish would be lawful unless finding that accumulated rubbish constituted fire hazard was without basis.

5. Municipal corporations ⇐607.

Method to be employed in handling of rubbish and preventing its becoming nuisance was for city's determination.

6. Constitutional law ⇐81.

Where particular legislative action is lawfully pursuant to police power, loss occasioned by invasion of individual rights is damnum absque injuria.

Application by John Pedrosian for a writ of habeas corpus to be directed to the Chief of Police of the City of San Bernardino to secure release of petitioner from custody under commitment for violation of rubbish removal ordinance.

Writ discharged; petitioner remanded.

Swing & Swing, of San Bernardino, for petitioner.

Joseph R. Rensch, of San Bernardino, amicus curiæ.

William Guthrie, City Atty., and Wardwell D. Evans, Deputy City Atty., both of San Bernardino, for respondent.

HARDEN, Justice pro tem.

Petitioner is detained by the chief of police of the city of San Bernardino by virtue of a warrant of arrest issued by the police court of said city based upon a complaint filed therein charging him as defendant with the violation of the provisions of Ordinance No. 1456 of said city. The complaint alleges that the defendant has unlawfully engaged in the business of collecting and removing, and that he has unlawfully collected and removed, rubbish from the exclusive zone of said city without having a contract with or consent of the city so to do, at a time when there was in force and effect, pursuant to said ordinance, a contract between said city and the Johnson Rubbish Company granting to said company the exclusive privilege of collecting and removing such rubbish.

Important provisions of the ordinance are:

"Section 1. The word 'rubbish' shall be deemed to include all waste material and refuse of every character whatever collected or accumulated within the city of San Bernardino, except garbage. * * *

"Sec. 5. That any contractor as herein defined, during the time that he shall fully and faithfully keep and perform all the terms, covenants and conditions of the contract awarded to him, shall have the exclusive right to collect, remove and dispose of all rubbish accumulated within said exclusive zone.

"Sec. 6. That it shall be unlawful for any person, firm or corporation to collect or remove any rubbish from said exclusive zone during the time any contract shall be in force for the collection and removal thereof pursuant to the provisions of this ordinance, save and except as herein provided."

It is made unlawful to deposit, collect, or

accumulate any rubbish in any open place within said exclusive zone save and except in receptacles provided for such purpose and approved by the chief engineer of the fire department. It is further provided that collections shall be made from the exclusive zone, at the expense of the person served, as frequently as required by and under the supervision and to the satisfaction of the sanitary inspector, but in any event at least once a week. Provision is made for the giving of a bond to the city by the contractor guaranteeing faithful performance of his contract. The owner or person in possession of property may remove therefrom rubbish naturally accumulating thereon in a vehicle owned or possessed by him. Any independent contractor may collect and remove rubbish accumulating upon any property in the city save and except from property embraced within the exclusive zone. Provision is made for the removal by the city semiannually of rubbish from portions of the city other than the exclusive zone without charge. By the terms of another ordinance of the city it is provided: "The word 'garbage,' as used in this Ordinance, shall mean and include table refuse, swill and offal, and every accumulation of animal, vegetable and other matter that attends the preparation, consumption, decay or dealing in or storage of meats, fish, fowls, fruits, and shall include all animal and vegetable refuse from kitchens and all household waste that shall have been prepared from or intended to be used as food, or shall have resulted from the preparation of food. Articles and things not hereinbefore enumerated are not included in the term garbage, and it is particularly provided that the following are not included in said term garbage, to-wit: dead animals over five pounds in weight, dish or waste water, paper and other combustible or inflammable material, crockery, glass, cans, tins, ashes, wire and sweepings."

Pursuant to constitutional provision and its city charter, the city of San Bernardino has authority to make and enforce all such local, police, sanitary, and other regulations as pertain to municipal affairs; and to define nuisances and provide for their removal.

The general purpose of the ordinance is to provide for the collection, removal, and disposal of rubbish accumulating in the city of San Bernardino. Its particular feature is that it establishes an exclusive zone, comprising the business district of the city, and provides for the award of a contract to some person, firm, or corporation granting the exclusive right, and imposing the duty, of collecting, removing, and disposing of all accumulations of rubbish within said zone.

[1] At the outset it is admitted by petitioner and the amicus curiæ that if the same rules apply to an ordinance covering the collection, removal and disposal of rubbish as apply to an ordinance so dealing with garbage, the petitioner should be remanded. All such questions as are raised herein have been definitely settled by the decisions of our courts and of other courts adversely to petitioner's contentions as respects such collection, removal, and disposal of garbage. Some of the decisions sustaining similar ordinances applicable to garbage are: In re Santos, 88 Cal. App. 691, 264 P. 281; In re Zhizhuzza, 147 Cal. 328, 81 P. 955; Bishop v. City of Tulsa, 21 Okl. Cr. 457, 209 P. 228, 27 A. L. R. 1008; Jansen Farms, Inc., v. City of Indianapolis, 202 Ind. 138, 171 N. E. 199, 72 A. L. R. 514. Among the cases sustaining the validity of such an ordinance applicable to both garbage and rubbish are: Porter v. City of Hot Springs, 171 Ark. 1142, 287 S. W. 585; State v. Lovelace, 118 Wash. 50, 203 P. 28; Smith v. City of Spokane, 55 Wash. 219, 104 P. 249, 19 Ann. Cas. 1220; California Reduction Company v. Sanitary Reduction Works, 199 U. S. 306, 26 S. Ct. 100, 50 L. Ed. 204.

Petitioner relies chiefly upon two cases: Landberg v. City of Chicago, 237 Ill. 112, 86 N. E. 638, 21 L. R. A. (N. S.) 830, 127 Am. St. Rep. 319, and Iler v. Ross, 64 Neb. 710, 90 N. W. 869, 57 L. R. A. 895, 97 Am. St. Rep. 676.

In the case of Landberg v. City of Chicago, supra, for a consideration flowing to the city the ordinance granted a monopoly to an individual to collect and appropriate the manure accumulating in the city of Chicago. The holding to the effect that the ordinance was invalid is based upon the fact that the granting of a monopoly under such circumstances to remove and appropriate the manure accumulating in the city had no legitimate relation to the preservation of public health. The court recognizes the line of authorities holding such ordinances as the one under consideration here, where applicable to garbage, to be valid and distinguishes such cases from the one before the court. We think the decision is not authority in support of any contention of petitioner.

Said case of Iler v. Ross, supra, holds that such an ordinance is valid as respects its application to garbage but invalid as to rubbish. The decision that the portion of the ordinance dealing with rubbish is invalid turns upon the point that provision is made for its collection before its accumulation in such quantities as to become a nuisance and that said portion of the ordinance has no just relation to the preservation of public health or safety. It further holds that the ordinance grants an unlawful monopoly for the removal of substances not nuisances per se. Accordingly, it is earnestly contended here that the rights of the owners of rubbish accumulating in the city of San Bernardino, of petitioner as an independent contractor, and the rights and duties of the city in the

premises, are so vastly different from the situation where garbage alone is the subject of such legislation as to require a holding that the ordinance here in question is void. It is urged that garbage is a nuisance per se; whereas rubbish, unless allowed to accumulate in large quantities, is not.

Perhaps the mere lapse of time since the rendition of the decision of Iler v. Ross, supra, in 1902, would work a change in the opinion of that court. Certainly since then great strides have been made in the handling of all problems of public health and safety. No one would willingly go back to the days of the open toilet, the livery stable, the hogpen, or the alley overflowing with its filth, in the thickly populated portions of our cities. With modern methods being applied in all phases of community life, the people are not expected now to dull their sensibilities and endure the offenses which were formerly accepted as of necessity. If, as is stated, garbage is a nuisance per se, the same should be said of much of the rubbish accumulating in a city. One need not be a specialist to make an inspection. Little observation will reveal that much filth, withheld from the garbage pail out of regard for the well-being of the hogs fed upon the contents, finds its way to the rubbish pile and the trash can. Considerations both of public health and safety suggest its prompt removal.

[2] Particular stress is laid upon the claim that unless rubbish is allowed to accumulate in large quantities it is not a danger to public health or safety. The evident purpose of the ordinance was to *prevent* its accumulation in large quantities. To our minds, the exercise of the police power in the timely prevention of a nuisance is preferable to its use for purposes of abatement after a nuisance has come into existence. That said power may be lawfully exercised for such purpose is well established. In French v. Davison, 143 Cal. 658, 77 P. 663, the act of 1899 requiring the vaccination of children was held to be valid and within the police power of the state. The case was followed in Wallace v. Regents of the University of California, 75 Cal. App. 274, 242 P. 892. Lands have been drained pursuant to police power as conducive to public good and in the interest of public health. Laguna Drainage District v. Chas. Martin Co., 144 Cal. 209, 77 P. 933. Under that power the burial of bodies within the city limits of San Francisco was prevented. Odd Fellows' Cem. Ass'n v. San Francisco, 140 Cal. 226, 73 P. 987, 988. In that case it was said: "Whenever a thing or act is of such a nature that it may become a nuisance, or may be injurious to the public health, if not suppressed or regulated, the legislative body may, in the exercise of its police powers, make and enforce ordinances to regulate or prohibit such act or thing, although it may never have been offensive or injurious in the past." The following general statement is found in 12 Corpus Juris, 916: "Statutes and ordinances may be enacted for the prevention of, and protection from fires, as by the establishment of limits within which buildings of wood or other combustible materials may be erected, * * * regulating the method of installing electric wires, requiring reasonable fire escapes, and even authorizing the destruction of buildings in the path of a conflagration." "The police power is to the public what the law of necessity is to the individual. It is comprehended in the maxim Salus populi suprema lex. It is not a rule; it is an evolution. * * * The power has always been as broad as the public welfare." State v. Mountain Timber Company, 75 Wash. 581, 135 P. 645, 648, L. R. A. 1917D, 10. "The police power * * * is coextensive with the necessities of the situation." In re Santos, 88 Cal. App. 691–696, 264 P. 281, 283. All property is held subject to the proper exercise of the police power. Ex parte Quong Wo, 161 Cal. 220, 118 P. 714. "The police power, as such, is not confined within the narrow circumscription of precedents, resting upon past conditions which do not cover and control present day conditions obviously calling for revised regulations to promote the health, safety, morals, or general welfare of the public. * * * As a commonwealth develops politically, economically, and socially, the police power likewise develops, within reason, to meet the changed and changing conditions. What was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power." Miller v. Board of Public Works, 195 Cal. 477, 484, 234 P. 381, 383, 38 A. L. R. 1479. The California cases most nearly in point on the facts are the cases of In re Santos and In re Zhizhuzza, already cited, where similar ordinances designed to prevent nuisances in the handling of garbage were upheld.

[3] Petitioner contends that the definition of "rubbish" as found in the ordinance is uncertain for the reason that it is sufficiently comprehensive to include material of value over which the police power of the city does not extend. We think there is no uncertainty in the definition. Under the ordinance rubbish is defined as "waste material and refuse of every character collected or accumulated within the city, except garbage." The provisions of another ordinance show what substances are excluded as garbage. Petitioner is not concerned with the possibility of disputes between the citizens of San Bernardino and the official rubbish collector as to what constitutes rubbish. We may repeat what was said in In re Zhizhuzza, supra, to the effect that the owners of property referred to as being injuriously af-

fected are not complaining here. There is nothing in the ordinance which requires the abandonment of any property. So long as an owner desires to retain his property he may do so; and there is nothing to prevent him from making a bona fide sale of it. But he may not accumulate and retain large quantities of rubbish. When refuse has been deposited for collection as rubbish by the owner, it may be regarded as abandoned by him. The definition of "rubbish" as waste material or refuse comprehends an abandonment of the property as valueless. "Refuse" is generally defined as "that which is refused or rejected; anything worthless or useless; trash; debris."

While not involved directly in this proceeding, respondent has asked for an expression of our opinion upon the question of the validity of contracts entered into between petitioner and persons residing or doing business within said exclusive zone for the collection, removal, and disposal of their rubbish. It is our opinion that, while a bona fide sale of property is not prevented by the ordinance, any contract designed either directly or indirectly to permit the collection, removal or disposal of rubbish from within the exclusive zone by any person other than the official rubbish collector would be illegal and void.

[4, 5] While considerations of health were doubtless in mind, the evidence is before us in the provisions of the ordinance that it was designed particularly to meet the fire hazard. By its provisions it requires that rubbish accumulating in open places in the exclusive zone be kept in receptacles to be provided for such purpose and approved by the chief engineer of the fire department; provides for the frequent removal and disposal of such rubbish; provides for an official rubbish collector under bond to the city for the faithful performance of his duties under the contract; provides that in bidding for the contract he specify the nature and kind of conveyances to be used; and generally gives to the city complete control over the whole subject of the collection, removal, and disposal of rubbish within the exclusive zone. The city impliedly found that in the usual course of affairs in the business district, if not controlled by provisions of such an ordinance, rubbish would accumulate in such quantities as to become a menace to public health and safety. If reason and experience do not show clearly that such finding was without substantial basis, then any action taken by the city in adopting suitable means to avoid the hazard would be lawful. There is nothing before us which would warrant a court in holding that there was no sufficient basis for legislative action to meet the situation. There is the question of whether the provisions of the ordinance are designed to serve the purpose. Just what methods were to be employed was, of course, a question for determination by the city. The ordinance establishes appropriate means for the handling of rubbish and to prevent its becoming a nuisance.

[6] The cases hereinabove cited and many others that might be referred to dispose of contentions that such an ordinance when applied to the handling of garbage is open to justifiable attack upon the ground that such private property is not subject to control by the exercise of the police power, or that such ordinance grants an unlawful monopoly, or that it unlawfully authorizes the taking of property without due process of law, or that it improperly deprives one of the right to pursue a lawful occupation. Neither of said grounds of attack may be properly urged against the ordinance under consideration here. The reasons sustaining the validity of such an ordinance covering the subject of garbage as a proper measure in the preservation of health are equally applicable to an ordinance dealing only with rubbish. The police power may be exercised as well in guarding against the hazard of fire as in preventing the spread of disease. Here, considerations both of public health and safety are involved. We need not state at length the reasons advanced by the various courts in holding similar ordinances do not violate any of said constitutional rights of the parties involved. Such reasons are comprehended in the statement that where particular legislative action is lawfully pursuant to the police power any loss occasioned by the invasion of individual rights in the exercise of that power is damnum absque injuria. In such case individual constitutional rights must yield in favor of the general welfare.

The court is taking no great step in upholding this ordinance as a valid exercise of the police power. If it be true, as is suggested, that in its enactment the city of San Bernardino has broken new legislative ground, or if in sustaining such legislation we are giving judicial approval in a case for which there is no precedent exactly in point, such advances are in pursuance of what can be expected in the working out of public rights under changing conditions.

The writ is discharged, and the petitioner is remanded to the custody of the chief of police of the city of San Bernardino.

We concur: BARNARD, P. J.; MARKS, J.

GERDES v. PACIFIC GAS & ELECTRIC CO. et al., and three other cases. *

Civ. 8102.

District Court of Appeal, First District, Division 2, California.

July 5, 1932.

Rehearing Denied Aug. 4, 1932.

Hearing Granted by Supreme Court Sept. 2, 1932.

1. Gas ⇐20(2).

Evidence *held* to show that consumers injured by explosion of escaping gas on their premises were guilty of contributory negligence in failing to leave property when properly warned.

2. Negligence ⇐136(26).

Ordinarily contributory negligence is for jury.

3. Negligence ⇐136(5).

Where reasonable men could not differ, or where one fails to exercise common prudence required by law, contributory negligence is for court.

4. Appeal and error ⇐1001(1).

Appellate court will reverse judgment where reasonable men could not fail to agree that plaintiff was guilty of contributory negligence.

5. Negligence ⇐121(2).

"Res ipsa loquitur" applies only where instrumentality is under defendant's exclusive control, strong probability of negligence exists, and cause of accident is unknown.

[Ed. Note.—For other definitions of "Res Ipsa Loquitur," see Words and Phrases.]

6. Gas ⇐20(2).

"Res ipsa loquitur" did not apply where gas explosion occurred on consumers' premises through ignition, and instrumentalities causing break in pipe were not in exclusive control of defendant gas company.

7. Negligence ⇐138(3).

Where evidence was sufficient to prove real cause of accident and thus exclude res ipsa loquitur doctrine, such element must be covered in instruction.

8. Gas ⇐20(5).

Failure to instruct that res ipsa loquitur did not apply where bursting of water mains allegedly caused gas explosion injuring plaintiffs, if accident was due to causes for which water company was not liable *held* error.

9. Gas ⇐20(2).

In action against water company for injuries resulting from gas explosion allegedly caused by breaking of water mains which in turn caused gas leak in plaintiffs' house, res ipsa loquitur *held* inapplicable under facts.

Facts disclosed that circumstances surrounding accident were not such as would support the inference of negligence of the water company and exclude all others, and that such evidence showed that, if city was negligent in the maintenance of its water mains which allegedly caused the breaking of defendant company's water mains, then such negligence was of itself sufficient to have caused the fall of the street pavement and the subsequent sagging of the gas pipe which resulted in the leak on plaintiffs' premises.

10. Appeal and error ⇐882(12).

Submission of instruction that res ipsa loquitur did not shift burden of proof did not preclude defendant from attacking instructions on res ipsa loquitur.

11. Negligence ⇐138(2).

Refusal to instruct as to amount of evidence required to overcome presumption of negligence from happening of accident *held* error.

Refusal to so instruct was error not only because res ipsa loquitur was not applicable to the facts, but also because a similar instruction was given in relation to a codefendant.

12. Gas ⇐20(5).

Where consumers knew for more than two hours of escaping gas, instruction on care required of persons in "imminent danger" was error.

"Imminent danger" does not mean a danger which is known to be approaching over a long period of time though party may not know the precise time when injury might be expected.

[Ed. Note.—For other definitions of "Imminent Danger," see Words and Phrases.]

Appeals from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Separate actions by H. A. Gerdes, by Barbara Gerdes, by H. A. Gerdes and Barbara Gerdes and others against the Pacific Gas & Electric Company and others, which were tried together. From judgments for plaintiffs, the Pacific Gas & Electric Company and the Olympic Salt Water Company appeal.

Reversed.

Thomas J. Straub and Cullinan & Hickey, all of San Francisco, for appellant Pacific Gas & Electric Co.

Hadsell, Sweet & Ingalls, of San Francisco, for appellant Olympic Salt Water Co.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 27 P.2d 365.

Ford & Johnson, of San Francisco, for respondents.

NOURSE, P. J.

The plaintiffs brought four actions for damages resulting to persons and property from the explosion of gas in their home located on the east side of Forty-seventh avenue in San Francisco. The four causes were tried together on stipulation, and plaintiffs had verdicts against the Pacific Gas & Electric Company and Olympic Salt Water Company amounting to $40,000, which were reduced by order of the trial judge to the sum of $25,000. Verdicts were returned against the plaintiffs and in favor of the City and County of San Francisco in all four cases. From the judgments following the verdicts against the Pacific Gas & Electric Company and the Olympic Salt Water Company, these defendants have appealed upon a joint record presented under the alternative method. Three of the actions involved claims for personal injuries to Mr. and Mrs. Gerdes, the fourth involved claims of both for the damage to their home and furniture. It should however, be borne in mind throughout the opinion that on this appeal all four cases are presented upon the same briefs and none of the parties makes any distinction between the several causes of action as to the application of the rules of law involved.

At the time of the accident the defendant Olympic Salt Water Company owned and operated a 16-inch salt water main along the easterly side of Forty-seventh avenue; the defendant City and County of San Francisco owned and operated an 8-inch fresh water main along the same avenue at a distance of about a foot and one-half west of the salt water main; the defendant Pacific Gas & Electric Company owned and operated an 8-inch steel welded high pressure gas main located to the west and close to the westerly curb; Pacific Gas & Electric Company also owned and operated a 6-inch low pressure main from which a service pipe extended across and above the two water mains and into the home of the plaintiffs where it was connected with the meter and service pipes installed in the home at a point in the westerly front wall below the garage and directly under the front door and porch of the home.

On March 18, 1930, at about 4:45 or 4:50 p. m., the two water mains broke at a point in front of the Gerdes home and the water coming from these mains undermined the pavement in the street so that this pavement broke and the sand underneath was washed out and a portion of the pavement fell upon the service pipe of the Pacific Gas & Electric Company extending into the Gerdes home and caused it to sag and separate at the point of connection within the front wall of the home and outside of the place where the meter was installed. This caused gas to escape into the garage and basement of the Gerdes home which rose throughout the upper rooms.

The odor of gas was detected by Mrs. Gerdes as early as 5:15 p. m., and at 5:24 p. m. a member of the fire department went into the Gerdes home in the line of his duty. He detected the odor of gas and in going into the basement heard a distinct roar as the gas escaped from the broken pipe. He opened all the doors and windows in the basement and upper rooms, and told Mrs. Gerdes that he and his associate had been sent to take her out of the house, but Mrs. Gerdes refused to leave, stating that she had telephoned to her husband and that he was on his way home. The fireman then warned her to stay in the rear of the house because of the escape of gas in the forepart, to refrain from lighting any fire, and suggested that inasmuch as her husband was coming immediately it would be proper to wait and let him take her out of the house. Another fireman, who was in the house at the time, and Mrs. Gerdes both corroborated this testimony in every particular. Mr. Gerdes arrived home at about 5:40 p. m., detected the odor of gas and learned from his wife the warning that had been given by the firemen. They ate a cold supper, refraining from lighting a fire of any kind because of the warning of danger given by the firemen. At about 6:30 p. m. Mrs. Gerdes put on her hat and coat, preparing to leave the place, and Mr. Gerdes at the same time left the house through the rear of the lot and called upon a neighbor, who was a member of the fire department and who accompanied Mr. Gerdes back to the Gerdes home. They went into the basement and turned off the meter, but discovered that the leak came from a point beyond the meter and could not be controlled within the house. At this time they found the odor of gas very strong, and one of them stepped to the garage in front of the house and warned the men on the outside of the house to refrain from smoking because of the danger on account of the leak. This fireman telephoned to the gas company at some time between 7:10 and 7:30 p. m., notifying the company that the pipe was broken and in need of repair.

As Mr. Gerdes and the fireman returned to the upper floor of the house they found Mrs. Gerdes in a stupefied condition as the result of the escaping gas. They moved her to a place near the front door and afterward she was moved out on the front porch. At about this time a friend came to the house and urged Mrs. Gerdes to leave, and the fireman again warned those gathered on the street in front of the house to refrain from smoking because of the danger caused by gas escaping in the house. At approximately 8 p. m. gas was ignited in a manner not shown in the evidence, and the explosion which resulted

injured both plaintiffs and caused serious damage to their property. The repair man of the gas company, in answer to the call for service, appeared at the home just as the explosion occurred. (No satisfactory proof was made of the cause of the explosion. Evidence was offered that men working in the street were using lighted lanterns and that some men were smoking; also that the electric lights were turned on and off within the premises. But, whether the gas was ignited from the street or from sparks from the electric switches was not known.)

[1] Upon these facts both appellants urged that the plaintiffs were guilty of contributory negligence as matter of law. They point particularly to the undisputed evidence that both plaintiffs were warned of the approaching danger more than two hours before the explosion occurred; that, conscious of this danger, Mrs. Gerdes was dressed prepared to leave the premises nearly two hours before the explosion; that the means of exit were never closed either from the front or to rear of the house; that, though Mrs. Gerdes was physically ill, there were a large number of men, firemen, policemen, and others who were ready and willing to help her out of the house; that, though frequent warnings were given by firemen and others of the danger arising from the escape of gas, Mrs. Gerdes took the one position in the entire house where the danger was the greatest—at the front door, directly over the point where the gas was escaping from the broken pipe.

[2-4] It would seem evident that this is a case where that doctrine should be applied. It has long been the accepted rule that a party may not wantonly and carelessly cast himself into known peril and thereby hold the party at fault for the injury arising, but it is just as necessary that one use common and ordinary caution to protect himself from injury as it is that another must use common and ordinary caution not to cause him injury. Ordinarily, of course, the question of contributory negligence is one largely of fact for the consideration of the jury, but where the quantum of common and ordinary conduct is prescribed by law or by rule of decision, as in the "stop, look and listen" cases, or by the fixed judgment of the ordinarily reasonable man, the question becomes more one of law than of fact. Some of the decisions have stated it this way; that, if the question of the negligence of the plaintiff is one upon which reasonable minds could not differ, then that question is one of law and not of fact. Thus where the contributory negligence arises from a violation of an express provision of law, or rule of decision, or where it rests upon evidence which would not justify a conclusion that the conduct of the plaintiff was that of a reasonable and prudent person, then the question is not one for the final determination of the jury. In this we mean that in such a case the appellate courts must reverse the judgment if the uncontradicted evidence demonstrates contributory negligence on the part of the plaintiff to such an extent that reasonable men could not draw different conclusions. Hughes v. Atchison, Topeka & Santa Fe Railway Co. (Cal. App.) 8 P.(2d) 853.

Though extensive briefs have been written by the several parties, the real answer of the respondents to this point may be listed under three heads: First, they say that they were confronted by an imminent peril and feared that the house was being undermined by the action of the water. No evidence of such peril appears in the record, but, if it be true that the plaintiffs feared it, it is hard to understand why the invalid wife should have taken a position on the front porch where, if the undermining should occur, she was seated at the point of the greatest danger from that source. Second, it is said that the plaintiffs were confined in the house because of the weakened pavement of the street in front. The record does not support this statement. The parties were going in and out of the house from both front and rear, and, for a period of two hours or more prior to the explosion, both exits were unobstructed. Third, it is suggested that the respondents were not aware of the danger from the explosion of the gas because the fireman had told Mrs. Gerdes that there was no immediate danger. This statement, however, was made at about 5:30 p. m., which was two and one-half hours before the explosion. It should also be noted that the statement of the fireman was accompanied with a warning that, as there was no immediate danger, it would be all right for Mrs. Gerdes to wait for her husband to return, and also that the statement was made after Mrs. Gerdes had told the fireman that she was expecting her husband at any minute.

There is no substantial conflict in the evidence covering the issue of plaintiffs' contributory negligence. The statement of facts at the beginning of this opinion is as favorable to their case as it could be made without a distortion of the uncontradicted evidence in the record. We cannot escape the conclusion that upon this point the undisputed evidence of plaintiffs' negligence is so plain and unmistakable that reasonable minds could not honestly differ and that the judgments must, therefore, be reversed. The case is of the same character as Hughes v. Atchison, Topeka & Santa Fe Railway Co., 8 P.(2d) 853, which was recently decided by this court and in which authorities supporting the proposition are cited. It would serve no purpose to cite further authority here.

Both appellants complain of the instructions relating to the doctrine of res ipsa loquitur. The instruction directed to the gas

company reads: "In the present case if you find from the evidence that the injuries sustained by plaintiffs, if any, were due to an explosion of gas on the premises of plaintiffs and if you further find from the evidence that said gas was communicated to said premises through a pipe under the control and management of the defendant, Pacific Gas and Electric Company, and if you find that said pipe broke without fault of plaintiffs, permitting gas to escape therefrom into the premises of plaintiffs, and that said gas proximately caused the explosion, then I instruct you that the bursting or breaking of said pipe affords reasonable evidence, in the absence of explanation, that it arose from a want of reasonable care." That directed to the Olympic Salt Water Company reads as follows: "I instruct you that when a thing which causes injury is under the control and management of a defendant and the accident is such as in the ordinary course of things does not happen if those who have the control and management use proper care, it affords reasonable evidence in the absence of explanation by the defendant, that the accident arose from want of proper care. Therefore in the present case if you find from the evidence that the defendant, Olympic Salt Water Company, owned and controlled a water main on Forty-seventh Avenue on the 18th day of March, 1930, and said water main broke on said day, permitting water to escape therefrom and thereby proximately contributing to the explosion causing the injuries complained of by plaintiffs, then I instruct you that the bursting or breaking of said water main affords reasonable evidence in the absence of explanation that it arose from a want of reasonable care."

[5] The essentials of the doctrine of res ipsa loquitur, or "the thing speaks for itself," are that the instrumentality causing the injury must be in the exclusive management or control of the defendant; that the circumstances attending the accident must be such as to carry a strong probability of negligence on the part of the defendant, and that the accident would not have happened if the defendant had exercised proper care in the management of the instrumentality; and that the actual cause of the accident must be otherwise unknown. 45 Cor. Jur. 1197–1211. Thus it has been said that the doctrine is applicable only when the nature of the accident itself not only supports the inference of defendant's negligence but excludes all others. Scellars v. Universal Service, 68 Cal. App. 252, 228 P. 879; Carlsen v. Diehl, 57 Cal. App. 731, 208 P. 150; Olson v. Whitthorne & Swan, 203 Cal. 206–208, 263 P. 518, 519, 58 A. L. R. 129; 19 Cal. Jur. 708, 710, 711. In the Olson Case it is said: "To render the doctrine applicable 'it must be shown that the instrumentality causing the injury was under the control of the defendant, and that the injury was caused by some act incident to that control,' and the injury 'must be of such a nature that it ordinarily would not have occurred but for the defendant's negligence.'" The application of this rule has, however, been found restricted where two or more defendants have been jointly charged with negligence. In the early case of Harrison v. Sutter Street Ry. Co., 134 Cal. 549, 552, 66 P. 787, 55 L. R. A. 608, it was held that this doctrine was not applicable where two defendants were jointly charged with the negligence causing the injuries complained of because the particular instrumentality that caused the injury could not have been under the exclusive control of either. This rule has been followed without interruption and was recently cited in Wright v. Southern Counties Gas Co., 102 Cal. App. 656, 666, 283 P. 823, 827, where it is said that "where the negligence of one is sufficient to occasion injury without the negligence of the other party, no inference of negligence as against both can be drawn."

[6] Applying these rules to the case of the gas company, it must be apparent that the res ipsa loquitur doctrine was not available to the plaintiffs because it is conceded that the explosion occurred through the ignition of gas in the premises of plaintiffs and beyond the control of the gas company; that the gas escaped from a pipe located wholly on plaintiffs' premises; that the break in the gas pipe was caused by the fall of the pavement, which, in turn, was caused by the break in the water mains; and that neither of these two instrumentalities was in the exclusive or any control of the gas company.

[7] The doctrine was inapplicable to this company for the further reason that the cause of the accident was not "otherwise unknown." The accident was caused by the ignition of gas within the premises which came there through the breaking of appellants' pipe. If this appellant were negligent because of its failure to shut off the flow of gas before the explosion, then that was a distinct act of negligence proximately causing the injury, and the cause of the accident was not, therefore, unknown. But, if this were not a distinct act of negligence, then the only evidence of negligence of this appellant is the inference of negligence arising from the application of this doctrine. We do not hold that the defendants lost the right to rely on this doctrine by attempting to prove the real cause of the accident, because such is not the rule in this state. What we do hold is that, when the evidence is sufficient to prove the real cause and thus exclude the application of the res ipsa loquitur doctrine, that element should be covered in the instructions. Thus, if the accident occurred because of the failure of this appellant to remedy the leak within a reasonable time, there was then direct evidence of the cause of the ac-

cident which would exclude the application of the doctrine (Carlsen v. Diehl, 57 Cal. App. 731, 208 P. 150), and, if the failure to repair the leak within 30 or 40 minutes after notification is evidence of negligence on the part of this appellant, the failure of the respondents to escape from the building within two and one-half hours of notice of the danger is also evidence of contributory negligence on their part. Hence, the inference that the respondents were guilty of contributory negligence could be drawn just as reasonably from the evidence as could the inference that the gas company was negligent in the conduct of its affairs, and thus the res ipsa loquitur doctrine is excluded under the rule of those cases which hold that it is not applicable when the unexplained accident might have been caused by plaintiffs' negligence or might have been due to one of several causes for some of which defendant was not responsible. Olson v. Whitthorne & Swan, 203 Cal. 206, 208, 263 P. 518, 58 A. L. R. 129; White v. Spreckels, 10 Cal. App. 287, 294, 295, 101 P. 920; 19 Cal. Jur. 710, 711.

[8, 9] In reference to the appellant Olympic Salt Water Company, the instruction embracing this doctrine was especially erroneous because it failed to inform the jury that the inference was not to be drawn if the evidence disclosed that the accident might have been due to other causes for which this appellant was not responsible. The applicability of the rule of the cases just cited to the case of the Olympic Salt Water Company is apparent. Throughout the trial this appellant sought to prove that the breaking of the water mains was caused by a defect in the main of the City and County of San Francisco which, breaking first, washed away the sand and soil supporting the salt water main and the pavement overhead and caused the pavement to fall and break the main of the Salt Water Company. It was conceded by all parties that the breaking of the pavement was caused when the sand and soil supporting it was washed away by the water escaping from one or both of these two mains, and it was also conceded that the dropping of this pavement caused the gas pipe to sag and spring a leak in the home of respondents. As a part of the evidence offered by the Salt Water Company, it was shown that a few minutes before the break in the two water mains, the main of the City and County of San Francisco broke at a distance of about 150 feet further down the street, and that an analysis of the pipes at a point in front of respondents' home showed that the pipe of the City and County was defective. On the other hand, the City and County offered evidence tending to disprove this point and to prove that the pipe of the Salt Water Company was defective at that point. The evidence of neither party on this issue was clear and convincing. For some reason unexplained in the record the jury found in favor of the City and County of San Francisco and against the other defendants. If the jury had believed the evidence offered by the Salt Water Company then it could have concluded that the accident resulted from the negligence of the City and County, and this in turn would have excluded the inference arising out of the res ipsa loquitur doctrine. Our examination of all the evidence convinces us that it was just as reasonable to draw the inference against the City and County as it was to draw that inference against the Salt Water Company. This being so, the res ipsa loquitur doctrine was inapplicable to the Salt Water Company, first, because the evidence of the circumstances surrounding the accident was not such as would support the inference of the negligence of the Salt Water Company and exclude all others (Scellars v. Universal Service, supra; Carlsen v. Diehl, supra; 19 Cal. Jur. 710, 711; Ryan v. Fall River Iron Works, 200 Mass. 188, 86 N. E. 310; White v. Spreckels, supra), and, second, because this evidence shows without doubt that, if the City and County of San Francisco was negligent in the maintenance of its main as charged by the Salt Water Company, then that negligence was of itself sufficient to have caused the fall of the street pavement and the consequent sagging of the gas pipe which resulted in the leak upon respondents' premises (Harrison v. Sutter Street Ry. Co., supra; Wright v. Southern Counties Gas Co., supra).

[10, 11] The respondents' reply to this point is that the appellant Olympic Salt Water Company tendered an instruction upon the same issue and thereby invited the error. They cite Yolo Water & Power Co. v. Hudson, 182 Cal. 48, 51, 186 P. 772, and other cases holding that a party cannot complain of an error in an instruction given at the instance of his adversary when he requests a substantially similar one. The rule is general but has no application to this case. The issue founded on the res ipsa loquitur doctrine was first presented in the opening statement of counsel for the respondents. It ran throughout the long trial in the testimony offered, the objections made thereto, and the ruling of the trial court thereon. The instructions upon that issue proposed by the respondents and given by the trial court were, as we have heretofore pointed out, incomplete statements of the proper application of that doctrine. In self-defense, so to speak, this appellant proposed and the trial court gave an instruction to the effect that the res ipsa loquitur doctrine does not shift the burden of proof between the parties, but that the burden of producing the preponderance of the evidence remained with the plaintiffs. This is far from an invitation to the trial court to commit error in submit-

ting to the jury the issues raised by the respondents. But, to emphasize the position of this appellant, it proposed an instruction which the trial court refused to give, and which, if given, would have gone far towards lessening the error of the instructions given at the request of the respondents. This proposed instruction reads as follows: "I instruct you that even where the thing which caused the injury is shown to be under the control and management of the defendant and the accident is such as in the ordinary course of things does not happen if those who have the control and management use proper care, this does not place upon the defendant the burden of rebutting by a preponderance of evidence the prima facie case so made. The defendant is required merely to make such a showing as to want of negligence as will leave the jury unsatisfied as to whether or not there was negligence on defendant's part." In defense of this instruction this appellant directs particular attention to the concluding sentence which was designed to inform the jury as to the quantum of proof required by a defendant in rebutting the prima facie case of a plaintiff made out by the application of the res ipsa loquitur doctrine. The proposed instruction was a correct statement of the law in this respect. 19 Cal. Jur. 719; Seitzman v. Srere Corporation (Cal. App.) 3 P.(2d) 58. The rule, which is supported by abundant authority, is found in the text of California Jurisprudence, which reads: "Accordingly, a defendant need not rebut by a preponderance of evidence the prima facie case so made, but is required merely to make a showing as to want of negligence as will leave the jury unsatisfied as to whether or not there was negligence on defendant's part." 19 Cal. Jur., p. 719.

The error in the refusal to give this instruction was emphasized by the giving of an instruction covering the precise subject-matter, but limited specifically to the defendant City and County of San Francisco so that the issue as between the two water companies was given to the jury with instructions advising that they could infer negligence against either or both of these defendants from the fact that their water pipes broke while under their control and management, but that, as to the City and County of San Francisco, it was sufficient if that defendant produced evidence which would fairly balance the evidence introduced by the plaintiffs, but that, as to its codefendant, the Olympic Salt Water Company, it was necessary for it to overcome by a preponderance of evidence the inference of negligence arising from plaintiffs' prima facie case. The point was not, as respondents now argue, that one defendant was given more favorable consideration by the trial court than the other. The point is that this appellant was entitled to the instruction proposed by it covering this delicate question of preponderance of evidence, and that, in refusing to give this instruction, the trial court increased the burden upon this appellant by giving a similar instruction in relation to its codefendant. As the evidence of negligence on the part of the City and County was just as strong as the evidence against the Olympic Salt Water Company, and as the jury found in favor of the City and County of San Francisco and against the Olympic Salt Water Company, this appellant cites the circumstance as evidence that the errors complained of were prejudicial to it. We cannot escape the conclusion that the doctrine was inapplicable in the first instance, and that the failure to give the proposed instruction was prejudicial to this appellant.

[12] Criticism is also made of the instruction tendering the issue to the jury of imminent peril and reading as follows: "In time of imminent danger, a person is not necessarily negligent because he fails to take every precaution or adopt every means of safety that a careful calculation subsequently shows he might have taken or adopted. Where, however, two courses are open to the imperiled party, he should not take voluntarily a chance of obvious danger when a safe course is open and apparent to him. You are further instructed that this doctrine of imminent peril does not apply to a party who by reason of his own negligence creates the sudden peril which confronts him." This instruction should not have been given. There was no evidence that either one of respondents was in a position of imminent peril excepting such as was created by their own fault. Knowledge of the escape of gas was had by both more than two hours before the explosion occurred. There was ample time during this period for both to deliberate upon the approaching danger and to take at least ordinary steps to escape from this danger. Imminent danger does not mean a danger which is known to be approaching over a long period of time, though the party may not know the precise time when injury might be expected. "The appearance of danger must have been so imminent as to leave no time for deliberation." Stanley v. Helm, 204 Mo. App. 159, 223 S. W. 125, 127. Both appellants argue that this instruction tended to lessen the effect of their evidence of contributory negligence. The respondents reply that they were confronted with two perils, the imminent danger of their house being undermined by the flow of water in the street, and the imminent danger of escaping gas within the house. But the flow of the water had caused the pavement in front of the house to drop at about 5:30 p. m., and, if there were any danger of the house being undermined and thus causing the injuries

to the respondents, that danger was present for at least two hours prior to the time of the injury. The gas began to flow into the house at approximately the same time, 5:30 p. m., and was continually flowing at an increasing volume from that hour until 8 p. m., when the explosion occurred. Under such circumstances there was no question of imminent peril within any reasonable interpretation of that term as used in the decisions or as used generally. We are satisfied that this instruction injected a false issue into the case, and, as to our minds it is the only reasonable explanation of the jury's finding on the issue of contributory negligence of the respondents, it was, of course, an error which was prejudicial to both appellants.

Other points are raised in the brief of Olympic Salt Water Company which affect that appellant alone. It would unnecessarily lengthen this opinion to treat these points as, irrespective of anything said in this opinion except the treatment of the res ipsa loquitur doctrine, we are satisfied that the errors herein designated in relation to that issue alone demand a reversal of the judgments against both these appellants.

For the reasons given the judgments as to both appellants are reversed.

We concur: STURTEVANT, J.; SPENCE, J.

124 Cal.App. 706

PEOPLE v. MOODY.

Cr. 1213.

District Court of Appeal, Third District, California.

July 13, 1932.

1. Homicide ⇐230.

In prosecution for assault with intent to murder, jury could consider defendant's declaration of intention and acts constituting assault in determining intention (Pen. Code, § 21).

2. Homicide ⇐230.

In prosecution for assault with intent to murder, defendant's surly disposition before assault constituted circumstance for jury in determining question of premeditation (Pen. Code, § 21).

The surly disposition of defendant prior to the assault was in such case a circumstance for the jury to consider in determining the question of deliberation and premeditation which is necessary to raise an assault with a deadly weapon to the crime of attempt to commit murder.

3. Homicide ⇐257(1).

Evidence *held* sufficient to sustain conviction of assault with intent to commit murder.

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Zack Moody was convicted of assault with intent to commit murder, and he appeals.

Affirmed.

J. C. Webster, of Sonora, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The defendant was tried and convicted upon an information charging that on or about the 7th day of February, 1932, in the county of Tuolumne, state of California, he assaulted one Mrs. H. E. Rolfe with a deadly weapon, with intent to commit murder. From the judgment entered upon the verdict of guilty based upon the charge just referred to, the defendant appeals.

Only one question is presented for our consideration by the appellant's brief, to wit, whether the jury was justified in finding that the assault had coupled with it the intent to commit murder. The appellant admits that the court correctly instructed the jury.

The record shows that the defendant and Mrs. H. E. Rolfe both attended a ball which was given at the Harvard Hotel in the town of Tuolumne, on the evening of February 6, 1932. It further shows that prior to the date of the alleged assault the defendant and Mrs. Rolfe had been maintaining toward each other the relationship of husband and wife, without ever having in fact been married. While not expressly called to our attention in the record, the inference seems clear that the defendant and Mrs. Rolfe did not attend the ball together, but went there individually. During the evening of the ball, the defendant asked Mrs. Rolfe to dance with him; Mrs. Rolfe declined to do so, stating that she was not dancing that evening. From this time on the record shows that the defendant was in a surly mood, made many profane and vulgar remarks to her, and also about friends who apparently were in her company. Some time after 12 o'clock Mrs. Rolfe, accompanied by two of her friends, a husband and wife, went to her residence; the friends who accompanied Mrs. Rolfe remaining but a few minutes. After their departure Mrs. Rolfe made some preparations for retiring for the night, and at the time of the assault hereinafter mentioned was clad in her nightclothes covered by a kimono. Some time after 12 o'clock, and after Mrs. Rolfe had gone to her own home, the defendant repaired to the resi-

dence of Mrs. Rolfe and sought entrance. Whether on account of the ugly disposition which the defendant exhibited during the evening, or for some reason not completely disclosed by the record, Mrs. Rolfe did not wish the defendant to enter her apartments that night, and, seeking to drive him away, fired a pistol shot into the ceiling of the front room of her residence. It appears that there was a light left on the front porch which was explained as indicating that some member of Mrs. Rolfe's household was absent, the testimony showing that a daughter had gone to Sonora to attend the dance. The defendant, entering upon a front porch, sought entrance through a door which was partly frame and partly glass, and rapped thereon, demanding that it be opened. Mrs. Rolfe declined to do so, and fired the shot to which we have just referred. Immediately following this incident the defendant broke the glass part of the door and climbed through the opening thus made into the room where Mrs. Rolfe was standing. Then followed the assault of the defendant upon the person of Mrs. Rolfe. It appears that the defendant had a knife in one of his hands and began stabbing the person of Mrs. Rolfe, stating at the same time that he would cut her head off and roll it through the streets as a football.

The record shows that defendant stabbed Mrs. Rolfe in several places, once in the neck and once just over the left shoulder blade. This cut was about four inches long. Neither one of these cuts reached a vital spot. The defendant likewise inflicted several minor wounds on the person of Mrs. Rolfe.

It appears that Mrs. Rolfe, when the assault was made, grappled with the defendant and both of them fell to the floor. The cut in the back was about one inch deep. The lacerations, as testified to by one of the physicians, were in the neighborhood of the body where, had the knife blade pierced with sufficient depth, fatal results might have followed.

The testimony in the record shows that a considerable scuffle ensued between the defendant and Mrs. Rolfe, and that she finally escaped after receiving the wounds we have indicated.

The defendant's story of the affair was to the effect that two men were concealed in Mrs. Rolfe's room when he entered, and that they assaulted him. His story was of such a character, however, that no jury could accept it as being a correct version of the affair.

[1, 2] Section 21 of the Penal Code reads in part: "The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused." Here, we have an instance of the declaration of the intent of the accused, and also of the acts constituting the assault which the jury had a right to consider in determining whether the defendant did or did not intend to commit murder. The surly disposition displayed by the defendant prior to the actual assault constituted a circumstance proper for the consideration of the jury. The fact that the defendant did not commit murder was due only to the shortness of the knife blade. The jury had a right also to consider the disposition manifested by the defendant prior to the actual assault in determining the question of deliberation and premeditation which is necessary to raise an assault with a deadly weapon to the crime of attempt to commit murder. While these mental processes may follow each other in rapid succession, the circumstances disclosed by the testimony in this case indicate that a feeling of hostility existed for at least a few hours, and, as stated by counsel for the people, the fact that fate intervened and prevented the defendant from accomplishing his full purpose, does not tend to rebut the intent to commit murder and raise the offense from an assault with a deadly weapon to that of the higher degree of crime of which he was convicted.

[3] No other question being tendered for our consideration, it follows that the judgment of the trial court should be affirmed, and it is so ordered.

I concur: PRESTON, P. J.

124 Cal.App. 685

SMITH et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 8055.

District Court of Appeal, Second District, Division 1, California.

July 12, 1932.

Application for writ of prohibition prayed to be directed to the Superior Court of Los Angeles county. Writ granted.

John J. McMahon and C. W. Byrer, both of Los Angeles, for petitioners.

PER CURIAM.

It appearing that, although several months have expired since the alternative writ of prohibition was issued herein, and that, in the absence of either stipulation by the parties hereto, or by order of this court, respondent has entered no appearance, either by answer to the petition for the writ, or by memorandum of points and authorities in relation thereto, and it further appearing by the uncontradicted facts set forth in the petition for said writ, as well as by the law

which is pertinent to the relief prayed for by petitioner, that his claim is well founded, it is ordered that the alternative writ hereinbefore issued by order of this court be, and the same is, made peremptory.

124 Cal.App. 686

GADERER v. GROSSMONT UNION HIGH SCHOOL DISTRICT OF SAN DIEGO COUNTY et al.

Civ. 893.

District Court of Appeal, Fourth District, California.

July 12, 1932.

Rehearing Denied July 30, 1932. Hearing Denied by Supreme Court Sept. 8, 1932.

1. Schools and school districts ⇐141(1).

Original jurisdiction or primary authority for bringing and hearing charges against teacher rests with school board (School Code, §§ 5.404, 5.661).

2. Schools and school districts ⇐141(5).

School board's bringing, hearing, and disposing of charges against teacher are matters prerequisite to trial of questions involved de novo in superior court (School Code, §§ 5.404, 5.661).

3. Schools and school districts ⇐141(5).

Where record disclosed sworn witnesses testified against teacher at hearing before school board and that teacher, present and represented by counsel, offered no evidence in own behalf, proof at board's hearing presumptively established facts as proved on hearing in trial court (School Code, §§ 5.404, 5.661).

4. Schools and school districts ⇐141(5).

Upon trial of teacher dismissed November 21, 1929, for professional misconduct, testimony that about January 5, 1927, teacher was arrested for violating Juvenile Court Law *held* incompetent for remoteness (School Code, § 5.661).

Such testimony was incompetent, irrelevant, and immaterial because of the remoteness in time prior to the making of the charges before the school board.

5. Appeal and error ⇐1011(1).

Trial court's finding on conflicting evidence on trial de novo of charges against teacher *held* conclusive (School Code, § 5.661).

6. Schools and school districts ⇐141(5).

In proceeding before school board to dismiss teacher for professional misconduct, teacher had burden of explaining conduct (School Code, § 5.661).

Appeal from Superior Court, San Diego County; Arthur L. Mundó, Judge.

Action by E. R. Gaderer against the Grossmont Union High School District of San Diego County and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

Curtis Hillyer and Irve C. Boldman, both of San Diego, for appellant.

Thomas Whelan, Dist. Atty., Frank T. Dunn, Chief Deputy Dist. Atty., and Edgar I. Kendall and Edward W. Goodman, Deputy Dist. Attys., all of San Diego, for respondents.

V. N. THOMPSON, Justice pro tem.

This is an action brought by the appellant teacher against the respondents school board and the several members thereof, for the sum of $1,710.40, salary alleged to be due the teacher for the part of the school term from November 21, 1929, on which date the teacher was dismissed by the school board, to the end of the school year, or June, 1930.

A contract of employment of the teacher, as a probationary teacher for the full school year, is admitted by the respondents. Respondents deny any liability, because of the dismissal of the appellant teacher for cause, after a hearing by the school board of charges made against the teacher for unprofessional conduct and evident unfitness for service in violation of School Code, § 5.661, and affirmance of the action of the school board upon appeal to the county superintendent of schools.

For the purpose of brevity, the appellant will be referred to as the "teacher" and the respondents herein the "school board."

[1, 2] One or two observations in connection with the appeal may well be made before taking up the points urged by the appellant. One is that under the law the appeal of a teacher, who has been dismissed for cause by the school board and after review by the county superintendent of schools, is taken to the superior court of proper jurisdiction where the matters in issue are pleaded and tried de novo. School Code 1929, § 5.404. However, the original jurisdiction or primary authority for bringing and hearing charges against a teacher rests with the school board, and the bringing of such charges and the hearing and disposition of the same by the board are matters prerequisite to the commencement of an action in the superior court under the law, although the questions involved may be tried de novo in the superior court. As a matter of fact, the action of the school board in dismissing the teacher, whether right or wrong, is brought in issue through the action in the superior court and the review of the proceedings of the school board therein for the pur-

pose of ascertaining whether or not the board was justified in taking whatever action it did.

The points relied upon by appellant in his specification of errors will be considered in the order in which they are urged: First. "The evidence is insufficient to show that appellant was guilty of any conduct that would warrant his dismissal by the defendants."

[3] There is nothing in the record which reveals definitely what testimony was taken or what facts were developed upon the hearing before the school board, except that the record shows that witnesses were sworn and testified in support of the charges which were then pending before the board; that appellant was present and represented by counsel at the hearing; that he did not testify, make any statement, or offer any evidence in his own behalf. With this situation it must be assumed that the proof which was produced before the school board, with the exception, of course, of the testimony of appellant himself, was such as to substantially establish the facts as they were proven upon the hearing in the trial court.

[4] In connection with the first charge as enumerated in the specification of charges made by or before the school board, "that on or about the 5th day of January, 1927, in this county and state, you were arrested and charged with violation of the Juvenile Court law," the only evidence which was produced before the trial court in support of this charge was the testimony of plaintiff himself upon examination under section 2055, Code of Civil Procedure, over the objection of plaintiff's counsel on the grounds that such evidence was incompetent, irrelevant, and immaterial, and not the best evidence. The objection was overruled by the court. Such evidence was subject to the first grounds of objection, and the objection should have been sustained because of the remoteness in time prior to the making of the charges before the school board. If the plaintiff and appellant did not testify before the school board, it must necessarily follow also that the board did not have before it evidence upon this charge at the time of the hearing.

If this were the only charge which was made or pending against appellant, his contention that "the trial court committed prejudicial error in admitting in evidence over appellant's objection testimony of appellant's arrest for violation of the Juvenile Court law," might be sufficient for reversal of the judgment. However, the sole question here is whether or not the school board, considering the evidence before it, and, as presented through the trial court upon this appeal, was justified in dismissing the appellant teacher and canceling the contract of employment at the time it did. In order that this question may be properly determined, it is necessary that consideration be given to all of the specifications or charges.

[5] The evidence upon the second charge "that on or about the 27th day of October, 1929, at the Hotel Olive in the city of San Diego, California, you were charged by one C. F. Postlewart with immoral conduct and chased from said hotel by said Postlewart armed with a knife, and hereby created a disturbance of the peace therein," is to some extent conflicting. The trial court has made its finding and judgment, based upon the evidence before it, sustaining the charges. The judgment should not be disturbed. It is true that the charge as laid before or by the school board is more or less recital and secondary or indirect in its verbiage. The charge is more fully stated in the second amended answer, however, and it is not shown that the substantial rights of the appellant teacher were at any time placed in jeopardy by reason of any insufficiency of the charge itself.

The third charge, "that these charges are generally known in the school district and as a result render you unfit for future service as a teacher in this district," is also amply supported by the evidence. The finding and judgment of the trial court in relation to the evidence upon this charge is correct.

The first part of appellant's second ground of appeal has already been disposed of. The last part of this ground, viz. "The trial court committed prejudicial error in admitting * * * testimony concerning rumors about appellant's conduct," is overcome by the evidence. The testimony of members of the school board and school principal indicates clearly that complaints of appellant's conduct toward and in the presence of pupils were made by parents of at least several of such pupils. Along with this testimony is some in the nature of hearsay, and statements of conclusions of the witnesses, in part admitted over objections of appellant's counsel. It appears that there is sufficient evidence of a direct nature, standing alone, to refute the last ground of appeal.

At the hearing before the school board, according to the record, objection was made by the attorney representing the teacher, plaintiff and appellant, that no written charges had been filed against the teacher and that the school board was biased or prejudiced against him to the extent that he was prevented from having a fair hearing. The record discloses that the teacher and his counsel were given an opportunity to submit evidence at such hearing and that they declined to do so. Apparently no point was attempted to be made of the teacher's objections in this respect before the trial court because of the fact that the matter was being tried de novo, and no point is made of it on appeal.

[6] The proceedings before the school board cannot be likened to a criminal proceeding,

where generally the entire burden of proof rests upon the prosecution. The teacher must have known that the school board was the body empowered with original authority to act upon the charges and dismiss him from his employment, and that, if his actions and conduct were such that they could be explained before the board in a satisfactory manner, it was not only his right, but his duty, to do so.

There is no doubt from all the evidence that the school board was fully justified in taking the action which it did.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

124 Cal.App. 701

GRIFFIN et al. v. PARKER.

Civ. 8530.

District Court of Appeal, First District, Division 1, California.

July 13, 1932.

As Modified on Denial of Rehearing Aug. 12, 1932. Hearing Denied by Supreme Court Sept. 8, 1932.

1. Waters and water courses ⇐154(1).

Lot owner *held* entitled to easement to take water from well on adjoining lot, where water arrangements were permanent and obviously used for both lots when common owner conveyed former lot (Civ. Code, § 1104).

2. Appeal and error ⇐1033(7).

Defendant could not complain of court's failure to make finding which would necessarily have been adverse.

3. Easements ⇐30(2).

Mere nonuser of easement created by grant will not work extinguishment, and right merely suspended may be revived.

4. Waters and water courses ⇐154(1).

Easement to take water from well on adjoining lot *held* revived, after nonuser due to well's becoming choked, when servient tenant cleaned out well although servient tenant was not bound to clean it out (Civ. Code, § 806).

5. Appeal and error ⇐1071(6).

Failure to find on certain issue *held* not prejudicial error, where findings made disposed of issues sufficient to uphold judgment.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Georgie E. Griffin and others against Vinnie D. Parker. From the judgment for plaintiffs, defendant appeals.

Affirmed.

Olin L. Berry and Delbert L. Berry, both of San Francisco, for appellant.

Henry E. Greer, of San Rafael, for respondents.

PER CURIAM.

Appeal by the defendant from a decree adjudging plaintiffs to be the owners of the right and easement to take water for household and garden purposes from a well on defendant's land.

The parties own adjoining lots which, until June, 1904, were owned by one C. F. Turner, who erected upon each a dwelling house. Turner also sank a well upon the property now owned by defendant, which will be hereinafter referred to as the Lawton lot, and constructed thereon a windmill and tank. He then laid pipes therefrom to both houses for the purpose of furnishing water for garden and domestic use. The well was about five feet in diameter and twenty-five feet deep, with a three-inch bore extending downward from the bottom a further distance of eighteen feet. The tank had a capacity of about 1,000 gallons, and water was conveyed therefrom to the two properties by means of a three-quarter inch pipe. On June 11, 1904, Turner, who lived on the lot now owned by plaintiff Georgie E. Griffin, and which will be hereinafter referred to as the Griffin lot, conveyed the property to her, and she has since resided thereon. On June 13, 1904, Turner conveyed the Lawton lot to Daisy B. Lawton, who resided thereon until July 18, 1928, when she conveyed the same to defendant Parker. Water from the well, pumped by the windmill, continued to be used by the owners of the two lots until January, 1924, when the windmill was destroyed by a storm. Soon thereafter Mrs. Lawton installed in its place an electric motor and pump. According to Mrs. Griffin, she offered to contribute to the cost of installing the motor and pump, but Mrs. Lawton refused, and it was then agreed between them that Mrs. Griffin should furnish the oil and grease necessary and attend to its operation. When first installed it was attached to and operated through the Lawton electric meter, but later was attached to the Griffin meter. This arrangement continued until July, 1928, when the husband of defendant, Parker, acting for Mrs. Lawton, disconnected the pipe leading to the Griffin lot. Defendant and Mrs. Lawton were sisters, and the conveyance from the latter appears to have been executed a few days thereafter. About the time the pipe was disconnected, the three-inch bore at the bottom of the well became choked with sand. To

remedy this, Mrs. Lawton caused the same to be blasted, but this did not remedy the defect. She thereupon increased the depth of the bore six and one-half feet, and its diameter about six inches. This required about three days' labor by two well borers, and it is clear from the evidence that the expense incurred was small. As a result the water supply was restored to the usual amount, and according to the testimony, there was on December 3, 1929, two days before the trial, about nine feet of water in the well.

Among other things, the trial court found that, when plaintiff purchased, she was told by Turner that the right to take the water as aforesaid passed with the conveyance, and that her use was at all times open and notorious, under claim of right, and with the full knowledge of the owner of the Lawton lot. A decree was entered adjudging plaintiff to be the owner of a right and easement appurtenant to her lot to take and convey water from the well through a three-quarter inch pipe, and enjoining defendant from preventing her and her employees from entering upon the Lawton lot for the purpose of maintaining the pipes with the tank and pump in good condition and repair and preserving her right to the water.

Defendant contends that the evidence was insufficient to justify the decision, and that the court erred by failing to find on all the issues.

Section 1104 of the Civil Code provides that a transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred for the benefit thereof at the time when the transfer was agreed upon or completed.

[1, 2] Defendant complains that the trial court made no finding which brings the case within the above section, but found instead that plaintiff's right was prescriptive. Nevertheless the undisputed facts are as stated above, namely, that, when Turner conveyed to plaintiff, the water arrangements were permanent in character and obviously in use for the benefit of both lots. Under such circumstances the Code rule applies, and the right passes with the conveyance. Cave v. Crafts, 53 Cal. 135; Cheda v. Bodkin, 173 Cal. 7, 158 P. 1025; Silveira v. Smith, 198 Cal. 510, 246 P. 58. Where a finding would necessarily have been adverse to a party, he cannot complain. 24 Cal. Jur., Trial, § 188, p. 944.

It is claimed that plaintiff's right ceased with the diminution of the water supply, and was not revived when an increased supply was developed by deepening the well.

[3, 4] The owner of an easement cannot enlarge the burdens upon the servient estate (Civ. Code, § 806), but a mere nonuser of an easement created by grant will not work an extinguishment (9 R. C. L. "Easements," § 66, p. 810); and, if the right is merely suspended it may be revived (19 Cor. Jur. "Easements," p. 958; Keller v. Oakland, 54 Cal. App. 169, 201 P. 618). Here the nonuser was due to the fact that the well became choked with sand; and, while neither the defendant nor her predecessor in interest was bound to clean out the well or deepen it, yet, having done so, and having increased the supply to its former flow, the easement itself was restored and revived. Hottell v. Farmers' Protective Ass'n, 25 Colo. 67, 53 P. 327, 71 Am. St. Rep. 109; Schneider v. Cross, 80 Colo. 26, 249 P. 643.

The cases of Cohen v. Adolph Kutner Co., 177 Cal. 592, 171 P. 424, L. R. A. 1918D, 410, and Muzio v. Erickson, 41 Cal. App. 413, 182 P. 974, cited by defendant, have no application here.

It is claimed that the decision erroneously failed to restrict plaintiff's right in the new supply to the amount previously used; but, as stated, the decree limits the amount to the carrying capacity of a three-quarter inch pipe; and, for aught that appears, the same tank at the same elevation continues to be used with no increase in pressure.

[5] It is also urged that there was a failure to find on a material issue, namely, the claim that the present water supply was from a new source. This, in view of the foregoing, is not material; and, if the findings made are of such a character as to dispose of issues which are sufficient to uphold a judgment, a failure to find upon others does not constitute prejudicial error. Pyle Co. v. Fossler, 200 Cal. 204, 209, 252 P. 599; Colver v. W. B. Scarborough Co., 73 Cal. App. 441, 455, 238 P. 1104.

Lastly defendant complains that under the decision she will be required to act and incur expense in supplying plaintiff with water; but we find nothing in the decree requiring her to do more than refrain from interfering with plaintiff's proper use of the motor and pump. All the equities of the case are with the plaintiff, and we find nothing in the record which would justify a reversal of the judgment.

The judgment is affirmed.

124 Cal.App. 634

TORNQUIST v. JOHNSON et al.

Civ. 911.

District Court of Appeal, Fourth District, California.

July 6, 1932.

1. Judgment ⇐944.

In action on foreign judgment, recitals of judgment *held* sufficient to show jurisdiction of court over persons of defendants.

Foreign judgment recited in substance that parties came by counsel into open court, and case was submitted for trial, and, after hearing evidence adduced, court found for plaintiff, and found allegations of plaintiff's complaint were true, and that there was due plaintiff from defendants on account sued on sum specified, together with costs of cause, and judgment was then ordered for plaintiff against defendants for sum specified.

2. Evidence ⇐35.

In action on foreign judgment, court would take judicial notice that, under laws of state wherein judgment was rendered, circuit court rendering judgment was one of general jurisdiction (Code Civ. Proc. § 1875).

3. Judgment ⇐942.

In action on foreign judgment, it would be presumed that court rendering judgment had jurisdiction of subject-matter.

4. Judgment ⇐943.

Where judgment for money rendered by court of general jurisdiction of sister state shows jurisdiction over defendant on its face, it is admissible in action in state based on judgment, though unaccompanied by copy of complaint.

5. Attorney and client ⇐70.

Presumption is that attorney making appearance for party was authorized to do so.

6. Evidence ⇐588.

Court may reject the most positive testimony.

7. Appeal and error ⇐1012(1).

In action on foreign judgment, weight of defendant's testimony that he was not served with summons in original action, where record evidence showed he was served, *held* for trial court.

8. Judgment ⇐944.

In action on foreign judgment, evidence warranted trial court's finding that defendant was served with summons in original action (Code Civ. Proc. § 1833).

9. Judgment ⇐934(1).

Statute of limitations did not begin to run against action on foreign judgment until judgment became final after expiration of time for appeal (Code Civ. Proc. § 336, subd. 1).

10. Judgment ⇐839.

Statutory provisions of state in which judgment sued on was rendered concerning assignment of judgments did not prevent making assignment in usual form (Burns' Ann. St. Ind. 1926, § 654).

11. Judgment ⇐928.

Question of who are necessary parties to action begun in state on foreign judgment is determined by laws of state.

12. Assignments ⇐121.

Action may be maintained by assignee of equitable assignment without joining assignor as party; assignee being real party in interest.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Amy Tornquist against Halleck F. Johnson and another. From judgment for plaintiff, defendant named appeals.

Affirmed.

A. R. Honnold, of Escondido, for appellant.

A. W. Treadwell and Stanley T. Howe, both of San Diego, for respondent.

HARDEN, Justice pro tem.

Suit on foreign judgment for money.

On October 20, 1923, O. W. Richardson & Co., a corporation, procured a judgment against defendants Halleck F. Johnson and Ralph E. Johnson, in the Marshall county circuit court, comprising the Forty-First judicial circuit (since changed to the Seventy-Second judicial circuit) of the state of Indiana, in the sum of $579.39, together with interest thereon at the rate of 6 per cent. per annum until paid. Plaintiff filed this action as assignee of said O. W. Richardson & Co., a corporation, against said defendants on said judgment, with the result that judgment was rendered herein in favor of plaintiff and against defendant Halleck F. Johnson for the sum of $795.65. The defendant Ralph E. Johnson was not served with process herein; nor did he make any appearance. From the judgment said Halleck F. Johnson has appealed.

Copies of the record of the Indiana court, viz. judgment, summons together with sheriff's certificate of service thereof upon defendants, and answer to complaint denying the averments thereof and purporting to have been filed in behalf of defendants, were received in evidence over the objection of appellant. All of said records were authenticated in accordance with the requirements of our section 1906, Code of Civil Procedure, and the act of Congress (see 28 USCA § 687).

The objection, as applicable to the judgment, is renewed here, and it is contended that said judgment was not admissible, for the reason that it was not accompanied by all of the records constituting the judgment roll. Particularly it is urged that said judgment was not admissible because it was not accompanied by a copy of the complaint in the action. The Indiana judgment recites: "Come now the parties by counsel into open court. This cause is now submitted to the court for trial and after hearing the evidence adduced the court finds for plaintiff and finds the allegations of plaintiff's complaint are true, and that there is due plaintiff from defendants on the account sued on the sum of $569.49, * * * together with costs of this cause herein taxed at $9.90."

[1-3] Judgment is then ordered for plaintiff against defendants in said action for $579.39. Said recitals are sufficient to show jurisdiction of the court over the persons of the defendants therein; and the court will take judicial notice that under the laws of the state of Indiana the circuit court which rendered the judgment is one of general jurisdiction (section 1875, Code Civ. Proc.); and it will be presumed that said court had jurisdiction of the subject-matter of the action (15 Cor. Jur. 827, § 146, citing many cases).

In support of his contention, appellant cites and relies upon the cases of Young v. Rosenbaum, 39 Cal. 646; Mason v. Wolff, 40 Cal. 249; Harper v. Rowe, 53 Cal. 233; and Wickersham v. Johnston, 104 Cal. 407, 38 P. 89, 43 Am. St. Rep. 118. Said line of cases is distinguishable from our case; and the distinction has been pointed out by Commissioner Britt in Simmons v. Threshour, 118 Cal. 100, 50 P. 312, 313, in the following language: "We are not unmindful of the decision in Wickersham v. Johnston, 104 Cal. 407, 38 P. 89 [43 Am. St. Rep. 118], and the previous cases there followed [citing the other three cases herein relied on by appellant]; nor do we now impugn the principle on which they proceed, viz. that to render a judgment admissible in evidence it must be shown to be a valid judgment, and that the appropriate method of doing this is to produce the roll, so that it may be seen whether the court had jurisdiction to determine the cause. But in none of those cases does it appear that facts showing that the court had jurisdiction were recited in the judgment itself. Since such recitals are evidence of their own truth, as numerous decisions of this court establish, they necessarily (when consistent with other parts of the judgment) supply the absence of the technical roll to the extent of rendering the judgment at least prima facie competent as evidence."

We think the rule applicable is that mentioned in said quotation and applied in the later cases of Uplinger v. Yonkin, 47 Cal. App. 435, 190 P. 822, 823, and Cummings v. Cummings, 97 Cal. App. 144, 275 P. 245. In the first of said last-mentioned cases the appellant raised the same point as is raised here. In disposing of it the court said: "First point: That the Illinois judgment has not been proved as required by law, in this, that an authenticated copy of the judgment alone was received in evidence without the judgment roll. This question has been determined adversely to appellant's contention in McHatton v. Rhodes, 143 Cal. 275, 76 P. 1036, 101 Am. St. Rep. 125. An issue presented in that case depended upon the validity of a judgment of a circuit court, a court of general jurisdiction in the state of Missouri. An authenticated copy of the Missouri judgment was admitted in evidence without the judgment roll. The judgment of the superior court was affirmed, notwithstanding that the decision therein contained was clearly wrong unless supported by the evidence of the foreign judgment."

Each of the cases of Uplinger v. Yonkin, supra, and Cummings v. Cummings, supra, was an action upon a money judgment procured in a sister state; and in each case the judgment sued upon showed jurisdiction over the defendant upon its face; and the last-mentioned case justifies the introduction of the judgment on that ground.

[4] We hold that, where a judgment for money rendered by a court of general jurisdiction of a sister state shows jurisdiction over the defendant upon its face, it is admissible in evidence in an action in this state based upon said judgment, though unaccompanied by a copy of the complaint; and that the judgment in question was properly received in evidence.

[5-8] Connected somewhat with the appellant's first point is his further contention that the trial court should have determined as a fact that the Indiana court did not have jurisdiction over the person of appellant. Appellant testified that he was not served with summons in said Indiana action, and that he did not authorize counsel who filed the answer for him and his codefendant to do so. He admitted, however, that he was living at Plymouth (Marshall county), Ind., on December 18, 1922, the date when, as shown by the sheriff's return, he was served with summons, but was uncertain as to whether he was in town on that particular day; and he also admitted that he was acquainted with the deputy sheriff who made return of service and with the attorney who filed the answer and who appeared at the trial. His testimony was indefinite in respect to his alleged indebtedness. In reply to the question: "Did your firm ever owe O. W. Richardson & Company anything?" he replied: "Not to my knowledge. I don't know. I didn't take care of that end of the busi-

ness." The presumption that an attorney who has made an appearance for a party was authorized to do so is firmly established. 6 Cor. Jur. 631, citing many cases. Many California cases so hold. The record evidence, if considered alone, was prima facie sufficient to justify the findings and judgment of the trial court in favor of plaintiff. Appellant complains because the court did not act upon his testimony denying service of summons upon him and denying the authority of counsel to appear for him. A court may reject the most positive testimony. People v. Knutte, 111 Cal. 453, 44 P. 166. The testimony of appellant did no more than contradict the record evidence, supported as that evidence was by all the presumptions attending it. It was peculiarly within the province of the trial court to weigh and consider such testimony. We cannot hold as a matter of law that the prima facie effect of the record evidence was contradicted and overcome by the testimony of appellant. Section 1833, Code Civ. Proc.; Miller & Lux, Inc., a corp., v. Secara, 193 Cal. 755, 227 P. 171. On the contrary, we hold that the trial court was amply warranted in disregarding the testimony of appellant and deciding in accordance with the effect of the record evidence.

[9] It is also contended that the cause of action sued upon is barred by the provisions of section 336, subdivision 1, Code of Civil Procedure, to the effect that an action upon a judgment must be commenced within five years. It is admitted that under the Indiana statute an appeal may be taken at any time within 180 days from the time judgment is rendered. The time within which an appeal could have been taken from said judgment therefore did not expire until April 17, 1924. The record does not disclose that any appeal was taken. Said judgment did not become final until the time within which an appeal might have been taken therefrom expired; and the statute of limitations did not begin to run against the cause of action until the judgment became final.

"An action will not lie upon a judgment until it has become final. Until that time has arrived, no cause of action upon the judgment has accrued. Hills v. Sherwood, 33 Cal. 474, 479. * * * In Harris v. Barnhart, 97 Cal. 546, 32 P. 589, it is said: 'Until the time for an appeal has expired, if the judgment has not been sooner satisfied, the action is, under section 1049 of the Code of Civil Procedure, to be deemed as pending.' To like effect are Naftzger v. Gregg, 99 Cal. 83, 33 P. 757, 37 Am. St. Rep. 23, and In re Blythe's Estate, 99 Cal. 472, 34 P. 108, in which latter case it is held 'that a judgment, in order to be admissible in evidence for the purpose of proving facts therein recited, must be a final judgment in the cause, and, if the action in which the judgment is rendered is still pending, necessarily the judgment is not final.' * * * The construction contended for by respondent would, as has been said, be an absolute reversal of, and exception to, this general salutary rule. Far more in harmony with the spirit of our law and with our adjudications upon this subject is the interpretation which holds that the statute begins to run only when the right of action has accrued, and this, as has been said and shown, is after final determination on appeal, in the event that an appeal has been taken, or after passage of the time in which an appeal might be taken in the event that none has been." Feeney v. Hinckley, 134 Cal. 467, 468, 66 P. 580, 86 Am. St. Rep. 290.

The present action having been commenced by the filing of the complaint on March 20, 1929, it was begun within the period of five years after the statute of limitations began to run, and was not barred by the provisions of that statute.

[10-12] The remaining point raised is that the assignment of the judgment to plaintiff was invalid for the reason that it did not comply with the requirements of the Indiana statute covering the assignment of judgments. Said statute provides as follows: "Judgments and decrees of a court of record for the recovery of money, and judgments obtained before a justice of the peace, may be assigned by the plaintiff or complainant, and the assignees thereof successively, on or attached to the entry of such judgment or decree; and the assignment, when attested by the clerk of the court or such justice of the peace, shall vest the title to such judgment or decree in each assignee thereof successively." Section 654, Burns' Ann. Ind. Stat. 1926.

The assignment herein was made by a separate instrument, and is not attested by the clerk of the court. Such assignment is in the usual form, and no claim of insufficiency is advanced except a noncompliance with the requirements of said Indiana statute.

The general rule in respect to such statutory provisions concerning the assignment of judgments is that they merely provide a cumulative method by which assignment may be accomplished. Thus it is stated in 34 Corpus Juris, p. 640, § 985: "Where the statute authorizing the assignment of a judgment provides a mode of assignment, its requirements must be followed in order to pass the legal title and secure to the assignee any rights which depend solely on the statute. But where such a statute does not expressly exclude other modes, it is regarded as cumulative merely, and does not prevent the making of an assignment in any other way which is recognized as sufficient in equity."

Notwithstanding the provisions of said Indiana statutes, the courts of that state recognize that assignments made not in pursuance thereof are valid as equitable assignments, and authorize suit thereon in the

name of the assignee. Chicago & S. E. Ry. v. Higgins, 150 Ind. 329, 50 N. E. 32; Snell v. Maddux, 20 Ind. App. 169, 49 N. E. 856. Appellant acknowledges that the Indiana courts so hold, but contends that, where an assignment is good only as an equitable assignment, the decisions of said state require that the assignor be joined as a party to an action in a suit thereon. The question of who are necessary parties to an action begun in this state is to be determined by the laws of this state. Under our practice, it is well established that an action may be maintained by the assignee of an equitable assignment without joining the assignor as a party. Such assignee is the real party in interest. 3 Cal. Jur. 297, § 43; Heisen v. Smith, 138 Cal. 216, 71 P. 180, 94 Am. St. Rep. 39; Puterbaugh v. McCray, 25 Cal. App. 469, 144 P. 149.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

termine whether his character is such that he should be admitted to office of trust.

2. Attorney and client ⇐61.

Burden is on disbarred attorney, applying for reinstatement, to satisfy court by positive evidence that his character has been rehabilitated.

3. Attorney and client ⇐61.

Proof of present honesty and integrity of disbarred attorney, applying for reinstatement must be sufficient to overcome court's former adverse judgment of his character.

4. Attorney and client ⇐61.

Testimony of nine witnesses, including disbarred attorney's wife and two brothers-in-law, wife's present and former attorney, and constable serving papers for her collection agency, and ten letters, one or two of which were rather lukewarm, *held* not to show sufficient rehabilitation of his character to warrant his reinstatement.

5. Attorney and client ⇐61.

Disbarred attorney's failure to pay balance due on judgment against him *held* to justify board of bar governors' denial of his petition for reinstatement.

In Bank.

Application by Leland S. Kepler to review an order of the Board of Governors of the State Bar of California, denying his application for reinstatement to practice as an attorney at law.

Application denied.

Leland S. Kepler, of Tracy, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

Petitioner seeks by this application to be reinstated to practice as an attorney at law, notwithstanding the denial to him of the favorable recommendation of the board of bar governors of the state of California. On February 24, 1925, petitioner was disbarred from the further practice of law by a judgment of the superior court of the county of San Joaquin. Said judgment was based upon three counts: "That the defendant, Leland S. Kepler, has committed acts involving moral turpitude and dishonesty, (1) In assuming a position adverse to the interest of his client, C. E. Jubb, (2) In claiming a transfer in good faith of a promissory note to R. H. Kepler, knowing the same to be not in good faith, and that the said R. H. Kepler was not the owner and holder thereof in due course, and (3) By deceiving an attorney and officer of the court and thereby depriving the said attorney and his clients of a prop-

216 Cal. 52

KEPLER v. STATE BAR OF CALIFORNIA.

L. A. 13414.

Supreme Court of California.

July 22, 1932.

1. Attorney and client ⇐61.

Court's sole object on disbarred attorney's application for reinstatement is to de-

er and legal defense to the note above set forth." No appeal was taken from said judgment. Thereafter petitioner removed to Orange county, and in the next year filed a petition for reinstatement with the District Court of Appeal for the Second District, Division 2, which was denied by said court for the reason stated in the opinion that said application contained a statement which was not true. In re Kepler, 79 Cal. App. 639, 250 P. 701. Subsequent to his disbarment, petitioner appeared as assignee of accounts for collection under the belief that the decision in the case of O'Connell v. Judnich, 71 Cal. App. 386, 235 P. 664, authorized him to so appear. In the case of Koepple v. Morrison, 84 Cal. App. 137, 257 P. 590, which he asserts was appealed for the sole purpose of determining whether or not he was entitled to appear in such actions, the right to appear was denied, and, since the date of said decision, according to his petition, he has absolutely refrained from the practice of law. It appears that the wife of petitioner, R. H. Kepler, is the sole owner of the Koepple's Collection Agency of Santa Ana, Cal., and petitioner has worked in her office as an investigator at a stated salary, and in addition has been managing a ranch near Santa Ana owned by himself and wife. On December 3, 1930, the present petition was filed with the State Bar of California. The petition was referred by the board of governors to a committee to investigate and report on the fitness of the applicant for reinstatement. Hearings were held by said committee, at which hearings several witnesses appeared and testified in behalf of petitioner. Letters of recommendation from some ten persons were also filed with said committee. Thereafter, in a written report filed on June 9, 1931, the committee recommended to the board of bar governors that petitioner be admitted to practice. The board of bar governors, however, at its meeting on August 22, 1931, refused to accept the recommendation of the committee, and denied petitioner's application for reinstatement. Petitioner thereafter sought a writ of review in this court. In denying petitioner's application, said board, after setting forth the facts of petitioner's original disbarment and the denial of his application for reinstatement by the District Court of Appeal in 1926, made the following finding with reference to the issue of petitioner's rehabilitation, which is the sole issue presented here: "That the evidence introduced before the committee appointed to hear the evidence herein is insufficient to warrant the reinstatement of the petitioner, Leland S. Kepler; that the said Leland S. Kepler has not produced sufficient proof to prove that his conduct since his disbarment has been such as to inspire confidence in his character, honor and integrity, and to warrant his reinstatement, or to inspire belief and opinion that he can be safely admitted to practice again and entrusted with the affairs of his clients."

[1-4] After a careful consideration of the record presented, we are of the opinion that this finding of the board of bar governors is correct, and we therefore concur in the conclusion of the said board of bar governors, based upon this finding, that the application for reinstatement should be denied. The sole object of the court, upon an application by an attorney previously disbarred for reinstatement to practice, is to determine whether or not the character of the applicant is such that he should be admitted to an office of trust, and recommended to the public as a trustworthy person, fit to be consulted by others in matters of confidence. In re Mash, 39 Cal. App. 548, 551, 179 P. 897. In such proceeding the burden of proof is upon the one who seeks, after disbarment, to accomplish a restoration to the ranks of the legal profession, and, before the court may grant the petition for reinstatement, it must be satisfied and fully convinced by positive evidence that the effort he has made toward rehabilitation of his character has been successful. In re Cate, 77 Cal. App. 495, 247 P. 231; In re Nisbet, 77 Cal. App. 260, 262, 246 P. 120. It is only reasonable that the person seeking reinstatement, after disbarment, should be required to present stronger proof of his present honesty and integrity than one seeking admission for the first time whose character has never been in question. In other words, in an application for reinstatement, although treated by the court as a proceeding for admission, the proof presented must be sufficient to overcome the court's former adverse judgment of applicant's character. In re Cate, 60 Cal. App. 279, 285, 212 P. 694. An examination of the record shows that, of the nine witnesses called to testify with reference to the rehabilitation of petitioner, one was his wife, two were closely related by marriage, being brothers of his wife, one was an attorney at the time employed by his wife as attorney for her collection business, another was an attorney who had formerly been employed by his wife as attorney for her collection business, and another was the constable of Orange county who served papers for the collection agency. In addition to the testimony of these witnesses, petitioner filed with the committee ten letters. One or two of the letters were rather lukewarm, as, for instance, that of the manager of the Santa Ana Branch of the Security-First National Bank of Los Angeles, who merely states that "we know nothing derogatory of his character." On the whole, however, the letters were quite laudatory and express a confidence in petitioner's honesty and integrity. Giving to these letters all the weight to which they

are entitled, they do not, for the reasons stated, entirely satisfy us that petitioner has sufficiently rehabilitated himself to warrant his return to the practice of law in this state.

[5] There is another feature of this matter which we think had a material bearing upon the decision of the board of bar governors denying to petitioner its approval of his petition for reinstatement. Petitioner's first application for reinstatement was denied by the District Court of Appeal for the reason that in his said application he had stated that a judgment for $650, which judgment was secured by the judgment creditor as a result of the acts of petitioner which subsequently led to his disbarment, had been fully paid and satisfied, whereas in fact said judgment had been compromised for $500, which compromise had been induced by the threats of petitioner to go into bankruptcy. It was the conclusion of the District Court of Appeal that, by virtue of the incorporation of this false statement in the said application, petitioner had demonstrated that he had not the moral qualifications entitling him to reinstatement. In this connection it appears in the present proceeding that the District Court of Appeal stated at the time said hearing was before it that an offer on the part of petitioner to pay the balance due on said judgment, after applying thereto said sum of $500, would place petitioner in a much more favorable position before the court than he then was with this amount still unpaid. Petitioner very properly drew from this remark of the court the deduction that there was, at least in the opinion of that court, justly due from him the balance unpaid on said judgment. The opinion of the District Court of Appeal was rendered in November, 1926. Petitioner made no effort to pay this debt justly due from him, although the evidence shows that he has at all times had ample funds with which he could conveniently discharge it, until November 12, 1930, immediately prior to the commencement of this proceeding. He then, instead of paying the same to the parties entitled thereto, sent a check, covering the amount due, to the board of bar governors of the State Bar, with the request that said board determine the person or persons entitled to the money represented by said check and for said board to then pay the same to said person or persons. The board of governors very properly returned the check, stating that said board had no jurisdiction to act as an arbiter in such matters. No effort so far as the record shows has since been made by petitioner to pay the balance on said judgment, and the same still remains unpaid. The conduct of petitioner in respect to this matter fails to show that he has yet manifested any correct appreciation of his obligations to those whom he has wronged in the past. If he were ever in doubt as to whether he should make this restitution, the warning of the District Court of Appeal should have been sufficient to dispel such doubt. Yet he waited over four years before acting in the matter, and then, just before he planned to file a second application for reinstatement, forwarded his check for the unpaid balance of said judgment to the board of bar governors. This may have shown some slight intention of righting the wrong he had committed, but it was of short duration and entirely ineffective, for, when informed by the board of bar governors that he had not pursued the right course, he evidently dropped the matter, with the result that the obligation incurred by him in a transaction which loomed large in his disbarment proceeding still remains unpaid. The delay of petitioner in the first place, followed by his failure to carry into final effect his attempt to make restitution, no doubt created a poor impression of petitioner's sincerity in the minds of the board of bar governors. With this impression we agree.

In this state of the record we cannot say that we are fully persuaded and thoroughly convinced that petitioner is entitled to reinstatement. We do not wish to be understood as saying that there has not been a marked improvement in petitioner's conduct and in his conception of the duties and obligations of a member of the legal profession since his disbarment. We do say, however, that the showing made by petitioner fails to convince us that he is qualified at this time to be reinstated as a member of the bar of this state, and that the proof proffered falls short of conveying that certainty to our minds which we deem necessary in applications of this character.

The application for admission to practice law is denied.

216 Cal. 58

BENTSON v. STATE BAR OF CALIFORNIA.

L. A. 13040.

Supreme Court of California.

July 22, 1932.

1. Attorney and client ⊂⇒57.

On application to review bar governors' recommendation that attorney be disbarred, court will pass on weight of evidence.

2. Attorney and client ⊂⇒58.

Attorney's retention of amount paid him as executor's attorney on price of realty belonging to estate *held* not to warrant disbarment, but only suspension for one year, in view of mitigating circumstances.

The attorney claimed that he paid money to executor, denied that he assured purchasers that he would return money, and testified that memoranda, acknowledging his obligation and promising to return money within few days, were given by his attorney without authorization or knowledge that amount was due.

In Bank.

Application by Victor L. Bentson to review a recommendation of the Board of Governors of the State Bar of California that petitioner be disbarred from the practice of law.

Petitioner suspended for one year. Superseding opinion in 9 P.(2d) 829.

Charles A. Sunderlin, of Los Angeles, for petitioner.

Philbrick McCoy and Lucian J. Clarke, both of Los Angeles, for respondent.

PER CURIAM.

In proceedings instituted by a local administrative committee of the State Bar, this petitioner was charged, first, in connection with his employment as attorney for the executor of an estate, with failure to obey an order of the superior court directing repayment of moneys found by a referee to be owing by him to the estate; and, second, with converting to his own use the sum of $450 paid to him to be applied on the purchase price of certain real property which one Jorgensen proposed to purchase from said estate.

As to the first charge, it appears that the referee found an indebtedness owing by petitioner to the estate in the sum of $2,944.80. The referee's report was confirmed by order of court, from which petitioner appealed. The appeal was later dismissed by stipulation, but petitioner at the hearing before the committee contended that it was incorrect and that he proposed to take further steps to have it modified. Moreover, petitioner filed a surety bond at the time of the controversy, to protect the estate, and the estate suffered no injury. The committee concluded from all of these facts that there was not sufficient evidence to justify a finding adverse to petitioner on this charge.

The second charge is that petitioner, while acting as attorney for the executor, improperly withheld the sum of $450 admittedly paid him by a Mr. Jorgensen and a Mr. Smith as a deposit on the purchase of certain real property belonging to the estate. Petitioner claimed that he paid the money over to the executor; the executor denied it. Jorgensen and Smith, learning that the purchase could not be completed, made repeated demands for their money, and testified that petitioner repeatedly assured them that he would return it. Petitioner denied this. Two documents were produced, written by petitioner's attorney, Mr. Milham, which acknowledged petitioner's obligation and promised to return the $450 within a few days. Petitioner testified that Mr. Milham gave these memoranda without authorization so to do, and without knowledge that the amount was actually due. The committee was of the opinion that it was strange that any attorney would make and deliver such documents without the express authority of his client, or that he could have learned the facts set forth therein without having previously discussed the matter with his client. The committee also took note of the fact that Mr. Milham continued to act as attorney for petitioner even after petitioner learned of the existence of said instruments. On this second charge, the committee found petitioner guilty of conduct involving moral turpitude, and recommended his disbarment. The board of governors, after a further hearing, adopted the findings of the committee and made a like recommendation.

[1, 2] In a case of this character we will, of course, pass upon the weight of the evidence, not being bound by the findings or recommendation. Fish v. State Bar (Cal. Sup.) 4 P.(2d) 937. The record here is voluminous, and cannot be fully reviewed here. We have studied it with great care, and, while we are unable to agree that petitioner's conduct was wholly ethical and justifiable, we are nevertheless of the opinion that it does not warrant the severe punishment meted out to him. His explanations, while unsatisfactory as a defense to the accusations, show certain mitigating circumstances. We are therefore of the opinion that the proper punishment would be suspension of the petitioner for a period of one year.

It is ordered that the petitioner, Victor L. Bentson, be, and he is hereby, suspended from the practice of law in this state for a period of one year.

⊂⇒For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

216 Cal. 23

DELANOY v. DELANOY.

S. F. 14019.

Supreme Court of California.

July 20, 1932.

1. Husband and wife ⇐262(1).

Without evidence of contrary intent, when title to property purchased with community funds is taken in name of spouses as joint tenants, community interest must be deemed severed by consent.

2. Husband and wife ⇐14(10).

Husband had power to convey, without wife's consent, his separate estate in property purchased with community funds and taken in joint names of spouses.

3. Husband and wife ⇐14(10).

On husband's conveyance of his share of joint property, joint tenancy with wife terminated, and grantee became tenant in common with wife.

4. Husband and wife ⇐14(6).

Joint tenancy deed between husband and wife does not create estate by entirety; no such estate being recognized in this state.

5. Appeal and error ⇐901.

Every presumption favors correctness of trial court's rulings; burden being on appellant to show error by record on appeal.

6. Appeal and error ⇐907(3).

On appeal perfected on judgment roll alone, appellate court must assume that all trial court's findings are sustained by evidence.

7. Appeal and error ⇐1071(6).

To warrant reversal for failure to find on issue, it must be shown by record on appeal that evidence sufficient to sustain finding for appellant was introduced.

8. Appeal and error ⇐499(1).

Without showing by record that appellant objected to trial on merits after taking of default on her cross-complaint, appellate court must assume in support of judgment that appellant waived default.

In Bank.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Mrs. M. F. H. Delanoy against Theresa Louise Delanoy. From an adverse judgment, defendant appeals.

Affirmed.

W. L. Albert, of Oakland (J. H. McKnight, of Oakland, of counsel), for appellant.

Calkins, Hagar, Hall & Linforth, of Oakland, for respondent.

PER CURIAM.

Defendant appeals from a judgment determining that she and plaintiff are each the owners of an undivided one-half interest in certain real property as tenants in common, and decreeing that the property be sold and the proceeds divided as determined in the judgment. The appeal is taken on the judgment roll alone.

The original complaint was filed in September, 1928. So far as pertinent here, this complaint alleged that prior to February 11, 1928, Frederick William Delanoy and defendant owned the real property involved herein as joint tenants; that on that date Frederick conveyed his interest in the property to his mother, plaintiff herein; that thereupon the plaintiff and defendant became owners of the property as tenants in common. Plaintiff prayed that the property be sold and the proceeds divided between the parties as their interests appeared. Defendant answered this complaint and alleged that Frederick conveyed his interest in the property to his mother by way of gift; that Frederick's interest in the property was the community property of Frederick and defendant; that the deed to plaintiff was voidable at the option of defendant, for the reason that she (the wife of Frederick) did not join therein. Defendant likewise alleged that prior to the date of the conveyance she had secured a judgment against Frederick, and that such judgment was a lien on Frederick's interest in the property. Defendant prayed that, if the property be sold, she be paid the amount of this judgment. Defendant likewise filed a cross-complaint in which it was alleged that since 1923 Frederick and the defendant owned the property as tenants in common; that the deed by which the property was conveyed to Frederick and defendant "creates an estate by the entirety"; that Frederick's interest in the property conveyed to his mother was community property; that plaintiff and Frederick conspired to defraud defendant of her interest in the community property. By her cross-complaint, defendant prayed that the deed to the plaintiff be canceled. No mention was made in the cross-complaint of the alleged judgment lien set forth in the answer. Plaintiff failed to answer the cross-complaint, and her default was entered in November, 1928. In January, 1930, the plaintiff filed an amended complaint, and later a supplemental amended complaint, in which the allegations of the original complaint are substantially realleged, and in addition it is alleged that defendant herein has collected the entire rentals from the premises since February 11, 1928, and plaintiff requests that she be reimbursed to the extent of one-half out of the proceeds from the sale of the

premises. The defendant duly answered these amended pleadings.

After a trial on the merits, the trial court found that the property was purchased by defendant and Frederick in 1923 with community funds; that on February 11, 1928, Frederick and the defendant owned the property "as joint tenants and not as tenants in common"; that on February 11, 1928, Frederick conveyed to the plaintiff his interest in the property by way of gift; that plaintiff and defendant were the owners, respectively, of an undivided one-half interest in the property as tenants in common. The court determined that the property was incapable of physical partition, and ordered the premises sold and the proceeds divided as set forth in the judgment.

[1-4] On this appeal it is urged that, inasmuch as the property was purchased with community funds, the interest of the husband therein was community property. Defendant contends that, since the property was so purchased, and the deed taken in the name of husband and wife as joint tenants, she owned her interest therein as her separate property, and her husband's interest was community property. This court has recently determined that, in the absence of any evidence of an intent to the contrary, when property is purchased with community funds and the title is taken in the name of the husband and wife as joint tenants, the community interest must be deemed severed by consent, and the interest of each spouse therein is separate property. Siberell v. Siberell (Cal. Sup.) 7 P.(2d) 1003. That case is determinative of this issue on the present appeal. It therefore follows, of course, that Frederick had the power to convey his separate estate by way of gift or otherwise without the approval or consent of his wife. It also follows that upon such conveyance the joint tenancy was terminated and the plaintiff and defendant became tenants in common, each the owner of an undivided one-half interest in the property. The contention that a joint tenancy deed between husband and wife creates an estate by entirety is without merit; no such estate being recognized in this state. Swan v. Walden, 156 Cal. 195, 103 P. 931, 134 Am. St. Rep. 118, 20 Ann. Cas. 194.

[5-7] Appellant also contends that the trial court committed error in that it failed to make any finding in reference to the judgment lien which appellant in her answer alleged existed in her favor against the interest of Frederick in the property. The allegations of the answer were, of course, deemed denied. Section 761 of the Code of Civil Procedure requires, in an action for partition, that, when "it appears to the court" that there are liens against the property, the rights of the lienholders must be protected. Appellant contends that failure to find on this issue constitutes reversible error. This contention is without merit. As already pointed out, this appeal is on the judgment roll alone. None of the evidence produced in the trial court is before us. It is elementary that it is incumbent upon the appellant to show error by the record on appeal. Every presumption is in favor of the correctness of the rulings and decision of the trial court. When an appeal is perfected on the judgment roll alone, we must assume that all of the findings of the lower court are amply sustained by the evidence. Even though it appears that the trial court failed to find on an issue raised by the pleadings, error cannot be predicated on such failure in the absence of a record showing that evidence was introduced on such issue sufficient to sustain a finding on behalf of appellant. 2 Cal. Jur. 525, § 262. In order to warrant the reversal of a judgment for failure to find on an issue, it must be shown by the record on appeal that evidence sufficient to sustain a finding for the complaining party was introduced. 24 Cal. Jur. 947, § 189. No such record has been presented. We must assume, therefore, that, had a finding been made on the issue, it would have been adverse to appellant.

[8] The taking of the default by appellant on her cross-complaint in no way affects the validity of the judgment rendered after a trial on the merits. The record in no way shows that appellant objected to the trial, and, in the absence of a record to the contrary, we must assume in support of the judgment that defendant waived the default.

For the foregoing reasons, the judgment appealed from is affirmed.

124 Cal.App. 750

BARNETT v. REYNOLDS et ux.

Civ. 7373.

District Court of Appeal, Second District, Division 1, California.

July 18, 1932.

1. Judgment ⇐153(2).

Motion to set aside default judgment addressed solely to equity powers of court need not be made within six months after judgment, but only within reasonable time (Code Civ. Proc. § 473).

2. Judgment ⇐161.

Motion to set aside default judgment addressed solely to equity powers of court need not be accompanied by copy of proposed plea (Code Civ. Proc. § 473).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by W. C. Barnett against Lee Reynolds and Helen Reynolds, husband and wife. From order setting aside defendants' default, vacating judgment, and quashing the alleged service of summons upon defendants, plaintiff appeals.

Affirmed.

Mose Katzev, of Los Angeles, for appellant.

Earl D. Killion, of Los Angeles, for respondents.

TAPPAAN, Justice pro tem.

This is an appeal from an order setting aside defendants' default, vacating the judgment thereon, and quashing the alleged service of summons upon defendants. The question presented here involves the alleged service upon defendant of an amended complaint. The default of defendants was duly entered on July 8, 1929, and judgment thereon entered upon July 9, 1929. An affidavit purporting to show due and regular personal service of the summons and complaint appears in the record. On February 2, 1930, defendants served their notice to set aside the default theretofore entered and to vacate the judgment. This motion came on regularly to be heard on February 13, 1930, and was granted by the court. From this order the appeal is taken.

Appellant questions the jurisdiction of the court to grant the order, contending that a period of more than six months had elapsed since the entry of the judgment, and further objects that respondents upon said motion failed to comply with section 473 of the Code of Civil Procedure, in that no copy of their proposed pleading was filed. At the hearing had upon this motion, defendants filed affidavits in which they denied that they or either of them had ever been served with process in the action, or that they had had any notice of its pendency, and further deny that the plaintiff had any claim whatsoever as against them. Plaintiff's attorney filed, at this hearing, an affidavit in which it was recited "the above named plaintiff informs me that he does not know the man by the name of D. M. Tierney, who has made the return of service in said action; that my said client is seeking to find said service man and ascertain the truth or untruth of the statements made by defendants in their affidavits. * * *"

[1, 2] The contention of appellant that the motion was one made under the provisions of section 473 of the Code of Civil Procedure, and was therefore barred by the limitation contained in said section, having been made more than six months after the entry of judgment, is without merit. The motion, though not made within six months of the entry of judgment, was made within less than one year therefrom. Where, as here, the motion to set aside a default judgment is made upon grounds not specified in section 473 of the Code of Civil Procedure, but is one addressed to the general equity powers of the court, it must be made within a reasonable time. Under circumstances similar to those presented in the instant case, it has been held that one year was a reasonable time within which to make the motion. Smith v. Jones, 174 Cal. 513, 515, 163 P. 890; Vaughn v. Pine Creek Tungsten Co., 89 Cal. App. 759, 763, 265 P. 491; Swallow v. Tungsten Products Co., 205 Cal. 207, 209, 270 P. 366. Under the circumstances presented in the case at bar, defendants were not required to file or submit a copy of their proposed pleading with their motion. De La Montanya v. De La Montanya, 112 Cal. 101, 117, 118, 44 P. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165.

The order appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

125 Cal.App. 24

ANDREW v. BANKERS' & SHIPPERS' INS. CO. OF NEW YORK et al.

Civ. 8201.

District Court of Appeal, First District, Division 2, California.

July 21, 1932.

Rehearing Denied Aug. 20, 1932.

1. Appeal and error ⇐1097(1).

Prior ruling as to sufficiency of evidence is law of case on subsequent appeal so far as same evidence is involved.

2. Appeal and error ⇐1010(1).

Finding of trial court is conclusive on appeal, if supported by sufficient substantial and competent evidence.

3. Appeal and error ⇐1008(3).

Appellate court should not review all evidence and pass on weight thereof merely because considerable portion of evidence was found in depositions and documents.

4. Stipulations ⇐19.

Stipulation of facts made for "trial" of action was binding on second, as well as on first, trial, and could not be withdrawn.

[Ed. Note.—For other definitions of "Trial," see Words and Phrases.]

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Archibald Andrew against the Bankers' & Shippers' Insurance Company of New York and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Miller & Thornton, H. A. Thornton, and H. B. M. Miller, all of San Francisco, for appellants.

W. S. Andrews and E. T. Cooper, both of San Francisco, for respondent.

NOURSE, P. J.

Plaintiff sued for damages for deceit, and had judgment for $14,594. Defendants appeal on typewritten transcripts.

The cause was partly tried at an earlier date when, upon the close of plaintiff's case, the trial court granted defendants' motions for nonsuit. On appeal this order was reversed. 101 Cal. App. 566, 281 P. 1091. In the opinion then rendered a full statement of the facts of plaintiff's case appears to which reference may be had. For the purposes of this opinion we may state briefly that plaintiff and the Oakland branch of the Bank of Italy were engaged in lending money on and discounting automobile paper; that defendant Earsman was the local agent of his codefendant insurance company; that one Shouse was engaged in buying and selling second-hand automobiles upon which he issued conditional sales contracts; that plaintiff and the local manager of the Bank of Italy agreed with Earsman that he should make a personal inspection of the cars held by Shouse, should issue a policy of insurance upon each car, and should attach a rider to each policy, certifying that he had made such inspection and had found the make and number as represented in the policy; that paper covering about two hundred cars was handled in this manner, but that, in the case of eleven cars, Earsman failed to make any inspection, but relied on the word of Shouse. In these instances the numbers inserted in the insurance policies were spurious and no cars corresponding to such numbers were owned or possessed by Shouse. The basis of the action is that Earsman fraudulently represented these facts to the plaintiff, and that the plaintiff, relying on these representations, purchased the paper, to his injury in the amount sued for. Earsman's relation as agent of the insurance company is conceded, and both defendants appeal on the same briefs.

In our previous opinion we discussed all the points relating to the issue of deceit, and held that the evidence tendered by the plaintiff was sufficient to make out his case. When the cause was called for the second trial the plaintiff offered in evidence the complete transcript of the former proceeding, the defendants offered two depositions of Earsman, and the plaintiff then put on three witnesses for oral testimony in rebuttal. This, with the stipulation of facts and some exhibits offered by agreement, constituted the trial. Upon this evidence the trial court made complete findings covering all the issues. The defendants now argue that we should review this evidence and reach a different conclusion.

[1, 2] The appeal does not present any intricate question of law. As we heretofore ruled that plaintiff's evidence was sufficient in all respects to support a judgment in his favor, that ruling is the law of the case on this appeal to that extent. When the defendants tendered evidence controverting that showing, there was committed to the trial court the duty of resolving the conflict, if any, and the case then comes back to us with the single question whether there is substantial and competent evidence supporting the court's findings. This question has already been determined on the former appeal. Meline Co. v. Kleinberger, 108 Cal. App. 60, 62, 290 P. 1042. At this point we are then confronted with the well-settled rule that, even where there is conflicting evidence, if there is sufficient substantial and competent evidence to support the finding of the trial court, that finding is conclusive on appeal.

[3] The appellants seek to avoid this conclusion by arguing that we are not bound by the findings because the greater part of the evidence was documentary or included in stipulations or depositions. The argument is not sound, because there is no substantial or irreconcilable conflict in the depositions with the evidence offered by plaintiff, and because what slight conflict appears therein was met by oral testimony heard by the trial court. In its final analysis the main point on this appeal is whether, when a considerable portion of the evidence is found in depositions and documents, the appellate court should review all the evidence and determine what, in its opinion, is true and what is false. That such is not the function of the appellate court where the evidence consisted of "the transcript of the testimony taken before another judge and deposition evidence" is the rule of Tupman v. Haberkern, 208 Cal. 261, 280 P. 970, 973.

[4] One other point may merit consideration. The parties had stipulated in writing as to the facts, and this stipulation was received at the first hearing. Under a second stipulation the full transcript of the first trial was received in evidence, including this stipulation of facts. Thereafter, and in presenting appellants' case, counsel for appellants sought to withdraw the portion of the agreed statement of facts which stipulated that none of the cars involved in the action was "possessed" by Shouse when the policies of insurance were issued. It is now argued that, having demanded the withdrawal of that portion of the stipulation, the appellants may urge that the evidence is insufficient to

support the trial court's finding on that point. The argument is not sound, because appellants did not have the right to withdraw the stipulation which was made for the "trial" of the action, which means the second as well as the first trial (Nathan v. Dierssen, 146 Cal. 63, 65, 79 P. 739), and also because other evidence conclusively proved that the facts as incorporated in the stipulation were true.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

125 Cal.App. 210

NIELSEN et al. v. STATE INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8510.

District Court of Appeal, First District, Division 2, California.

Aug. 1, 1932.

Rehearing Denied Aug. 31, 1932. Hearing Denied by Supreme Court Sept. 27, 1932.

1. Master and servant ⇐405(1).

There was no conflict in evidence in compensation case where that on one side consisted of opinions based on facts not existing while that on other rested on testimony of physicians who treated patient.

2. Master and servant ⇐376(2).

Acceleration of pre-existing disease is injury in occupation causing acceleration.

3. Master and servant ⇐405(4).

Evidence showed that unusual exertion of cabinet maker when installing altar top in church accelerated pre-existing heart condition causing death; hence death was compensable.

Proceedings under the Workman's Compensation Act by Camilla Nielsen and others, claimants, for the death of Anton Nielsen, opposed by Carl Bersch, an individual, doing business as the Bay City Cabinet Company, employer, and the State Compensation Insurance Fund, insurer. From an order of the State Industrial Accident Commission denying compensation, claimants petition for certiorari.

Annulled and remanded.

Hearing denied by Supreme Court; WASTE, C. J., and SHENK, J., dissenting.

John C. Scott and H. C. Kelsey, both of Oakland, for petitioners.

A. I. Townsend, of San Francisco, for respondent Industrial Accident Commission.

B. E. Pemberton and Ivan A. Schwab, both of San Francisco, for respondent State Compensation Insurance Fund.

NOURSE, P. J.

Petitioners seek a review of the order of respondent commission denying them compensation for the death of Anton Nielsen.

Deceased was employed as a cabinet maker by respondent Bersch, who was insured by the respondent State Compensation Insurance Fund. The deceased was forty-seven years old at the time of his death, and had been working steadily at his trade with respondent for a period of fifteen years. During all this time he had never displayed any symptom of illness or disability or any abnormal condition of health. On November 25, 1930, deceased, with five others, carried an altar top from Bersch's place of business to a truck and took it to a church, where it was to be installed. Seven other men helped deceased carry the altar top into the church, but, when they arrived there, it was found necessary to remove the old altar top. Deceased took a hammer and a chisel and worked upon the old top for about five minutes when he was stricken with a heart attack and soon thereafter died. The work of that morning was done in a great hurry, the new altar top was carried up the aisle of the church in an awkward and hurried manner, which no doubt caused an intense strain upon the deceased. The applicants are all dependents of the deceased entitled to an award if the death was the result of industrial injury.

The evidence upon which the Commission denied the application does not present a substantial conflict. Dr. Koford, the family physician, was present at the autopsy held immediately after the death. He testified that the deceased had "coronary and aortic sclerosis and the aorta was acutely dilated, being covered with numerous small red hemorrhages and broken capillaries." Also that "the dilatation had ruptured many of these fine blood vessels and that the rupturing had been very recent. I am convinced in my own mind that the heavy lifting caused an increased pressure in the blood stream, which the degenerated aortic wall could not withstand; this produced an acute dilatation and death." The autopsy surgeon at the inquest reported "arteriosclerosis, hemorrhages and dilatation of the aorta." Dr. Koford also testified that he had known the deceased for several years immediately prior to the death, and that the deceased had never displayed or complained of poor health or illness, and that he had not known anything abnormal in his physical condition. The wife of deceased, who had lived with him for more than twenty years immediately preceding his death, testified substantially to the same effect. Dr. Du Bray, without any examination of the deceased and without a full knowledge of the facts found at the autopsy, gave his opinion

that death was caused by coronary occlusion and was not caused by the exertion of the employment. Dr. Gibbons, likewise without any examination of the deceased and without full knowledge of the true facts disclosed at the inquest and the circumstances leading to the death, also expressed an opinion that death was not caused by the employment. Dr. Harbaugh, another physician called by the commission, reviewed the entire record and expressed the opinion that the pre-existing disease was the major factor in the case, but that the extra exertion and the testimony of the physicians who actually saw and performed the autopsy could not be disregarded.

[1] There are two principles which control the decision on this hearing. First, the rule of Winthrop v. Industrial Accident Commission (Cal. Sup.) 2 P.(2d) 142, where it was held that there was no true conflict in the evidence where that on one side consisted of opinions based upon a state of facts not shown by the record to exist while that on the other side was based upon facts actually shown to exist or rested upon the testimony of physicians who had actually treated and examined the patient. That situation exists here. The evidence on behalf of the applicants is that those physicians who treated and examined the patient drew the conclusion from such treatment and examination that the exertion immediately prior to the death of the deceased aggravated the pre-existing heart condition and caused the death. The evidence on the other side rested solely in the opinions of physicians who had not treated, examined, or seen the patient but who had based their opinions upon a statement of the case which in numerous particulars was not a full and complete statement.

[2] The other rule applicable here is found in the recent opinion of the Supreme Court in Buckley v. Roche (Cal. Sup.) 4 P.(2d) 929, where it was held that the fact that Buckley had a previous heart affection would not of itself defeat his wife's application for a pension if the exertion of climbing the stairs aggravated his condition. Similarly in Fogarty v. Dept. of Industrial Relations, 206 Cal. 102, 273 P. 791, the court, citing Eastman Co. v. Industrial Accident Commission, 186 Cal. 587, 200 P. 17, and Knock v. Industrial Accident Commission, 200 Cal. 456, 253 P. 712, affirmed the rule that acceleration or aggravation of a pre-existing disease is an injury in the occupation causing such acceleration and annulled an award denying compensation to the dependents of Fogarty for a death arising under such circumstances.

[3] The Buckley Case is followed in Casserly v. City of Oakland (Cal. Sup.) 12 P.(2d) 425, where the Fogarty Case and others are cited with approval, and the rule of these cases compels an annulment of the award in this instance because the material evidence unmistakably discloses that, however serious the pre-existing heart condition of deceased might have been, the unusual exertion and hurry and excitement of the work immediately preceding his death either aggravated and accelerated such pre-existing condition or directly caused the death.

For these reasons, the award is annulled, and the application remanded for further proceedings and findings in accord herewith.

We concur: STURTEVANT, J.; SPENCE, J.

125 Cal.App. 19

ANDREWS v. ZOOK.

Civ. 8304.

District Court of Appeal, First District, Division 1, California.

July 21, 1932.

Rehearing Denied Aug. 20, 1932. Hearing Denied by Supreme Court Sept. 19, 1932.

Limitation of actions ⇐51(2).

Default in payment of installment on note containing acceleration clause *held* not to start running of statute on recovery of entire indebtedness (Code Civ. Proc. § 337).

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by L. A. Andrews, receiver of the United State Bank, against Maurice B. Zook, administrator of the estate of F. H. Zook. Judgment for plaintiff, and defendant appeals.

Affirmed.

Holcomb, Holcomb & Kempley, of Los Angeles, for appellant.

Aubrey Devine, of Los Angeles, for respondent.

TUTTLE, Justice pro tem.

This is an action brought to recover $7,922.81 upon a promissory note. Judgment was rendered in favor of plaintiff. The appeal is prosecuted from the judgment.

The note was executed by F. H. Zook, who died and whose estate is being administered by defendant, and it reads as follows:

"No. 12315 Due 9—5—24

"Des Moines, Iowa, September 5, 1923.

"Twelve months after date, for value received, I or we jointly and severally as

principals, promise to pay to the order of The United State Bank, Des Moines, Iowa, Six Thousand and no/100 Dollars, payable: $500.00 Dec. 4, 1923, $500 on Mar. 4, 1924, $500.00 on June 2, 1924, $4500. on Sept. 5, 1924, at its office in Des Moines, Iowa, with interest at the rate of eight per cent per annum, from date payable semi-annually until paid. Overdue principal or interest shall draw interest at the rate of eight per cent per annum, payable semi-annually. Sureties, endorsers and guarantors hereon severally waived demand, notice of non-payment, notice of protest and protest of this note, and consent that time of payment may be extended without notice. Upon default of payment of this note we agree to pay attorney fees and all expenses of collection. Any Justice of the Peace may have jurisdiction hereon to the amount of $300.00. If payments are not made on dates specified above, entire amount of note becomes due and payable at once.

"C. W. Graham
"Address Lloyd Waddell L. B. Kirkpatrick
"Address E. L. Lloyd F. H. Zook"

On March 24, 1928, F. H. Zook died in Los Angeles county, and defendant was appointed administrator of his estate. On September 11, 1928, plaintiff filed his duly verified claim against said estate, and on March 9, 1929, the claim was rejected by the administrator. On April 13, 1929, this action, based upon the claim, was instituted. The only payment made by the makers of said note was the sum of $240, which represented interest on the principal sum for the first six months, and which was paid March 11, 1924. Defendant pleaded the statute of limitations—section 337, Code of Civil Procedure. This was the only defense offered.

The note contains the following acceleration clause: "If payments are not made on dates specified above, entire amount of note becomes due and payable at once." It is the contention of appellant that "the right of action on a promissory note providing for payment in installments and containing a positive non-optional acceleration clause is barred in four years after default in any installment." Or, more specifically, appellant contends that the cause of action for the full amount arose on the 5th day of December, 1923, and was barred four years thereafter.

In the conclusions of law the following appears: "That in arriving at this judgment the court has found as a conclusion of law that the $500.00 principal payment due on December 4, 1923, and the $500.00 principal payment due on March 4, 1924, under the terms of the above-mentioned promissory note, are barred by the provisions of section 337 of the Code of Civil Procedure of the State of California, but that the additional $5,000.00 principal of said promissory note and the interest accrued thereon from March 4, 1924, are not barred by the provisions of section 337 of the Code of Civil Procedure or any other provision in the laws of the State of California. * * *" It will thus be seen that the judgment did not include the first two installments of $500 each, which the trial court held were barred by the statute of limitations. As to the other two installments, the maker died before the four-year period had expired, and the action as to them was commenced in time (Code Civ. Proc. § 353), if the contention of appellant, based upon the acceleration clause, does not prevail.

While the precise point here involved does not appear to have been decided in California, a very analogous adjudication has been made in this state respecting the payment of interest upon a promissory note. This question was first presented in the case of Belloc v. Davis, 38 Cal. 242, where the clause under consideration read as follows: "And in case default be made in any payment of interest, when the same shall become due as aforesaid, then the whole amount of principal and interest to become due and payable, immediately, upon such default." The action in that case was commenced more than four years after a default in the payment of interest. It was contended by the maker of the note that when a default in the payment of interest occurred, the whole amount became due and payable, and as the action had been commenced more than four years thereafter, it was barred. In disposing of the legal question thus presented, the court stated the rule to be as follows: "The question is novel and somewhat embarrassing; but our conclusion is, that the cause of action, within the true meaning of the statute, accrued at the expiration of the credit fixed by the note, to wit: six months after its date. The provision in the note, to the effect that in case of a default in the payment of interest, the whole amount of principal and interest shall 'become due and payable immediately upon such default,' is evidently in the nature of a penalty, inserted for the benefit of the creditor, and as an incentive to the debtor to stimulate him to the prompt payment of the interest, in order to avoid a forfeiture of the credit allowed by the note. * * * If it were otherwise, a perfectly solvent debtor, owing a debt payable at a remote period, with interest payable monthly, or at other stated periods, might shorten the credit to the statutory time of four years by wilfully declining to pay the first instalment of interest, provided the note contained a clause similar to that in this case. Money is often loaned at interest on a long credit, for the purposes of an investment; and in order

to avoid the annoyance and hazard of changing the securities, the interest is generally lower on a long loan than on a short one; nevertheless, it is important to the lender that the interest be punctually paid; and if, with that view, he should insert in the note a clause similar to that in this case, the borrower needs only to decline to pay, even for a day, the first instalment of interest, in order to shorten the credit to four years, if the argument for the defendants be sound. This would convert the Statute of Limitations from a statute of repose into one of oppression and fraud. Instead of simply compelling the creditor to sue upon his demand within a reasonable time *after* it is due, it would enable a dishonest debtor, if his interest prompted it, to compel the creditor to take payment long *before* it is due, and thereby to escape the payment of future interest. We do not give to the statute so narrow a construction, and therefore hold that the cause of action in this case did not accrue until the maturity of the note."

The foregoing rule has been followed in Congregational Church, etc., v. Osborn, 153 Cal. 197, 94 P. 881, and California Sav. etc., Soc. v. Culver, 127 Cal. 107, 59 P. 292, and is the settled law in this state. In the case of Keene Five Cent Sav. Bank v. Reid (C. C. A.) 123 F. 221, 224, the application of the statute of limitations to promissory notes and other contracts which contain acceleration clauses, is exhaustively treated. It is there stated: "The effect of such clauses as the one in question has frequently been a subject for judicial consideration, and, while the decisions are not entirely harmonious, yet the decided weight of reason and authority is in favor of the view that such provisions are not self-operative; that they are for the benefit of the creditor, and intended to give him, on grounds of convenience, the right to treat the entire debt as matured, if an installment of interest is not paid as and when it should be, or if the taxes on the mortgaged premises are not paid pursuant to agreement. The great majority of the cases treat such provisions, when contained in mortgages, as designed to further constrain and stimulate the debtor to meet his engagements promptly, and to arm the creditor with a right in the nature of a right to declare a forfeiture or to exact a penalty, which he may or may not exercise, and as a right which the courts will never regard as having been exercised by the creditor, or as having any effect upon the period of maturity specified in a note or bond, without some affirmative action on his part, such as a notification to the debtor, by a suit or otherwise, that on account of the default he elects to treat the entire indebtedness as due. Attention has also been called to the fact that to hold such provisions as the one in question to be self-operative would be to confer on the debtor the right to take advantage of his own wrong; that is, to mature an indebtedness which was intended as an investment for a given period, in advance of the time specified on the face of his note or bond, by failing to keep his engagements. Cox v. Kille, 50 N. J. Eq. 176, 24 A. 1032; Mason v. Luce, 116 Cal. 232, 48 P. 72; Richards v. Daley, 116 Cal. 336, 48 P. 220; Lowenstein v. Phelan, 17 Neb. 429, 22 N. W. 561; First Nat. Bank of Snohomish v. Parker, 28 Wash. 234, 68 P. 756, 757 [92 Am. St. Rep. 828]; Watts v. Creighton, 85 Iowa, 154, 52 N. W. 12; Batey v. Walter (Tenn. Ch. App.) 46 S. W. 1024; Nebraska City Nat. Bank v. Nebraska City Gas Light & Coke Co. (C. C.) 14 F. 763; Phillips v. Taylor, 96 Ala. 426, 11 So. 323."

We are aware that a number of text-books support the contention of appellant, but we regard the rule as having been settled to the contrary in this state by decisions above cited. Appellant also cites Perkins v. Swain, 35 Idaho, 485, 207 P. 585, 34 A. L. R. 894. While that case is authority for the position taken by appellant, it clearly indicates that there is a conflict of authority upon this question throughout the United States. In the list of authorities which hold that the acceleration clause is for the benefit of the creditor and that while not therein so expressed, it is purely optional to declare the whole amount due, we find Belloc v. Davis, supra, from our own jurisdiction.

Appellants attempt to distinguish the California cases upon the ground that they apply to *interest* payments only, and not to *installments*. While this is true, a careful reading of the Belloc Case and those cases following it indicates that our courts have adopted the broad principle that acceleration clauses of like character are not absolute or self-operative; that they are for the benefit of the creditor; and that failure to pay an installment of principal when due cannot be taken advantage of by the debtor to mature the entire indebtedness.

We therefore conclude that the trial court properly held that the amounts for which judgment was given were not barred by the statute of limitations.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

125 Cal.App. 72

MILANO v. BULLERI et al.

Civ. 8414.

District Court of Appeal, First District, Division 2, California.

July 25, 1932.

1. Appeal and error ⇐756.

Appellants' brief, containing no headings except words "Appellant's Opening Brief" on first page, *held* not to comply with rule (Rules of Supreme Court and District Courts of Appeal, rule 8).

Rule 8 of Rules of Supreme Court and District Courts of Appeal requires that brief should present each point separately under appropriate heading, showing nature of question to be presented.

2. Appeal and error ⇐766.

Where appellants ignored rule requiring headings in brief and, in court below, permitted default to be entered and failed to present points, appeal was dismissed (Rules of Supreme Court and District Courts of Appeal, rule 8).

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by B. Milano, doing business under the name, firm, and style of the Daly City Lime & Cement Company, against J. Bulleri and wife and others. From a judgment in favor of plaintiff, named defendant and wife appeal.

Appeal dismissed.

George R. Perkins, of San Francisco, for appellants.

W. H. Clay, of San Francisco, for respondent.

SPENCE, J.

Plaintiff commenced this action to foreclose a materialman's lien for materials furnished by plaintiff to the defendant subcontractor, A. Fraumeni. Said defendant and the defendant owners, J. Bulleri and Christine Bulleri, defaulted and the action was dismissed as to the defendant T. Sharman, the contractor. Judgment of default was entered after a hearing, which judgment decreed foreclosure of the lien in the sum of $302.60. The defendant owners appeal.

[1, 2] Appellants have not complied with rule VIII of the Rules of the Supreme Court and District Courts of Appeal. Their brief fails to "present each point separately, under an appropriate heading, showing the nature of the question to be presented." In fact, the brief contains no headings whatever except the words "Appellants' Opening Brief" on the first page thereof. This rule has been in effect for several years and the necessity of compliance therewith has been frequently called to the attention of the bar. Best v. Martin (Cal. App.) 12 P.(2d) 80; Kaltenberger v. Alexander Hotel Company (Cal. App.) 12 P.(2d) 59; Sun Lumber Co. v. Bradfield (Cal. App.) 10 P.(2d) 183; Estate of Smith (Cal. App.) 9 P.(2d) 244; Stout v. Farwell (Cal. App.) 6 P.(2d) 983; Richmond Terminal Corp. v. Parr Terminal Co., 116 Cal. App. 368, 2 P.(2d) 579; Corcoran v. Ward, 115 Cal. App. 180, 1 P.(2d) 455; Hawkins v. Doolittle, 113 Cal. App. 619, 298 P. 862; Dunn v. Farrow, 104 Cal. App. 660, 286 P. 709; Barnes v. Cocke, 99 Cal. App. 700, 279 P. 190. Under the terms of the rule the appeal may be dismissed when the rule is ignored. We deem this a proper case in which to order such dismissal for appellants have not only failed to present their points properly in this court, but also permitted their default to be entered and failed to make any presentation of their points in the trial court.

The appeal is dismissed.

We concur: NOURSE, P. J.; STURTEVANT, J.

125 Cal.App. 784

B. MILANO, Doing Business under the Name, Firm, and Style of the Daly City Lime Cement Co., Plaintiff and Respondent, v. F. RATTO, T. Sharman and A. Fraumeni et al., Defendants; F. Ratto and Rina Ratto, Defendants and Appellants.

Civ. 8415.

District Court of Appeal, First District, Division 2, California.

July 25, 1932.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

George R. Perkins, of San Francisco, for appellants.

W. H. Clay, of San Francisco, for respondent.

SPENCE, J.

This is a companion case to Milano v. Bulleri (Cal. App.) 13 P.(2d) 521, in which the opinion was this day filed. The appellant owners in the present case defaulted in the trial court and a judgment decreeing foreclosure of the lien was entered. The ap-

peal in this case is submitted upon the briefs in Milano v. Bulleri.

For the reasons stated in the opinion in said last-named case, the appeal herein is dismissed.

We concur: NOURSE, P. J.; STURTEVANT, J.

124 Cal.App. 765

RYAN v. McKINLEY et al.

Civ. 8579.

District Court of Appeal, First District, Division 2, California.

July 19, 1932.

1. Parties ⇐45.

Application to intervene, granted ex parte, may be set aside ex parte.

2. Appeal and error ⇐143.

Parties refused permission to intervene may appeal from such order, but not from subsequent judgment for plaintiff (Code Civ. Proc. § 963, subd. 1).

Writ of Mandate to Civil Service Commission of City and County of San Francisco.

Proceeding in mandamus by J. J. Ryan against Howard McKinley and others, as members of, and constituting, the Civil Service Commission of the City and County of San Francisco, in which E. A. Hahn and others applied for permission to intervene. From a judgment for plaintiff after denial of the application, applicants appeal.

Appeal dismissed.

E. H. Zion, of Modesto, for appellants.

Grover O'Connor, of San Francisco, for respondent.

STURTEVANT, J.

[1, 2] Claiming that the defendants, as the Civil Service Commission of San Francisco, had marked his papers incorrectly, the plaintiff commenced a proceeding in mandamus to compel the defendant commission to remark his papers. On December 9, 1931, E. A. Hahn, C. A. Spuur, and A. J. Canty were given permission to intervene. As the record before us does not show to the contrary, we assume that the application was made ex parte. On December 10, 1931, the trial court made an order denying the application to intervene. Whether that order was made on notice or was made ex parte is immaterial. As the application was granted ex parte it could be set aside ex parte. Coburn v. Pacific L. & M. Co., 46 Cal. 31, 33. If it could be entirely set aside it could be entirely ignored, and from the record before us we assume that it was entirely ignored. The defendant commission answered the plaintiff's complaint and a trial was had. On May 18, 1932, the trial court entered a judgment in favor of the plaintiff and against the defendants. On May 27, 1932, E. A. Hahn, C. A. Spuur, and A. J. Canty filed a notice of appeal from the judgment entered May 18, 1932. The plaintiff has made a motion to dismiss said appeal on the ground that the appellants are not parties to the action. The motion is well founded. From the order made December 10, 1931, E. A. Hahn, C. A. Spuur, and A. J. Canty were entitled to appeal. Code Civ. Proc. § 963, subd. 1; Dollenmayer v. Pryor, 150 Cal. 1, 87 P. 616. But, having been refused permission to intervene, they were not entitled to appeal from the judgment entered May 18, 1932. Thorpe v. North Moneta, etc., Water Co., 12 Cal. App. 186, 106 P. 1107; 20 Cal. Jur. 529; Stern & Goodman Inv. Co. v. Danziger, 206 Cal. 456, 459, 274 P. 748.

The appeal is dismissed.

We concur: NOURSE, P. J.; SPENCE, J.

125 Cal.App. 315

LOWE v. COPELAND et al.

Civ. 8540.

District Court of Appeal, First District, Division 1, California.

Aug. 10, 1932.

1. Evidence ⇐60.

Fairness in business transactions is presumed (Code Civ. Proc. § 1963, subd. 19).

2. Evidence ⇐100.

Fairness in business transactions is question of fact, provable both by direct and circumstantial evidence (Code Civ. Proc. § 1963, subd. 19).

3. Appeal and error ⇐1010(1).

Trial court's finding based upon sufficient evidence that president did not act arbitrarily in refusing to approve offers made to corporation for manufacture and sale of cigar and cigarette lighting devices cannot be disturbed, though appellate court might have reached different conclusion.

4. Patents ⇐202(1).

Contract for transfer of patent rights to cigar and cigarette lighting devices to corporation *held* to pass title to corporation subject to condition subsequent (Civ. Code, § 1438).

Contract provided, amongst other things, that inventor, who held certain patents

and applications for patents for cigar and cigarette lighting devices, and corporation he organized, would transfer the patent rights to a foreign corporation, and that the transfers were to be subject to the condition that the transferee corporation should manufacture and sell at least 5,000 of the devices during each calendar year, and that, if it failed to do so, then upon demand the patent rights should be reassigned.

5. Patents ⇐202(1).

Title to certain patent rights which passed by assignment subject to condition subsequent remained in assignee until forfeiture was enforced (Civ. Code, § 1438).

6. Contracts ⇐226.

"Condition subsequent" refers to future event upon happening of which obligation becomes no longer binding on party in whose favor condition was created if he chooses to enforce it (Civ. Code, § 1438).

[Ed. Note.—For other definitions of "Condition Subsequent," see Words and Phrases.]

7. Contracts ⇐226.

While intent to create condition subsequent must appear expressly or by clear implication, no precise words are necessary, and plain letter of agreement cannot be disregarded (Civ. Code, § 1438).

8. Contracts ⇐318.

Forfeitures are not favored, and any inconsistent acts by party claiming forfeiture will be regarded as a waiver.

9. Estoppel ⇐119.

Unless but one inference can be drawn from evidence, waiver and estoppel are questions for jury or trial court.

10. Patents ⇐203.

Evidence showed that inventor did not waive right to reassignment of certain patent rights for assignee's breach of condition in contract.

11. Corporations ⇐307.

President and directors occupy fiduciary relationship to corporation, and are not permitted to assume position adverse to corporation.

12. Corporations ⇐312(1).

Transfers of corporate property by president and directors to themselves are voidable, and trust arises in favor of corporation as against officer as to anything so received.

13. Corporations ⇐320(13).

Refusing injunction to enjoin transfer of certain patent rights to president *held* not error, though president assumed position adverse to corporation's interests in demanding transfer, where his right was clear.

14. Injunction ⇐13.

Before injunction will issue, it must appear that some substantial and positive injury will occur, and irregular and unauthorized acts not having that result constitute no ground for relief.

15. Injunction ⇐1.

Injunction will not issue to enforce right or prevent wrong in abstract, or where it will retard instead of promoting justice.

16. Receivers ⇐8.

Except where moving party has some absolute right to property sought to be controlled, appointment of receiver rests in trial court's sound discretion, and should not be made where no benefit is to be gained thereby.

17. Corporations ⇐320(13).

Refusal to appoint receiver of corporation's business *held* not error under circumstances.

There was no allegation or claim that, with the exception of certain patent rights to which the president was entitled to a reassignment, the corporation had any assets, nor that, if such rights should not be retained, it could or would continue in business, and there were no funds in the company's treasury, no means of raising funds from its stockholders by assessment or otherwise, and no business in prospect which would bring into its treasury any funds to carry on the business.

18. Corporations ⇐320(2).

Stockholder *held* to have right to maintain action to enjoin transfer of certain patent rights from corporation to its president, where any demand that corporation bring such action would have been unavailing.

19. Pleading ⇐8(6).

Averments of complaint that directors adopted resolution confessing without cause corporation's failure to perform contract with its president and directing reassignment of certain patents to him *held* legal conclusion which tendered no issue, although found among findings of fact.

20. Corporations ⇐94.

Certificate of stock is only evidence of ownership which may exist without it.

21. Corporations ⇐98.

Demand is necessary to put corporation in default for failure to deliver certificate of stock where right thereto has not been denied.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Edward Lowe, Jr., against Francis C. Copeland and others. From an adverse judgment, plaintiff appeals.

Affirmed.

M. Mitchell Bourquin, of San Francisco, for appellant.

Jos. T. O'Connor, Hartley F. Peart, Charles V. Barfield, and Thomas F. McCue, all of San Francisco, for respondents.

PER CURIAM.

This action was one for equitable relief, namely, a decree declaring the plaintiff to be the owner of certain shares of stock in defendant American Metal Products Corporation and enjoining defendants Copeland and the Cig-a-Lite Corporation from transferring certain patent rights. In the alternative, damages were prayed, and plaintiff asked that a receiver of the business and property of defendant American Metal Products Corporation be appointed.

Defendant Copeland was the inventor of various cigar and cigarette lighting devices, and the holder of certain patents and applications for patents for such devices. He organized defendant Cig-a-Lite Corporation, in which he owned a majority of the stock. On or about March 25, 1927, plaintiff entered into a contract with Copeland and the corporation last named, by which the latter two agreed to transfer the patent rights to said devices to a corporation to be organized under the laws of Nevada, in which Copeland should own 51 per cent. of the stock, and act as its president at a salary of $500 per month. In consideration of the issuance to him of 44 per cent. of the stock of the Nevada corporation, plaintiff agreed to advance to this company in cash from time to time as needed sums not to exceed $44,000. This promise was to be evidenced by plaintiff's note, and considered as his subscription for the stock mentioned. It was also agreed that no contract involving more than $500 should be entered into by the Nevada corporation without the approval of defendant Copeland; further, that the transfers of the patent rights to the company were to be subject to the condition that it should manufacture and sell at least 5,000 of the devices during each calendar year, and that if it failed to do so, then upon demand the said patent rights should be reassigned. The Nevada corporation was organized and the patent rights assigned to it.

The complaint alleged that plaintiff executed and paid said promissory note, and in accordance with said contract became the owner of said stock, which had not been issued to him, although demand therefor had been made; further, that good and reasonable offers were made to the Nevada corporation for the manufacture and sale of said devices, but that defendant Copeland without good cause refused to approve the same, and thus obstructed and prevented the manufacture and sale of said devices by the Nevada corporation; that as a result this company failed to manufacture and sell the number of said devices agreed upon within the time fixed in the contract, following which Copeland and the Cig-a-Lite Corporation gave notice on that ground of their election to terminate the contract, and demanded a reassignment of the patent rights. The complaint contained further allegations that Copeland by virtue of his majority interest in the stock of the Nevada company controlled the action of its board of directors; also that, by virtue of such control, he caused said directors to adopt a resolution directing the company's officers to execute such assignments. Plaintiff prayed that he be declared the owner of the stock mentioned, and that Copeland and the Cig-a-Lite Corporation be restrained from reassigning the patent rights; that the Nevada corporation be relieved from the condition in said contract; and that a receiver of its business be appointed.

The trial court found that plaintiff executed and paid the note and was the owner of the stock as alleged; that the same had not been issued, but that no demand for its issuance had been made; further, that the Nevada corporation had never during any calendar year manufactured or sold, or caused to be manufactured or sold, 5,000 of said devices; that Copeland in the exercise of his discretion had rejected the offers mentioned, stating his reasons therefor; and that the offers made through plaintiff, while not unreasonable, presented a question upon which reasonable minds might differ and upon which plaintiff and Copeland did differ. The same finding was made respecting offers made to the company through Copeland, and also that none of the rejections by him were made in bad faith or arbitrarily but in good faith and in the exercise of his business judgment; further, that he had not waived any of his rights under the agreement.

The complaint alleged in paragraph 15 that on September 27, 1929, at a meeting of the stockholders of the Nevada corporation, Copeland, by force of his majority ownership in the stock and over plaintiff's vote and protest, caused the adoption of a resolution confessing without cause the failure, default, and inability of the company to perform the contract, and authorizing its officers and directors to reassign the rights acquired thereunder, and that Copeland, unless enjoined, will execute such reassignments. The court found the allegations of this paragraph to be true. In this connection, however, it was found that, by reason of the other findings, and the inability of the plaintiff and Copeland to agree upon any settled policy for the company or upon any contract submitted by either to the other, and that, due to the fact that Copeland and the Cig-a-Lite Corporation owned a majority of the stock in the Nevada corporation, and consequently controlled its board of directors, and to the attitude of its finance committee, which the court found was an-

tagonistic to Copeland, it was impossible for the Nevada company to perform the contract or to manufacture or cause to be manufactured 5,000 of the devices in any one year.

The court concluded that the patent applications and rights assigned to the company were subject to reassignment to Copeland; and that, notwithstanding the condition of the company's affairs as found, no receiver should be appointed, as there were no funds in its treasury, no business in prospect, and no assessments being permitted under its articles of incorporation and by-laws, there was no means of raising money to continue its business. The court also concluded that the Nevada corporation was not entitled to be relieved from the condition in the contract, and that no injunction should issue, and entered judgment denying the relief prayed for in the complaint.

Plaintiff claims that portions of certain findings are unsupported and that the findings do not support the judgment; while defendants contend that no cause of action was alleged in the complaint or proved.

[1-3] We are satisfied that there was sufficient evidence to support the finding that the defendant Copeland, in rejecting the offers mentioned, did not act arbitrarily or in bad faith. Fairness in business transactions is presumed (Code Civ. Proc. § 1963, subd. 19), and, the question being one of fact, provable both by direct and circumstantial evidence, and there being evidence in the record which the trial court believed reasonably sufficient to support its conclusion, its finding on this issue cannot be disturbed. Rossen v. Villanueva, 175 Cal. 632, 166 P. 1004; 6 Cor. Jur. 880). This is true even though an appellate court might be of opinion that a different conclusion should have been reached. Clopton v. Clopton, 162 Cal. 27, 121 P. 720.

[4-6] That title to the patents and patent rights mentioned passed by assignment to the Nevada corporation subject to a condition subsequent is plain from the provisions of the contract (Waterman v. MacKenzie, 138 U. S. 252, 11 S. Ct. 334, 34 L. Ed. 923), and in such cases the title remains in the assignee until the forfeiture is enforced (48 Cor. Jur. "Patents," § 397, p. 257). A condition subsequent refers to a future event upon the happening of which the obligation becomes no longer binding on the party in whose favor the condition was created if he choses to enforce it. Civ. Code, § 1438.

[7] While the intent to create a condition subsequent must appear expressly or by clear implication, no precise words are necessary (Firth v. Los Angeles Pacific, etc., Co., 28 Cal. App. 399, 152 P. 935; Firth v. Marovich, 160 Cal. 257, 116 P. 729, Ann. Cas. 1912D, 1190), and the plain letter of an agreement cannot be disregarded (13 Cor. Jur. "Contracts," § 533, p. 567).

[8] Forfeitures under such provisions, however, are not favored; and any inconsistent acts or dealings by the party claiming the forfeiture will be regarded as a waiver. Haserot v. Keller, 67 Cal. App. 659, 228 P. 383. In the case cited, the waiver found rested upon the principles underlying estoppel, namely, that the acts of the party claiming the forfeiture had induced a detrimental change of position. McCormick v. Orient Ins. Co., 86 Cal. 260, 262, 24 P. 1003. Here the contract was entered into on March 25, 1927, and a demand for the reassignment of the patents was made in June, 1929. Plaintiff admits that Copeland had the right to demand such assignment in March, 1928. He failed, however, to do so, and plaintiff thereafter paid the company pursuant to his contract approximately $22,000; this money being used in its business. It is contended that having allowed the above period to elapse without exercising his right to demand a reassignment, and having thus encouraged plaintiff to make the payments mentioned, Copeland waived the right to enforce the condition.

[9, 10] Had the company, notwithstanding it failed to manufacture and sell the required number of devices the first year, performed the contract, in that respect during the second year, no advantage could have been taken thereafter of the fact of nonperformance during the first year; but in view of the finding in substance that Copeland acted in good faith in his dealings with plaintiff and the company we cannot say that his failure to demand a reassignment at the end of the first year was due to anything but the expectation that the company would perform during the following year; and this notwithstanding the company directly, and Copeland indirectly, received the benefit of the payments made by plaintiff during the second year. Unless but one inference can be drawn from the evidence, waiver and estoppel are questions for the jury or the trial court. 27 R. C. L. "Waiver," p. 912; Kerr v. Reed, 187 Cal. 409, 202 P. 142; Parke v. Franciscus, 194 Cal. 284, 228 P. 435. Here the trial court found that there was no waiver, and we cannot say that the finding is unsupported.

There is no merit in the claim that the notice given by Copeland of his election to take advantage of the breach of condition was insufficient in form. However, it is contended that the notice was legally insufficient, as Copeland thereby assumed a position hostile to the interests of the company, which, he being the president, the law would not permit.

[11-13] The president and the directors of a corporation occupy a fiduciary and trust relationship thereto (Sims v. Petaluma Gas Light Co., 131 Cal. 656, 63 P. 1011; Pacific Vinegar, etc., Works v. Smith, 145 Cal. 352, 78 P. 550,

104 Am. St. Rep. 42), and they are not permitted to assume a position adverse to the corporation (Dean v. Shingle, 198 Cal. 652, 246 P. 1049, 46 A. L. R. 1156). Transfers of corporate property by such officers to themselves are voidable (6a Cal. Jur. "Corporations," § 633; Phillips v. Sanger Lumber Co., 130 Cal. 431, 62 P. 749; Dean v. Shingle, supra); and a trust arises in favor of the corporation as against an officer as to anything so received (Lezinsky v. Mason Malt, etc., Co., 185 Cal. 240, 196 P. 884). In the present case, however, the court found in effect that defendant Copeland was entitled to an unconditional reassignment of the patents. Accordingly a duty rested upon the corporation to reassign; and, while it may be conceded that Copeland, being president and a director of the company, assumed a position adverse to the company's interest in attempting to procure the reassignment, nevertheless, his right being clear, the trial court properly concluded that no injunction should issue.

[14] It is well settled that, before an injunction will issue, it must appear that some substantial and positive injury will occur; and that acts, although irregular and unauthorized, which will not have that result, constitute no ground for relief. 1 High, Injunctions (4th Ed.) § 9; 32 Cor. Jur. "Injunctions," pp. 49, 50; Duggan v. Emporia, 84 Kan. 429, 114 P. 235, Ann. Cas. 1912A, 719; Gilfillan v. Grier, 145 Pa. 317, 22 A. 593; Robins v. Latham, 134 Mo. 466, 36 S. W. 33. As held in the case last cited, there must not only be a violation of plaintiff's rights, but such a violation as is or will be attended with substantial damage, not merely a technical injury; and this rule is followed in principle in the following cases: Modoc Land, etc., Co. v. Booth, 102 Cal. 151, 36 P. 431; Copsey v. Sacramento Bank, 133 Cal. 659, 66 P. 7, 204, 85 Am. St. Rep. 238; Clough v. W. H. Healy Co., 53 Cal. App. 397, 200 P. 378.

[15] Furthermore, an injunction will not issue merely for the enforcement of a right or the prevention of a wrong in the abstract (14 R. C. L. "Injunctions," p. 321; Goodrich v. Moore, 2 Minn. 61 [Gil. 49], 72 Am. Dec. 74), or where it will retard instead of promoting justice (Endicott v. Mathis, 9 N. J. Eq. 110).

[16, 17] It has been held that where, because of dissension in its board of directors, a corporation cannot function, a court has power to appoint a receiver to preserve its property, but in such a case the proceeding is not directed toward the closing of the affairs of the corporation nor an attempt to dissolve it, but merely to place its assets in safe hands, as courts are not authorized before dissolution to appoint a receiver for such purposes. Elliott v. Superior Ct., 168 Cal. 727, 145 P. 101; Boyle v. Superior Ct., 176 Cal. 671, 170 P. 1140, L. R. A. 1918D, 226. Here there was no allegation or claim that, with the exception of the patent rights, the Nevada company had any assets; nor that, if such rights should not be retained, it could or would continue in business. There were no funds in the company's treasury, no means of raising funds from its stockholders by assessment or otherwise, and no business in prospect which would bring into its treasury any funds to carry on the business, and, as found, Copeland was entitled to a reassignment of the patent rights. Except where the moving party has some absolute right to the property sought to be controlled, the appointment of a receiver rests in the sound discretion of the trial court, and the appointment should not be made where no benefit or advantage is to be gained thereby (53 Cor. Jur. "Receivers," § 21, p. 36); and, in view of the facts, we cannot say that the court erred by refusing to do so.

As stated, it is urged by defendants that plaintiff could not maintain the action on his own account, and that no facts were alleged or proved which gave him the right to proceed in the corporation's behalf.

[18] Plaintiff's claim to the stock mentioned gave him the right to sue therefor; and the facts alleged and found show sufficiently that any demand that the corporation bring action to restrain the retransfer of the patent rights would have been unavailing. The company was made a party to the suit, and all the questions above discussed were litigated. The act sought to be restrained, although irregular, was in view of the facts, one which could cause no substantial injury to the corporation or to plaintiff, and the trial court rightly so decided.

With respect to the finding that the averments of paragraph 15 of the complaint were true, this paragraph contained the allegation that the directors of the Nevada company adopted a resolution confessing without cause its failure and inability to perform the contract and directing a reassignment of the patents. It is urged by plaintiff that, in view of this finding, the relief prayed for should have been granted.

[19] The finding that the acts were done "without cause," if one of fact, might be said to conflict with the findings that the company had failed to perform and that Copeland acted in good faith. However, we are of the opinion that this was but a legal conclusion (Fisher v. Fisher, 23 Cal. App. 310, 137 P. 1094), which tendered no issue; and, although it is found among the findings of fact, it is no less a conclusion of law (Savings & Loan Society v. Burnett, 106 Cal. 514, 39 P. 922; Towle v. Sweeney, 2 Cal. App. 29, 32, 83 P. 74; Lynip v. Alturas School Dist., 24 Cal. App. 426, 438, 141 P. 835).

Plaintiff asked for a decree declaring him

to be the owner of the shares of stock for which he subscribed. It was found that the agreed price had been paid, but that there had been no demand for the issuance and no refusal to issue a certificate therefor, and that the defendants had been at all times ready and willing to issue the same to plaintiff.

[20, 21] Such a certificate is only evidence of ownership, which may exist without it (Cal. Southern Hotel Co. v. Callender, 94 Cal. 120, 29 P. 859, 28 Am. St. Rep. 99; Majors v. Girdner, 31 Cal. App. 47, 159 P. 826), and it has been held that a demand is necessary to put a corporation in default for failure to deliver certificates of stock where the right thereto has not been denied (14 Cor. Jur. "Corporations," § 712, p. 483; Thompson, Corporations [3d Ed.] § 3518; Fergus v. Venice Investment Co., 36 Cal. App. 425, 172 P. 396; Jefferson County Savings Bank v. Compton, 192 Ala. 16, 68 So. 261; Teeple v. Hawkeye, etc., Co., 137 Iowa, 206, 114 N. W. 906; Boyd, etc., Ass'n v. Eastham, 208 Ky. 368, 270 S. W. 12; Gallatin, etc., Alliance v. Flannery, 59 Mont. 534, 197 P. 996; Weaver v. Consumers', etc., Co., 246 Pa. 438, 92 A. 553; Ophir Investment Co. v. Alexander Realty Corporation, 117 Wash. 637, 201 P. 897; Lipscomb's Adm'r v. Condon, 56 W. Va. 416, 49 S. E. 392, 67 L. R. A. 670, 107 Am. St. Rep. 938).

While plaintiff was doubtless entitled in this respect to the decree prayed for, he makes no complaint here that a formal judgment declaring him to be the owner of the stock was not entered.

We have examined the evidence, and are satisfied that the findings of the court are fairly supported, and that no sufficient ground for reversing the judgment has been shown.

The judgment is affirmed.

124 Cal.App. 760

SHEFFLER v. HUTCHINGS et al.

Civ. 8286.

District Court of Appeal, First District, Division 1, California.

July 19, 1932.

1. Fraud ⇐44.

Complaint alleging that defendants fraudulently obtained money from plaintiff ostensibly for investment, under written guaranty of profits, but appropriated proceeds, *held* sufficient.

2. Appeal and error ⇐1024(4).

Decision refusing to set aside default should not be disturbed, where evidence was conflicting as to whether plaintiff extended time to demur.

3. Judgment ⇐162(1).

On motion to set aside default, uncontroverted facts alleged in complaint must be taken as true.

4. Judgment ⇐167.

Order setting aside default on condition that defendant file bond *held* not unreasonable, where complaint alleged that defendant had transferred property for purpose of defeating plaintiff's recovery.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Sadie B. Sheffler against Clare Hutchings and others. Judgment for plaintiff, and defendant named appeals.

Affirmed.

Tanner, Odell & Taft and Donald A. Odell, all of Los Angeles, for appellant.

Otho S. Vernon, of Pasadena, for respondent.

KNIGHT, J.

The defendant Clare Hutchings appeals from an adverse judgment for the payment of money, entered after default for failure to answer the complaint. The grounds of appeal are that the complaint fails to state a cause of action, and therefore is insufficient to support the judgment, and that the trial court abused its discretion in determining the motions to set aside the default.

[1] The complaint contains five counts, but it is unnecessary to inquire into appellant's objections to the first four because the facts alleged in the fifth are legally sufficient, in our opinion, to sustain the judgment. The cause of action stated therein is one to recover the sum of $4,929.32 and the earnings and accumulations thereof based upon the charge that defendants fraudulently obtained from plaintiff the principal sum mentioned for the ostensible purpose of investing it for her under a written guaranty that from such investments she would receive "a net profit of not less than ten per cent. per annum," and that, after obtaining said principal sum, they fraudulently appropriated the same and the earnings and accumulations thereof to their own use. In this regard it is alleged in substance that defendants were engaged in the real estate business in and about Los Angeles; that plaintiff, a widow, reposed confidence and trust in defendants on account of a friendly business relationship theretofore existing between plaintiff's husband and defendants; that upon the death of plaintiff's husband she received the sum of $4,929.32

from his estate, and that as a result of conspiracy and false promises defendants induced her to turn said money over to them under the written guaranty above referred to, a copy of which is set out in the complaint; that she received no income whatever from said money, and that after a lapse of some three years, during which she was lulled into a feeling of security by false statements made by the defendants as to the nature and character of the investments they claimed to have made for her, she asked for an accounting, and then ascertained that defendants had appropriated to their own use the entire principal sum and the proceeds derived from the several transactions financed therewith. The complaint goes on to set forth in detail the method employed by defendants, after obtaining the money, to defraud her thereof and to describe the numerous transactions carried on by them to accomplish such purpose, which consisted chiefly of mortgaging the property in which most of the money was invested, and afterwards selling the mortgages and appropriating the proceeds received therefrom and the rents and issues from the property to their own use. Eventually, so the complaint alleges, when an accounting was demanded, defendants tendered to plaintiff deeds conveying to her two parcels of land, both of which were fully incumbered, and against which foreclosure proceedings were impending for nonpayment of taxes, interest, etc. It was also alleged in substance that in furtherance of the conspiracy to defraud, and in consummation thereof, appellant stripped himself of all property in which he was interested by transferring the same to his mother, thus preventing plaintiff from realizing on any judgment she might obtain against him.

The points urged by appellant against the sufficiency of this particular count are based mainly on technical grounds, some of which may have been good on special demurrer; but they reveal no fatal defect in the pleading, and in our opinion it contains all the essential allegations to constitute a cause of action for the recovery of money, based on fraud and deceit, and therefore, as indicated, is legally sufficient to sustain the judgment.

[2] The following are the facts relating to the second assignment of error: The default was entered by the clerk of the court on June 7, 1929, and on June 10th appellant served and filed notice of motion to set it aside. The motion was accompanied by a proposed demurrer to the complaint, and was heard on affidavits; and on June 20th the court made the following conditional order: "* * * Motion to set aside default is granted on condition defendants file a Surety Bond of $5000.00 by noon June 22, 1929, to guarantee Judgment and Costs and also pay an attorney fee of $250.00, if plaintiff prevails, otherwise said motion is denied. Demurrer to complaint is continued to June 27, 1929." Appellant failed to comply with the condition imposed, and on June 22d served and filed a second notice of motion whereby he sought to have the default set aside unconditionally upon the ground that he was unable to meet the condition stated in the previous order. The second motion was heard also on affidavits, and on July 8, 1929, was denied. Thereafter, on July 15, 1929, and after taking evidence in open session, the court determined that the amount due plaintiff was $7,225, and gave judgment against appellant therefor. Appellant's mother was named also as a party defendant; but she filed no appearance in the action, presumably for the reason that she was not served with summons. Consequently she is not affected by the judgment.

Appellant's time to plead to the complaint expired on June 4, 1929; and it appears from the record upon which the motions were determined that on that day appellant was being tried on ten criminal charges growing out of this same controversy; that he was subsequently convicted thereof and sentenced to jail imprisonment. Counsel then representing appellant and counsel now representing plaintiff participated in the trial of the criminal action, and it is claimed by the former in his affidavit that on June 4th, during the trial of said criminal action and in response to his request, counsel for plaintiff verbally stipulated to extend appellant's time to demur to and including the following Friday; but that, when he arrived at the clerk's office on Friday to file his demurrer, default had already been taken. Counsel for plaintiff, in his counteraffidavit, admitted having had a conversation with appellant's counsel at the time stated relating to an extension of time, but he averred in his affidavit that appellant's request related to an extension of time to answer—not to demur; that he extended the time to answer until and including the following Thursday—not Friday; and that he did not cause the default to be entered until 11 o'clock Friday morning.

Even assuming as a matter of law that the action of a trial court in denying a motion to set aside a default in the face of a verbal stipulation extending time would constitute an abuse of discretion, it will be seen from the foregoing that in the present case there is a sharp conflict in the evidence as to whether or not counsel for plaintiff ever agreed to extend the appellant's time until and including Friday, the day on which the default was taken; therefore this court is precluded from interfering on appeal with the trial court's decision in resolving such conflict. Moreover, so far as the record discloses, no proposed answer has ever been tendered by appellant, nor any affidavit filed denying the allegations of conspiracy and

fraud, and consequently appellant failed to show that he had a meritorious defense to interpose in the action.

[3, 4] Appellant complains of the condition imposed by the court in its first order, claiming in his affidavit that it was not only unreasonable but was impossible to perform. But, in the absence of denials of the allegations of the complaint, the facts alleged therein must be taken as true, and it appears therefrom that appellant fraudulently and without any consideration therefor transferred title to whatever property in which he may have held an interest to his mother for the purpose of defeating any effort on the part of plaintiff to recover the money which was due her; that being so, it cannot be fairly said that the condition imposed was unreasonable nor that the inference drawn by the trial court that appellant could comply with the same is unsupported. In any event, if, as shown, the facts adduced before the trial court were legally sufficient to warrant an unconditional denial of the motions, the question of the reasonableness of the conditions imposed becomes unimportant.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

124 Cal.App. 715

SCHNEIROW v. LAS VEGAS LAND & BUILDING CO., Inc. (HINSCH, Intervener).

Civ. 908.

District Court of Appeal, Fourth District, California.

July 15, 1932.

1. Bills and notes ⇐520.

Finding that plaintiff's assignor made fraudulent representations respecting condition of corporation, inducing intervener to renew note, *held* not sustained by evidence (Civ. Code, § 1572, subd. 3; § 1573, subd. 1).

2. Licenses ⇐39.

Stock issued by foreign corporation without permit to transact business or issue stock in state *held* void and gave holder no rights (St. 1917, p. 673, as amended).

Appeal from Superior Court, San Diego County; Eugene Daney, Jr., Judge.

Action by M. Schneirow against the Las Vegas Land & Building Company, Incorporated, in which A. M. Hinsch intervened. From a judgment for defendant and intervener, plaintiff appeals.

Reversed.

S. W. Newman, of Los Angeles, for appellant.

J. C. Hizar, of San Diego, for respondents.

V. N. THOMPSON, Justice pro tem.

The appeal of this cause is taken by the plaintiff from a judgment in the trial court in favor of the defendant corporation and the intervener, and against the plaintiff.

The record on appeal is made, aside from the usual transcripts, only upon the appellant's opening brief, without any respondent's brief. Therefore, there is nothing before this court to even indicate what position the defendant corporation and intervener Hinsch take with respect to the points raised by this appeal. The pleadings and evidence, of course, indicate their contentions before the trial court. An added burden is therefore placed upon this court to more thoroughly review all of the evidence and details of fact as developed before the trial court in order that a proper conclusion may be reached, having in mind the contentions of all of the litigants.

The action was brought by the plaintiff as the assignee of Olive Krug, who was an original assignee of R. E. L. Blankenship, for money in the amount of $6,289.32, claimed to have been had and received by the said defendant corporation from the said Blankenship.

The basis of this claim is that in organizing and financing the defendant corporation, which was a Nevada corporation, R. E. L. Blankenship and Phillip F. Bartlett undertook to place equal amounts of money in the corporation as capital, for which shares of stock were to have been issued, according to the amount of money contributed by each. This plan was followed up to a certain point, when contributions made by Blankenship exceeded those made by Bartlett in the amount of $6,289.32, which was shown as a credit balance in favor of Blankenship in his personal account in the books of the corporation.

Blankenship, prior to and during the organization and operation of the defendant and respondent corporation, was indebted to A. M. Hinsch, intervener and respondent, upon two promissory notes aggregating $30,000, as security for the payment of which there was pledged certain shares of stock of San Diego Finance Company. Shortly prior to the dates of maturity of these notes Blankenship sought their renewal and at the same time the release of the pledged stock in the San Diego Finance Company,

and to substitute therefor stock in Las Vegas Land & Building Company.

A statement purporting to show the financial condition of this company was prepared by the secretary, J. G. Chapman, at the instance of Blankenship, who was then, and had been since the organization of the company, the president, and Bartlett, the vice president thereof. Although at the time of the preparation of the financial statement there was a credit balance standing on the books of the company in the personal account of Blankenship, this item was given no mention in the statement, except in this way: "Cash paid in by stockholders, $29,156.02." The statement was also made therein, "No debts, current or otherwise, excepting on three tracts above." The tracts referred to are tracts upon which the company owed certain balances. A copy of this statement is attached to the complaint in intervention, marked Exhibit A. There was no direct statement that Blankenship was a creditor of the company. When the financial statement was thus prepared on June 4, 1930, it was presented to Blankenship; his creditor, Hinsch; Bartlett, the principal coowner of the Las Vegas Land & Building Company; J. C. Hizar, a stockholder of that company, whose name appears as an accommodation maker upon the two promissory notes which were given by Blankenship in renewal of the original notes to Hinsch, and whose name also appears as attorney for both the defendant Las Vegas Land & Building Company and the intervener Hinsch in this action. The financial condition of the company was discussed by all of these parties, collectively and in smaller groups, prior to the preparation of the statement already referred to.

Nowhere in the testimony of the witnesses is it disclosed whether or not the fact of the existence of indebtedness of the Las Vegas Land & Building Company to Blankenship was made known to Hinsch, although the fact is developed that Hinsch, as a condition for the renewal of the Blankenship notes and the substitution of Las Vegas Land & Building Company stock for San Diego Finance Company stock, required that Bartlett replace Blankenship as president and financial manager of the company. This was done through official action of the board of directors on May 5, 1930.

The credit in Blankenship's favor remained on the books of the company until September 10, 1930, when a book entry was made by the secretary, Chapman, for the purpose of closing it. Blankenship was indebted to Olive Krug on a judgment in the superior court in San Diego county in amount of $64,675. On July 24, 1930, a written agreement was entered into between Blankenship and Mrs. Krug whereby Blankenship agreed to pledge one hundred shares, more or less, of Las Vegas Land & Building Company stock as collateral security to a note for $1,000, and other considerations, which was to have been applied in reduction of this judgment. Although stock in the Las Vegas Land & Building Company was issued in favor of Blankenship to the extent of one hundred and eight shares on July 29, 1930, for the purpose of consuming Blankenship's credit on the company's books, Blankenship, after receiving and keeping the stock for a few days, returned it to the secretary and refused its acceptance on the ground that he had agreed with Hizar and Bartlett that he would be given an irrevocable power of attorney to vote the stock. Instead of this particular stock being pledged to Mrs. Krug, as provided by the terms of Blankenship's agreement with her, an assignment was made by him to her of his claim for the amount of the credit balance shown in his favor on the books of the Las Vegas Land & Building Company. This assigned claim forms the basis for the action from the judgment in which this appeal is taken.

The allegations of the complaint in intervention, particularly paragraphs III and IV, apparently are made for the purpose of showing fraud, or the making of fraudulent representations on the part of Blankenship by which intervener Hinsch was misled and was thereby induced to renew Blankenship's notes, to part with the original securities which he held, shares of stock in the San Diego Finance Company, and to accept in substitution therefor three hundred seventy-five shares of stock in the Las Vegas Land & Building Company. Paragraph IX then recites, in part, that, "* * * except for the representations as to the condition of the company * * * intervener would not have accepted as a pledge the said stock * * * and surrendered the security formerly held by him, * * *" and then recites further, "* * * that he (intervener) accepted said two promissory notes, * * * and said security of such stock entirely upon the said representations of the said R. E. L. Blankenship, said J. C. Hizar, J. G. Chapman and Phillip F. Bartlett, which statements and representations were all made in the presence of and at the request of the said R. E. L. Blankenship." (Parenthesis ours.)

Here we have an anomaly, in that the name of J. C. Hizar appears as attorney for the intervener and also for the defendant corporation, and at the same time as one of the persons who it is alleged made representations which misled and caused the intervener to do the things complained of, i. e., to renew Blankenship's notes and accept a substitution of securities.

There is no direct allegation in the complaint in intervention that the representations of either Blankenship, Hizar, Chap-

man, or Bartlett with respect to the solvency or financial condition of the Las Vegas Land & Building Company were not true, that the representations complained of were made for the purpose of misleading or defrauding the intervener, or any of the material and necessary allegations upon which the claim of actual fraud might be based. The complaint in intervention apparently attempts to make the intervener the principal party to the action, aside from the plaintiff herself.

Only inferentially can it be taken from the complaint in intervention that there was actual or constructive fraud committed, either on the part of Blankenship individually, or Blankenship and the other persons named by "The suppression of that which is true, by one having knowledge or belief of the fact" (Civ. Code, § 1572, subd. 3), or by a "* * * breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault * * * by misleading another to his prejudice" (Civ. Code, § 1573, subd. 1) by Blankenship and/or such other persons failing to make known to the intervener Hinsch that the accounts of the Las Vegas Land & Building Company showed a credit balance in favor of Blankenship, and permitting a financial statement of this company to be exhibited to Hinsch without having shown thereon the fact that Blankenship was a creditor of the company to the extent of $6,289.32.

[1] The testimony of Blankenship, Bartlett, Chapman, and Hizar himself shows that the financial condition of the company, as well as its prospects for the future, were discussed by all of these persons with the intervener Hinsch at different times for more than a month immediately prior to the renewal of the notes and substitution of securities, and that the financial statement, as prepared by the secretary, Chapman, or memoranda containing its substance, was used on different occasions in these discussions; that all of these officers and stockholders were aware of the fact that there was a credit in Blankenship's favor standing on the books of the company during the entire time covered by the discussions; and that no false statement or misrepresentation by or on the part of Blankenship caused the intervener to change his position with respect to the notes and securities.

Even though the intervener was available, and could have attended the trial, the record discloses that he did not choose to attend, nor to give the trial court the benefit of his testimony with respect to whether or not he relied upon or was actually misled by any statements or representations of Blankenship, or any or all of the other persons connected with the Las Vegas Land & Building Company.

Appellant's first point of appeal, "The court erred in its finding that the plaintiff's assignor had made the representations alleged in intervener's complaint and the intervener had relied thereon in accepting the securities therein stated," is well taken.

[2] Appellant's second point of appeal, "The stock issued and held by the intervener, A. M. Hinsch, was issued in violation of the Corporate Securities Act, was void, gave rise to no rights in the intervener, and the court erred in its finding in that respect" is also well taken.

The evidence is plain that all of the stock in the defendant corporation which is involved in this action was issued in violation of the Corporate Securities Act of the state of California as it existed in 1930 (St. 1917, p. 673, as amended), and that Las Vegas Land & Building Company, being a Nevada corporation, had not obtained a permit to transact business or to issue its corporate stock in California, as required by the act at that time. The finding and judgment of the trial court in this respect is clearly contrary to the evidence.

We believe, also, that the findings of the trial court upon the matters referred to in appellant's points III and IV are contrary to the evidence, and that these points should be sustained.

The judgment is reversed.

We concur: BARNARD, P. J.; MARKS, J.

125 Cal.App. 1

SIMPSON v. BERGMANN et al.

SOUTHERN LUMBER CO. et al. v. SAME.

Civ. 8543.

District Court of Appeal, First District, Division 1, California.

July 20, 1932.

Rehearing Denied Aug. 19, 1932. Hearing Denied by Supreme Court Sept. 16, 1932.

1. Pleading ⇐404.

Objections to pleadings not demurred to will be deemed waived, where cause was tried on assumption that pleadings stated cause of action.

2. Action ⇐59.

Where several actions against same defendants are consolidated, allegations of various complaints may be treated as one pleading.

3. Joint tenancy ⇐8.

Act of joint tenant which is beneficial to cotenant will be regarded as act of all, in so far as sharing in benefit is concerned.

4. Husband and wife ⇐208.

Wife who testified that she and her husband, since deceased, were building house on property owned as joint tenants, could sue contractor and surety, though she was not named in contractor's bond.

5. Corporations ⇐484(3).

Trading corporations may, in furtherance of their interests, guarantee obligations of customers.

6. Corporations ⇐447.

Corporation has implied power to make contracts essential to transaction of its ordinary affairs or reasonably expected to advance its business (Civ. Code, § 354, subd. 9).

7. Corporations ⇐399(2).

Corporation cannot defeat rights of third persons arising from transactions completed under ostensible authority of officers.

8. Evidence ⇐220(8).

Unanswered letter may afford inference that statements therein are true, where in ordinary practice recipient would have answered if he did not acquiesce in statements.

9. Evidence ⇐220(8).

Failure of corporation, which was furnishing lumber for dwelling, to reply to letter wherein owner asserted that company was contractor's surety, *held* admissible on question of existence of suretyship contract.

10. Evidence ⇐75.

Corporation's failure to rebut evidence of authority of its assistant manager to sign bond warranted inference that such evidence, if produced, would be unfavorable to corporation.

11. Evidence ⇐373(2).

Evidence *held* sufficient to warrant admission in evidence of bond, as against corporation, on ground of ostensible authority of agent of corporation who executed bond.

12. Principal and agent ⇐189(1).

Plaintiff can allege in complaint that contract was made by principal, though ostensible agency based on estoppel is sought to be established.

13. Trial ⇐395(6).

Findings may follow language of pleadings.

14. Mechanics' liens ⇐315.

Contractor's surety is presumed to have agreed to provision of contract authorizing owner to request alterations during progress of construction work.

15. Mechanics' liens ⇐314.

Surety on building contractor's bond who had guaranteed delivery of building free of liens could not enforce lien for materials furnished.

16. Mechanics' liens ⇐279.

It was presumed that none of parties to construction contract intended to commit fraud by filing insufficient bond (Code Civ. Proc. § 1183, as amended by St. 1911, p. 1313).

17. Mechanics' liens ⇐279.

Materialmen seeking to enforce liens had burden to establish insufficiency of bond under statute authorizing court to restrict recovery where bond is given (Code Civ. Proc. § 1183, as amended by St. 1911, p. 1313).

18. Appeal and error ⇐949.

Court's restriction of materialmen's recovery to contractor and his sureties, pursuant to statute providing for contractor's bond, cannot be disturbed in absence of plain abuse of discretion (Code Civ. Proc. § 1183, as amended by St. 1911, p. 1313).

19. Mechanics' liens ⇐315.

Court's restriction of recovery by material claimants to contractor and sureties, pursuant to statute, *held* not abuse of discretion, where sufficiency of surety, though not established by evidence, was unquestioned (Code Civ. Proc. § 1183, as amended by St. 1911, p. 1313).

Appeals from Superior Court, Santa Clara County; F. B. Brown, Judge.

Actions by James S. Simpson against Ernest F. Bergmann, as executor, Louise Bergmann, and others, and by the Southern Lumber Company and others against Ernest F. Bergmann, as executor, Louise Bergmann, and others, in which defendant last named filed a counterclaim. From the judgment, plaintiffs and defendants, other than those named appeal.

Affirmed.

Jensen & Holstein, of San Jose (Anson Hilton, of Oakland, of counsel), for appellant Southern Lumber Co.

Victor A. Chargin, A. P. Lindsay, and D. T. Jenkins, all of San Jose, for appellants E. C. Power and others.

D. M. Burnett and John M. Burnett, both of San Jose, for respondent Ernest F. Bergmann.

John J. Jones, of San Jose, for respondent Louise Bergmann.

PER CURIAM.

In 1927 defendant Raymond R. Allison, a contractor, entered into a contract with Fred H. Bergmann for the construction of a dwelling house on two lots near the town of Los Gatos. Prior to the commencement of work the contract with the plans and specifications was duly filed in the office of the county recorder of Santa Clara county. At the same time a bond was delivered to Bergmann,

which was also filed. The contractor began work, but before the completion of the structure disputes arose between the contractor and Bergmann and his architect, and the work ceased. Bergmann thereupon made written demand upon the contractor and upon the Southern Lumber Company, a corporation, whose name appeared as surety on the bond, to complete the structure. The demand was not complied with, and Bergmann proceeded with the work. Before the dwelling was finished, Bergmann died, and his wife, Louise Bergmann, completed the work. Upon Bergmann's death it developed that the lots were owned by him in joint tenancy with his wife, and she was thereafter decreed to be the sole owner thereof by right of survivorship. Ernest F. Bergmann was appointed executor of the last will and testament of the deceased, and in the meantime numerous persons, claiming to have furnished labor and materials in the construction of the dwelling, filed their claims of lien and brought actions to foreclose. Among these claimants were the Southern Lumber Company, E. C. Power, Bryant B. Bailey, James S. Simpson, S. H. Thompson, and Frank A. Bell, and in each action said executor and Louise Bergmann were made defendants. The executor denied ownership and all responsibility in the matter. Louise Bergmann also answered, denying the allegations of the respective complaints, and, with regard to that of the Southern Lumber Company, alleged that, after the abandonment of the work by Allison, she and her husband, then living, made written demand upon this corporation, as surety on the bond, that it fulfill the contract, that it failed to do so, and that consequently she and her husband were forced to take over and complete the work; further alleging by way of counterclaim that, by reason of such failure, she was compelled to expend $8.577 over and above the contract price in completing the structure.

The actions were consolidated for trial. Among other things, the court found that the bond was executed for a sufficient consideration by the contractor as principal and Southern Lumber Company and W. F. Button as sureties, guaranteeing performance by the contractor and agreeing to deliver to the owner the building and premises free and clear of incumbrances. Judgment was entered in favor of Louise Bergmann upon her counterclaim in the sum of $2,528.76; also in favor of the several claimants against the contractor, and the Southern Lumber Company as surety. The lumber company was allowed nothing on its claim, and it was decreed that none of the claims should be enforced against the property.

The lumber company and claimants Power, Bailey, Simpson, Thompson, and Bell have appealed from the judgment.

The company claims that no cause of action upon the bond was stated in the complaints; that the admission of the bond in evidence over objection was error; that Louise Bergmann had no cause of action against the company and that the sureties upon the bond were released from liability by changes in the plans as the work progressed; further, that certain findings are unsupported. The other appellants contend that they were entitled to a judgment against the property as well as against the contractor and his sureties.

[1, 2] As to the pleadings, it was alleged that a bond was executed, and a copy thereof was in some instances annexed thereto as an exhibit. No objection was made by demurrer or otherwise to the sufficiency of any of the pleadings, and the cause appears to have been tried on the assumption that they stated a cause of action on the bond. Where such is the case, objections to the pleadings will be deemed to have been waived. Wagner v. Ruppe, 56 Cal. App. 233, 204 P. 1095. Moreover, where several actions for the foreclosure of mechanics' liens and for judgments against the contractor and his sureties are consolidated for trial, the allegations of the various complaints may be taken together and treated as one pleading; the allegations in one remedying defects or omissions in another. Tyler v. Mitrovich Building Co., 47 Cal. App. 59, 190 P. 208.

[3, 4] With regard to the claim of Louise Bergmann, while as a rule the act or contract by one joint tenant respecting the joint property without the authority or consent of his cotenant cannot bind or prejudicially affect the latter (33 Cor. Jur. "Joint Tenancy," § 22, p. 913), where the act of one joint tenant is beneficial to his cotenant, such act will be regarded as the act of all in so far as sharing in the benefit thereof is concerned (Crary v. Campbell, 24 Cal. 634). Mrs. Bergmann testified that she and her husband were building the house, and this was alleged in substance in her pleading. While she was not named in the bond, this evidence is sufficient to show that her husband was also acting for her in the transaction, and, notwithstanding the agency was undisclosed, she could maintain an action for damages on the contract. 1 Cal. Jur. "Agency," § 131, p. 854; Shader v. White, 173 Cal. 441, 160 P. 557; McKee v. Cunningham, 2 Cal. App. 684, 84 P. 260; Eddy v. American Amusement Co., 9 Cal. App. 624, 99 P. 1115; Wilcox-Rose Construction Co. v. Evans, 9 Cal. App. 118, 98 P. 83; Eldridge v. Mowry, 24 Cal. App. 183, 140 P. 978; Cowan v. Tremble, 111 Cal. App. 458, 296 P. 91.

The bond was signed by the contractor as principal and by W. F. Button as surety. There was also affixed thereto the name of the lumber company as one of the sureties. Its name, "Southern Lumber Co.," was placed thereon by means of a rubber stamp, be-

low which appeared the signature "M. E. McLeod, Asst.-Mgr." McLeod testified, in substance, that he signed the bond at the office of the lumber company; the purpose being that the company might get the business of furnishing the lumber on the job. He would not say that he affixed the stamp thereto, but stated that he might have done so, and that the company had such a stamp at its office; further, that he acknowledged its execution before the attorney for the company, who was also a notary. He also testified that he owned no property. The record discloses no direct evidence of his authority to execute the bond on behalf of the company, or that the company was expressly empowered by its charter to do so. Button, who was also in the employ of the company, testified that the bond was brought to him by McLeod, who stated: "This is the bond for Allison for the Bergmann job. If you sign it we get the job." This witness further stated that at the time of its execution he was married and owned a home worth about $5,000, but had no other assets. After this transaction the attorney for the Bergmanns wrote to the lumber company, referring to the bond, and stating that the company had executed it as surety, and calling attention to the fact that the contract was not being performed according to its terms. No reply was made to the letter.

[5, 6] The rule appears to be well settled that trading corporations may in furtherance of their interests extend financial aid to their customers by way of guaranteeing their obligations; and guaranties of this nature are brought within the scope of the implied powers of the corporation. 7 Cal. Jur. "Corporations," p. 67. A corporation engaged in carrying on a business which it is authorized to do by its articles and the law under which it is organized, has implied power to make all contracts which are essential to the transaction of its ordinary affairs (Civ. Code, § 354, subd. 9, as it existed prior to the revision of 1931), or the making of which is an appropriate means by which it may reasonably be expected that the business in which the corporation is engaged will be advanced, or which tends directly to promote the business authorized by its articles and which it is doing (Woods Lumber Co. v. Moore, 183 Cal. 497, 191 P. 905, 11 A. L. R. 549); and it has been held that a lumber company may become surety on the bond of a building contractor to induce him to purchase of the company the lumber to be used in such building (Central Lumber Co. v. Kelter, 201 Ill. 503, 66 N. E. 543).

[7] It is a fair conclusion from the evidence that McLeod was in charge of the company's business at the place where the bond was signed; and, as stated, the company was later notified of the claim that it had executed the same. If a corporation allows its officers to conduct its business, and third parties act upon the apparent authority thus shown, it cannot defeat the rights of such persons arising from transactions done and completed under such ostensible authority. Venice v. Short Line Beach Land Co., 180 Cal. 447, 181 P. 685.

[8] While ordinarily the fact that a letter is received containing false statements does not impose upon the recipient the duty to reply thereto, nevertheless this depends upon the circumstances, and, as said by Mr. Wigmore, "each case must stand upon its own facts." 2 Wigmore, Evidence, § 1073. The test is found in whether the circumstances are such that in the ordinary practice of mankind the party receiving it would have answered it if he did not acquiesce in the statements it contained. 22 Cor. Jur. "Evidence," § 364, p. 326. The ground of admissibility, however, is not that the letter affords any proof that the statements therein are true, but that silence, when such statements are calculated to draw forth a reply, may be the ground for an inference that the statements are true. Keeling-Easter Co. v. Dunning, 113 Me. 34, 92 A. 929; Ross v. Reynolds, 112 Me. 223, 91 A. 952. Here the inference sought to be drawn was the existence of a contract; and the instances in which such letters have been admitted have usually been cases where they were part of a mutual correspondence, or referred to an existing contract. See notes, Ann. Cas. 1917D, 790; 8 A. L. R. 1163; 34 A. L. R. 560; 55 A. L. R. 460.

[9-11] In the present case, while there was no previous correspondence or contract directly between the company and the owner, we have the circumstance that the lumber company was furnishing the lumber to be used in constructing the dwelling, which it knew was being erected by Allison as contractor; and when during the course of construction a claim was made by the owner that the company was surety for performance by Allison, and that the latter was failing to comply with his contract, the letter reasonably called for some reply. How much weight should be given the fact that no reply was made was of course a question for the trial court, but that it had some probative value seems clear, and this conclusion is supported in principle by the following cases: Ross v. Reynolds, supra; Keeling-Easter Co. v. Dunning, supra; Sonnesyn v. Hawbaker, 127 Minn. 15, 148 N. W. 476; Clay v. Brown, 148 Mo. App. 541, 128 S. W. 803; Downs v. Racine-Sattley Co., 175 Mo. App. 382, 162 S. W. 331; Harmon v. Leberman, 39 Tex. Civ. App. 251, 87 S. W. 203; Mahoney v. Kennedy, 172 Wis. 568, 179 N. W. 754; Murphey v. Gates, 81 Wis. 370, 51 N. W. 573. Furthermore, if McLeod was without authority to execute the

bond, the fact was peculiarly within the knowledge of the company, and, notwithstanding this, it offered no evidence on the question. The case is, we think, within the rule that, where the evidence tends to prove a material fact which imposes a liability upon a party, the failure to produce evidence to the contrary where he has the power to do so is ground for the inference that such evidence, if produced, would be unfavorable to him. Wigmore, Evidence, § 285; Bone v. Hayes, 154 Cal. 759, 99 P. 172; Alloggi v. Southern Pacific Co., 37 Cal. App. 72, 173 P. 1117. We are satisfied that sufficient was shown to warrant the admission of the bond in evidence, and to reasonably justify a finding that the company was bound by the act of McLeod.

[12, 13] In this connection it is urged that there was no allegation or finding that the lumber company was estopped to deny that it became a surety. As stated, the pleadings alleged, in substance, that the bond was executed by the lumber company as surety. In an action based upon a contract made by an agent, it is proper to allege that it was made by the principal; and the rule is the same where an ostensible agency based upon estoppel is sought to be established (Resetar v. Leonardi, 61 Cal. App. 765, 216 P. 71), and the findings may follow the language of the pleadings, which was done here (24 Cal. Jur. "Trial," § 213, p. 985).

[14] As work by the contractor progressed, changes were made therein which did not correspond in every particular with the original plans and specifications. It is claimed that this released the sureties from liability.

The contract provided that, should the owner or architect at any time during the progress of the work request any alterations in, additions to, or omissions from the contract, with the plans and specifications, either of them should be at liberty to do so, and the same should not in any way affect or make the contract void. Where a building contract contains such a provision, the surety will be presumed to have known thereof and to have agreed to be bound thereby. People's Lumber Co. v. Gillard, 136 Cal. 55, 68 P. 576; Roberts v. Security Trust & Sav. Bank, 196 Cal. 557, 238 P. 673.

The lumber company claims that certain findings are unsupported. The court found that demand was made by Louise Bergmann that Allison and the company complete the contract. Several letters were written by the attorney employed by her husband and the architect, making such demands. As stated, her husband was her agent, and these demands inured to her benefit. The court found that she was forced to take over and finish the work and to expend certain sums therefor. It is not disputed that due to the default of the contractor her husband took over the work, and that upon his death she continued it, and the evidence was amply sufficient to show the amount found to have been expended in completing the building.

One of the objections in this connection made by the lumber company seems to be that she was not a party to the contract, and not concerned with the completion of the structure. For the reasons stated above, this contention is untenable.

Other findings are attacked upon the ground that they erroneously assume that the lumber company executed the bond, and are consequently unsupported; but, as stated, the evidence sufficiently sustains the conclusion that the company became a surety. Other objections to the findings are also without merit.

[15] The court refused to allow proof by the lumber company of its claim for materials furnished. This was proper, as a surety on a building contractor's bond who has guaranteed the delivery of the building free of liens, as was the case here, cannot enforce a lien against the property. 17 Cal. Jur. "Mechanics' Liens," § 48, p. 80; Blyth v. Robinson, 104 Cal. 239, 37 P. 904; Ganahl v. Weir, 130 Cal. 237, 62 P. 512; Burnett v. Glas, 154 Cal. 249, 97 P. 423; Barrett-Hicks Co. v. Glas, 9 Cal. App. 491, 496, 99 P. 856.

[16, 17] With regard to the appeal by the parties other than the lumber company, as stated, the trial court refused to decree a lien in their favor against the property. They contend that no equities were shown which justified the court in so limiting their relief.

At the time of the transaction, section 1183 of the Code of Civil Procedure provided: "* * * In case said original contract shall, before the work is commenced, be so filed, together with a bond of the contractor with good and sufficient sureties in an amount not less than fifty (50) per cent. of the contract price named in said contract, which bond shall in addition to any conditions for the performance of the contract, be also conditioned for the payment in full of the claims of all persons performing labor upon or furnishing materials to be used in such work, and shall also by its terms be made to inure to the benefit of any and all persons who perform labor upon or furnish materials to be used in the work described in said contract so as to give such persons a right of action to recover upon said bond in any suit brought to foreclose the liens provided for in this chapter or in a separate suit brought on said bond, then the court must, where it would be equitable so to do, restrict the recovery under such liens to an aggregate amount equal to the amount found to be due from the owner to the contractor,

and render judgment against the contractor and his sureties on said bond for any deficiency or difference there may remain between said amount so found to be due to the contractor and the whole amount found to be due to claimants for such labor or materials or both." St. 1911, p. 1313. The record contains no evidence as to the sufficiency of the lumber company as a surety; but it appears beyond question that the bond was executed for the purpose of complying with the statute, and it is presumed that none of the parties intended to commit a fraud by filing an insufficient bond. The burden of showing its insufficiency rested upon appellants. Tyler v. Mitrovich, etc., Co., supra; Sudden Lumber Co. v. Singer, 103 Cal. App. 386, 284 P. 477.

[18, 19] The amount of the bond was $7,950; and as to Button, the other surety, it is clear from his testimony that he was not a good or sufficient surety either at the time the bond was executed or subsequently. The bond provided, in accordance with the above section, that the persons for whose benefit it was given should have a right of action thereon in any suit to foreclose a lien provided for in chapter 2 of title 4 of part 3 of the Code of Civil Procedure, or in a separate suit on the bond. The purpose of such a bond was to create an additional fund or security for the satisfaction of lien claimants (Sunset Lumber Co. v. Smith, 91 Cal. App. 746, 267 P. 738; Hubbard v. Jurian, 35 Cal. App. 757, 170 P. 1093; 17 Cal. Jur. "Mechanics' Liens," § 46, p. 75), and to limit the owner's liability to the contract price (Roystone Co. v. Darling, 171 Cal. 526, 154 P. 15; Sudden Lumber Co. v. Singer, supra). It has been held that to have the latter effect it must conform to the statutory requirement that the sureties be good and sufficient. S. R. Frazee Co. v. Arnold, 46 Cal. App. 74, 188 P. 822. However, as provided by the statute and held in the case last cited, the court has discretionary power in cases of this character, and its conclusion that it would be equitable to restrict the recovery to the contractor and his sureties cannot be disturbed in the absence of a plain abuse of discretion. Here there appears no question regarding the sufficiency of the lumber company as a surety, or its ability to meet all demands against it under the bond. Doubtless this was one of the considerations which moved the court to restrict recovery to a judgment against the contractor and his sureties; and we cannot say that it abused its discretion in so doing.

We are satisfied that the conclusions of the trial court are fairly sustained, and that no error has been shown which would warrant a reversal of the judgment.

The judgment is affirmed.

125 Cal.App. 234

FERRIS v. COOPER et al.

Civ. 735.

District Court of Appeal, Fourth District, California.

Aug. 4, 1932.

Rehearing Denied Aug. 29, 1932.

1. Chattel mortgages ⇐172(5).

In claim and delivery action, mortgagee could not justify taking of mortgaged personalty without establishing terms of note and mortgage or that mortgagor had defaulted or breached mortgage.

2. Replevin ⇐82.

$800 damages for seven months' detention of well-drilling equipment valued at $1,200 *held* not excessive.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Savia Ferris against C. A. Cooper and others. From an adverse judgment, the named defendant appeals.

Affirmed.

Strother P. Walton, of Fresno, for appellant.

J. E. Manning, of Sanger (Fred Baruch, Jr., of Fresno, of counsel), for respondent.

MORTON, Justice pro tem.

Plaintiff filed an action of claim and delivery against defendants for a well-drilling rig and equipment which she alleged defendants had taken possession of without her consent. She secured judgment for its return, or its value in the sum of $1,200 as determined by the trial court, together with $800 damages for its detention.

It appears that plaintiff was indebted to defendant Thompson, and with Thompson's authorization in October, 1926, gave a chattel mortgage on the well rig and equipment to defendant Cooper for $401. Thompson was indebted to Cooper in excess of the amount of the mortgage. Plaintiff had paid Cooper $100 on this mortgage at the time of the taking of the well rig outfit which was located on a rented lot in Sanger and the tools for same were in a locked shop situated on an adjoining lot. She had previously endeavored to sell the outfit to Thompson, but he could only buy if Cooper would finance him, which Cooper refused to do. Shortly thereafter Thompson wired plaintiff at Oakland for permission to use the tools, which permission was not granted. Cooper then went to Oakland to see plaintiff about the well rig outfit, but no definite agreement was reached. Defendants took possession of the well rig about April 16,

1929. The tools were secured by breaking open the shop. Some necessary repairs were made and the outfit put to their own use.

[1] Defendant Cooper appeals, contending that he was entitled, under the terms of his chattel mortgage, upon default, to take possession of said personal property and therefore a claim and delivery action would not lie against him. No evidence was offered as to the terms of the note secured by the chattel mortgage or that respondent was in default as to said note and chattel mortgage. No evidence was introduced to show a breach of any obligation or promise of the mortgagor. Appellant Cooper therefore has no basis upon which to justify a taking under the terms of his chattel mortgage. We are also unable to find satisfactory evidence upon which to support appellant's contention that plaintiff instructed him to turn the property over to Thompson and Peterman.

As to appellant being directly involved in the taking possession of the property, we find this testimony on his cross-examination:

"Q. Did you turn the rig over to Mr. Thompson? A. Yes.

"Q. You did, yourself, personally? A. Yes, sir.

"Q. Did you tell Mr. Thompson to go and break into the shop and get the tools and parts of the rig? A. No, I didn't know as anybody broke into the shop.

"Q. Well, did you tell him to go into Mrs. Ferris' shop and get the rig—the tools and the things that were in there? A. No, I don't think I did.

"Q. Well, did you—did you not tell Mr. Thompson that that shop—that that building belonged to you and you had a right to go into your own property? A. Well, I might have said—well, I don't know—'I don't see how she can hold this, have the door locked there and never turn it over, and turn me over the rest of it. How am I going to get what belongs to me.'"

In the testimony of defendant Thompson we find the following:

"Q. You just went back and took it. Did you tell Mr. Peterman to break the lock on the shop of Mrs. Ferris? A. I did. * * *

"Q. You wanted to make some casing and could not get into the building, is that it? You knew, that building belonged—was rented by Mrs. Ferris, didn't you? A. Yes, sir.

"Q. Still knowing that it was Mrs. Ferris' property in there, you told Mr. Peterman to break the lock, is that it? A. I had authority to break the lock.

"Q. What? A. I had authority from Mr. Cooper for that.

"Q. You had authority from Mr. Cooper to break into the premises of Mrs. Ferris? A. Yes, sir.

"Q. I see. So Mr. Cooper told you to go and break that lock? A. He did."

Considering all this evidence it appears that the taking was the joint act of all three defendants, Cooper, Thompson, and Peterman, and that the property remained in their possession. No definite deal was consummated between Cooper and Thompson whereby Thompson would acquire Cooper's interest. It presumably remained under the joint control of the three defendants; however, Cooper seems to have had the greatest interest because of his former chattel mortgage rights. In claim and delivery, defendants' possession may be actual or constructive. Eastern Outfitting Co., Inc., v. Myers, 39 Cal. App. 316, 180 P. 669; Taylor v. Bernheim, 58 Cal. App. 404, 209 P. 55.

Appellant states: "Since Thompson has not appealed, appellant Cooper is really not concerned with the value of the property as it is to be assumed that the judgment as to the possession of the property has been or will be satisfied." Although somewhat contradictory there is sufficient evidence to support the finding of the trial court as to a value of $1,200 for the well rig and tools.

[2] As damages for detention of the well rig and tools the trial court found for respondent in the sum of $800. Defendants had had possession of the personal property for approximately seven months and, according to the testimony of defendant Thompson, had used it on two well drilling jobs. "The ordinary measure of damages for the wrongful detention of property is interest. Where, however, the property has a usable value which exceeds the lawful rate of interest this rule has no application. In such a case the successful party is entitled to recover, as damages for the detention, the value of such use during the period that he was wrongfully deprived thereof. And this value is to be estimated by the ordinary market price of the use of such property." Tucker v. Hagerty, 37 Cal. App. 789, at page 791, 174 P. 908, 910. See, also, Smith v. Pilgrim (Cal. App.) 3 P.(2d) 573.

Respondent had operated the well drilling business since the death of her husband, approximately two and one-half years, taking contracts for boring wells, etc. She testified a fair rental value for the outfit would be $20 per day. The witness Brose, who was in the well-drilling business and operated a well rig similar to plaintiff's, gave testimony that he received for the use of his machine operated by an experienced man and one helper, $35 for a ten-hour day less 10 per cent. for cash. His experienced man re ived $180 per month, the helper 40 cents per hour. Therefore, by arithmetical computations the trial court could arrive at a fair rental value for the well rig and equipment.

There was sufficient evidence to show that a few months prior to the taking possession of

the personal property by defendants it was in fair running condition. In consideration of the fact that the defendants had possession of the personal property for seven months and had used it on at least two well-drilling jobs, we are of the opinion that the damages allowed were not in the least excessive.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

124 Cal.App. 744

JOHN v. ELBERTA OIL CO. et al.

Civ. 8303.

District Court of Appeal, First District, Division 1, California.

July 18, 1932.

Rehearing Denied Aug. 17, 1932. Hearing Denied by Supreme Court Sept. 16, 1932.

1. Mines and minerals ⇐78(2).

Provision authorizing lessee to cease producing oil if price fell below stipulated minimum *held* inoperative to prevent forfeiture, where drilling operations were never commenced.

2. Mines and minerals ⇐78(5).

Lessors who granted oil lessee extensions *held* not estopped to assert forfeiture when lessee failed to drill within extended period.

3. Mines and minerals ⇐78(3).

Where lessee agreed to drill for oil before specified date, lessor need not, as condition to forfeiture, give notice to commence drilling.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by G. A. John against the Elberta Oil Company and others, continued in the name of Alice V. John, as administratrix, on original plaintiff's death. Judgment for plaintiff, and defendants appeal.

Affirmed.

George W. Nilsson, of Los Angeles, and M. F. McCormick, of Fresno (Charles H. King and Ivan G. McDaniel, both of Los Angeles, of counsel), for appellants.

F. A. Knight, of Long Beach, for respondent.

TUTTLE, Justice pro tem.

This is an action to quiet title to real property and to forfeit a lease upon the same. Judgment was entered forfeiting the lease, and defendants appeal therefrom.

The complaint contains two causes of action: One, a simple action to quiet title, and the other setting up facts which it is alleged constitute a forfeiture of the lease. The answer, after denying the allegations of the complaint, sets up five defenses, all of which, except the third, are based upon waiver or estoppel. The lease in question is in the usual form of an oil and gas lease. The following portions thereof are pertinent to this inquiry:

"Covenants: Lessee shall enter upon any portion of lands above described, and shall commence actual operations for the drilling for oil thereon with a standard, rotary or combination rig, within two years from the date hereof, and shall prosecute the work so commenced diligently, continuously, and in good faith, with one crew (unforeseen accidents, delays by the elements or by strikes or causes beyond the control of lessee, Sundays and legal holidays excepted) until oil is found in paying quantities, or this lease abandoned by lessee."

"Time is the essence of this lease and it is mutually well understood and agreed by the parties hereto, that each and every express covenant and condition and obligation in this lease must be fully and specifically performed and within the time specified therefor."

"Conditions: It is mutually agreed that upon default by lessee in the performance of any of his agreements, or any of the conditions or stipulations required by him to be performed or observed, this lease shall cease, and lessors may then assume exclusive possession of said land, except as aforesaid. Lessors shall have no other remedy against lessee for breach of the whole or part of this contract beyond enforcing the forfeiture hereinbefore mentioned, and recovering actual damage herein agreed to be paid by lessee."

By mesne conveyances and assignments, defendants became interested in the lease as lessees or otherwise; and the lessors in said lease, by successive extensions, extended and postponed the time for the commencing of actual drilling operations up to and including the 1st day of January, 1929. Each of said extensions was given in writing by plaintiff G. A. John, who died while this action has been pending. We shall, however, designate him as "plaintiff" in this opinion. The term of the lease was twenty years from its date, November 30, 1920. It was provided therein that the lessee should pay the sum of $50 per month as rental, until the royalties provided for therein should amount to or exceed that sum. This rental was paid.

It is conceded that neither the original lessee nor any of his assignees ever actually commenced operations for the drilling of oil upon said premises, or any portions thereof. From the evidence it appears that defendants, from the year 1922 to 1928, were drilling for

oil upon another property which they had under lease, some quarter of a mile from the John premises. A well was brought in on this other property in 1928. In June, 1928, several months after this well was brought in, a Mr. Delaney, representing defendants, came to plaintiffs' ranch and said he wanted to select a drilling place thereon, and asked for an extension of twenty days within which to commence drilling. Plaintiffs thereupon extended the time seventy-five days, whereupon Delaney said: "Now, Mr. John, if I don't start operations in that time, I will gladly walk in here and hand you a quit-claim deed." In October, 1928, nothing had been done toward drilling on plaintiffs' land, and Mr. Nilsson, representing defendants, came to plaintiff and asked for an extension of time to March 31, 1929. On December 27, 1928, two representatives of defendants called upon plaintiff and requested another extension of time. The latter replied that he would have to discuss the matter with his wife before any extension was signed. No further extension was signed, and this action was commenced on February 1, 1929.

The court found, substantially, that no drilling was ever done upon the property; that plaintiffs did not advise defendants or anyone else that they would grant an extension to the defendants for drilling said land, up to March 31, 1929; that none of the defendants has ever been willing or ready to drill for oil upon said lands, under any conditions whatever; and that plaintiffs are not estopped to assert that defendants have forfeited all rights under said lease, but, on the contrary, all the rights of the defendants under the terms of said lease expired January 1, 1929. As law, the trial court concluded that defendants and each of them had no right, title, or interest in the real property described in said lease.

[1] It is first contended that the court erred in sustaining a demurrer to the third defense. The lease provided that, if the market price of oil was 35 cents per barrel or less, the lessee might, at his option, cease producing oil or developing oil wells until such time as the market price of oil should be more than 35 cents per barrel. The gist of the allegations of this defense is that "the market price of oil is less than thirty-five cents (35¢) per barrel of 42 United States gallons, and for that reason the defendants have exercised the option contained in said lease not to drill any oil wells upon the properties owned by the plaintiffs upon which the defendants have an oil and gas lease, as above alleged."

The ruling of the trial court was correct. The precise point was decided adversely to defendants' contention in the case of McComber v. Kellerman, 162 Cal. 749, 124 P. 431, 433, where a similar provision in an oil lease was under consideration. The court there said: "The language was evidently chosen upon the theory that he [defendant] should at all events begin the drilling of a well in good faith, but that, after having begun, he might be allowed to suspend such drilling until the price rose to 75 cents." We conclude that the obligation to commence drilling was entirely independent of any consideration based upon the price of oil, and that the provision giving the lessee the option to cease producing or drilling was not operative until operations had actually commenced. The third defense contained no allegations to the effect that drilling operations had commenced, and therein it was vitally defective.

[2, 3] It is contended that the finding to the effect that plaintiffs are not estopped to assert a forfeiture is not supported by the evidence. It has been held in this state that "the rule that forfeitures are not favored in law does not apply to oil and gas leases." Hall v. Augur, 82 Cal. App. 594, 256 P. 232, 235; Acme Oil & Mining Co. v. Williams, 140 Cal. 681, 74 P. 296. Bearing in mind the foregoing rule, we shall proceed to examine more specifically the points raised. It is claimed that lessors "waived their right of forfeiture by their course of conduct for more than six years after the expiration of the two years provided in the lease as the time within which drilling shall be commenced. Before the lessors can reinstate their right of forfeiture they must give the lessees reasonable notice of their intention to demand strict compliance with the terms of the lease." In support of this contention, appellants rely upon that line of cases which follow the rule laid down by Thornton in his work on oil and gas. He there states that "when rent was accepted by the lessor, with knowledge on his part that the lessee was every day violating the covenants of the lease, it was held that the lessor accepting rent could not declare a forfeiture without a reasonable prior notice that further non-compliance would not be waived." (4th Ed.) 1925, p. 553, § 184.

It will be observed that in the instant case there was no "violation" of the lease during the six-year period. Each extension of time within which to drill was made by the written consent of the plaintiffs. It was only when no work had been done during the last period, from October 1, 1928, to January 1, 1929, that an actionable breach occurred, and immediately thereafter plaintiffs notified defendants that the lease was forfeited. It cannot be said that there was any acquiescence in the breach upon which this action is predicated; hence the rule quoted from Thornton is not applicable. The following cases relied upon by appellants: Consumers' Gas Trust Co. v. Ink, 163 Ind. 174, 71 N. E. 477; Consumers' Gas Trust Co. v. Littler, 162 Ind. 320, 70 N. E. 363, and Denniston v. Kenova Oil Co., 187 Ky. 831, 220 S. W. 1078—are all predicated upon a situation where the lessor has lulled the lessee into a feeling of security and where it

would be wholly inequitable to declare a forfeiture based upon a breach which had been virtually condoned. No such facts are presented by this record. Other cases relied upon, such as Johnson v. Armstrong, 81 W. Va. 399, 94 S. E. 753, do not specify that drilling operations should commence within a certain time. In such cases the court stated that a forfeiture should not be declared until the lessee had notice to comply with the condition to drill within a reasonable time. Where, however, the lessee has agreed and is charged with knowledge that he must drill before a specified date, we do not believe that, upon a failure to do so, a forfeiture should be denied upon the mere failure to give notice that drilling must be commenced at some future date. It is only the absence of a certain expiration date which gives rise to the rule in the Johnson Case.

Other authorities cited by appellants have been given careful consideration. They are based, on the whole, upon equitable consideration arising out of the peculiar facts existing in each. Viewing the evidence here from every angle, we cannot see how the trial court could have reached any other conclusion than that pronounced. For some six years defendants held the lease only through the generous acts of their landlord in granting extensions. To say that such acts were "misleading" and "inequitable" is, in truth, "biting the hand which had fed them." Surely, equity should not assist them under such circumstances.

We conclude, therefore, that the findings are amply supported by the evidence, and, the record being free from error, it is ordered that the judgment be, and it is hereby, affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

124 Cal.App. 730

CULLEY v. COCHRAN, Constable (ROSS, Intervener).

Civ. 899.

District Court of Appeal, Fourth District, California.

July 16, 1932.

1. Attachment ⇐348.

Indemnitor, having received notice of permission to defend action against constable, could defend without intervening or being substituted as defendant (Code Civ. Proc. §§ 385, 1055).

2. Attachment ⇐348.

That there were other indemnifiers on attachment bond would in itself be sufficient for not substituting such indemnifier as sole defendant in place of constable (Code Civ. Proc. §§ 385, 1055).

3. Appeal and error ⇐78(2).

Order substituting indemnitor for constable as sole defendant in action against constable, and discharging original defendant from all obligation, *held* appealable (Code Civ. Proc. §§ 385, 1055).

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by B. F. Culley against Lester L. Cochran, Constable of Westmoreland Township, Imperial County, wherein J. Edgar Ross intervened as defendant. From an order granting intervener's motion to be substituted for defendant constable as sole defendant and discharging constable from all obligations, plaintiff appeals.

Reversed.

Hickcox & Trude, of El Centro, for appellant.

J. Edgar Ross and Lester L. Cochran, in pro. per.

BARNARD, P. J.

On a former appeal in this action, this court reversed the judgment on the ground that an indemnifier on an attachment bond had been denied the right to participate in the trial and to defend the action after having been served with notice in accordance with section 1055 of the Code of Civil Procedure, and upon the ground that such a person had the right to defend the action without being substituted and without intervening. Most of the facts are set forth in the former opinion (107 Cal. App. 525, 290 P. 484, 486) and need not be here repeated.

After the filing of the remittitur, J. Edgar Ross, the indemnifier in question, moved the court for an order substituting him as sole defendant in the action in the place and stead of the constable, who was named as sole defendant in the complaint. This motion was granted and an order entered substituting Ross for the constable as sole defendant and discharging the said constable from all obligation. From this order the plaintiff in the action has taken this appeal.

[1] It is contended that the showing made in support of the motion was not sufficient to justify the order of substitution. The record discloses that the notice of motion and the order were both based entirely upon the statement that this court, upon the former appeal, had decided that Ross was entitled to be substituted for the original defendant in the action. This court did not so intend to decide, and could hardly have done so, as such an issue was not then presented. Ap-

parently a confusion has arisen because in our former opinion we used this language: "But we think Ross had a right either to intervene, to substitute himself as a party, or to proceed with the action in the name of the original defendant." While that was apparently true, so far as the facts appeared in the record then before us, it was by no means the holding of the court nor was it thus held that Ross should be substituted as sole defendant. While the language we there used is justly subject to criticism as being too broad and unnecessary to the decision, considered in connection with the rest of the opinion, it can hardly be taken as directing the entry of such an order as the one now appealed from. Immediately following the sentence quoted, we said: "Not having intervened or been substituted, he still had the other right. The record conclusively shows that this was his intent; that he had given ample notice thereof; and that he was actually in court demanding the right to conduct the defense of the case in the name of the original defendant." Earlier in the opinion, after giving reasons why such an indemnifier should, under section 1055 of the Code of Civil Procedure, be given rights equal in this respect to one who is substituted under section 385 of this Code, we said: "The natural implication from the section itself" (sec. 1055, Code Civ. Proc.) "is that the party notified is to be permitted to conduct the defense of the action in the name of the original defendant. There is no provision anywhere that he must be made a party to the action, by substitution or intervention, before he may make such defense." Our conclusion was thus stated: "In effect, the trial court held that although Ross, having received the notice provided for in section 1055, was the real party in interest and would be bound by the judgment, he could not defend the action unless he intervened or unless he was substituted as a party. We think this is not the law." The whole purport of our decision was to the effect that the respondent Ross had a right to defend the action without intervening and without being substituted.

[2] Not only do we think the record contains no showing sufficient to justify the order made, but the claim is now advanced that there are other indemnifiers or sureties on this attachment bond, whose liability would be affected by substituting Ross in place of the officer as the sole defendant. If such is the case, this in itself is a sufficient reason for not substituting Ross alone as the sole defendant.

[3] The respondent maintains that the order appealed from is not an appealable order. It purports to substitute Ross as the sole defendant in the action and to discharge the original defendant from all obligation. It attempts to finally determine the rights of at least one party and we think it is therefore appealable. City of Los Angeles v. Los Angeles City Water Co., 134 Cal. 121, 66 P. 198.

The appellant contends that the respondent Ross has no right to participate in the defense of this action, since he alleged in his purported "complaint in intervention" that he "gave" an undertaking to the constable, but did not allege that he "executed" the same. We held in our former opinion that the rights of Ross depended, not upon his so-called complaint in intervention, but upon the facts shown. The court had found that he had "executed and delivered" an undertaking "by the terms of which he obligated himself to pay" the judgment. This finding was not attacked, and our attention was not then called to anything showing the contrary. The present appeal is taken on the judgment roll alone. The bond in question is not now, and never has been before us, and nothing appears in the judgment roll to show that Ross was not a surety on this bond, or to show that he was in fact the plaintiff in the other action in which the bond was given. If, however, as now stated in appellant's brief, the fact is that Ross was not a surety on the bond in the other action, section 1055 had no application, the constable gave notice to the wrong party, Ross had no right to conduct the defense, and everything else said in both of our opinions is inapplicable.

The order appealed from is reversed.

We concur: MARKS, J.; HARDEN, Justice pro tem.

124 Cal.App. 709

PEOPLE v. GREEN.

Cr. 228.

District Court of Appeal, Fourth District, California.

July 15, 1932.

Homicide ⇐254.

Evidence *held* sufficient to support conviction for murder in second degree (Pen. Code, §§ 187–189).

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

H. B. Green was convicted of murder in the second degree, and he appeals.

Affirmed.

Utley & Nuffer, of El Centro, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

HARDEN, Justice pro tem.

Defendant appeals from a judgment pronounced upon the verdict of a jury finding him guilty of murder of the second degree and from the order of the court denying his motion for a new trial. The information charged that on or about October 28, 1931, the defendant unlawfully killed and murdered Henry Lester Warren, sometimes known as Ed Warren, a human being.

There is but one point raised on the appeal. Contending that the evidence is insufficient to support the judgment, appellant asks that said judgment be modified, pursuant to the provisions of section 1181, subdivision 6, of the Penal Code, by reducing the offense from that of murder of the second degree to that of manslaughter.

Defendant and said Ed Warren had been employed in the baling of hay on a ranch near Bond's Corner in Imperial county. Warren was a large man and weighed 168 or 170 pounds, while defendant weighed only 103 pounds. During the morning of October 28, 1931, defendant, Warren, Mike Sunday, Cecil Wilson, and Husie Green, who was a nephew of defendant, went by automobile to Calexico. After their arrival at Calexico, the members of the party made several trips back and forth between Calexico and Mexicali, Mexico. On each trip to Mexicali they drank whisky. Defendant drank at least five glasses of whisky. After returning to Calexico, defendant and Warren argued about the weight of hay they had baled; defendant claiming that Warren had "shorted" him in the weighing. Warren threatened to drag defendant out into the street and whip him. At about 1 o'clock in the afternoon, defendant, Warren, Husie Green, and Mike Sunday left Calexico in Warren's car to return to their homes near Bond's Corner. Cecil Wilson returned in another car. On the return trip defendant and Warren continued to argue about the weights of the hay, and defendant called Warren a liar. When they had reached a point near what is called the Ten-Foot Drop, Warren stopped his car and pulled defendant out onto the road and struck him in the face twice, causing his mouth to bleed. During the course of the trouble, Husie Green took from defendant's pocket a knife which was "leaning out." Near this point, Cecil Wilson, traveling by automobile, came upon the scene. Sunday then got into Wilson's car and all parties proceeded a short distance to a house formerly occupied by Warren. Upon getting out of the automobile at said house, defendant, who was quite drunk, fell forward and struck his head against the spring shackle of the car, skinning his forehead. Defendant thereupon stated that he wanted to walk to his home, but was induced to wait. He went into the house and lay down. Warren had brought with him a luncheon which he divided between the parties. Defendant ate part of the food and drank some coffee. They remained there thirty or forty-five minutes. While at this place defendant stated to Warren, "Ed, you choked me down the road," to which Warren replied, "You know damned well I didn't." Defendant thereupon called Warren a liar, and Warren "got up and got straddle of defendant and started to push in on his chest." Warren was persuaded to get off defendant, and thereafter they appeared to become friendly. Defendant stated to Warren, "Ed, any one is a fool to be as good friends as we have been and get in a fight like that, aren't they?" Warren replied, "They sure are." Thereupon they shook hands. Defendant then said some one had taken his gun away from him and that he thought it had occurred while he was in Calexico; and he inquired if any one had his gun. He was told that he had not had any gun, but he contended to the contrary and continued to talk about it. The parties then prepared to leave said place for the purpose of taking defendant to his home. Before departure, Warren inquired of defendant in a joking manner, "You wont let your old lady jump onto me for bringing you in drunk?" to which he replied, "No, she wont bother you." They appeared to be friendly. Thus far the evidence is without substantial conflict.

The evidence of the prosecution's witnesses from this point on is substantially as follows: Warren and defendant proceeded to ride in Warren's car to defendant's home. Wilson and Husie Green rode in Wilson's car. On the way the cars became separated but met near defendant's home, where they were stopped, and the occupants conversed. Warren and defendant appeared to be friendly. Warren and defendant then drove into the yard surrounding defendant's house, followed shortly by Wilson and Husie Green in the other car. Warren brought his car to a stop near the northeast corner of the house. Defendant got out of the car, stepped to the door of the house on the north side near the northeast corner, procured a shotgun, and placed himself a few feet in front of the car. At that time Warren was seated in the front seat of the automobile on the left side behind the steering wheel. The door of the automobile to his immediate left was open and the window down. He was leaning over and was engaged in petting a dog. While he was thus seated, defendant shot him directly in the mouth. Warren died almost immediately. A charge of shot and the wadding from the shotgun shell were found embedded in the muscles of his throat. The testimony of a physician and surgeon was to the effect that the carotid artery was severed; that the injury and shock thus sustained by War-

ren were sufficient to render him unconscious instantly; that it would be unusual for a person after having received such an injury to take a step or make a move; that he would expect such person to collapse immediately in the direction in which he was leaning. He testified that the charge of shot had not spread to a width of over one and one-half inches, and gave it as his opinion that the gun was held at a point between five and ten feet from Warren at the time it was fired. The gun was a 16-gauge single-barrel shotgun, and the shell contained No. 5 or No. 6 shot. No footprints were noted in the immediate neighborhood of the automobile on the side on which Warren had been seated. He was found lying stretched out at right angles to the automobile with his feet resting on the running board. No blood was found on Warren's car.

Defendant's testimony was to the effect that he had not ridden to his home in Warren's automobile; that he had gone there in the automobile of Cecil Wilson; that upon arrival he had gone into his house; that shortly thereafter he heard a car drive up and stop and heard some one "holler"; that he walked to the door and saw Warren in his car; that Warren then said to him, "I will whip hell out of you and your wife both"; that Warren got out of the car; that defendant reached through a window, got his shotgun, and told Warren to stop; that Warren made another step and started for defendant; that defendant was in fear of being killed by Warren and fired under the influence of that fear. There was no claim that Warren was armed. Defendant's testimony was corroborated by that of his wife. The day following the shooting defendant was examined and found to have a cut one and one-half inches long above his left eye and a lump below his right eye. The inside of his lower lip was cut and his arms were scratched.

Appellant's contention that the evidence does not support the judgment is based upon the single fact that no blood was found upon Warren's car. Starting from this premise, he argues that Warren could not have been seated in the car at the time of the shooting, and contends that the jury should have accepted and acted upon defendant's version of the occurrences immediately surrounding the homicide. The point raised obliges us to examine the evidence to the extent of determining whether it is sufficient to support the verdict. We may not pass upon the weight of conflicting testimony.

We cannot say that the absence of blood on Warren's car after the shooting is so inconsistent with the other facts established by the prosecution as to require an adoption of defendant's evidence as to the occurrences at the time of the shooting. Under the peculiar circumstances it is very probable that, upon being shot, Warren slipped and fell headlong from his car in such a manner as to prevent its becoming spattered with any blood. That was evidently the view the jury took of the situation. We think there was ample evidence to support such view.

Said point as to what inferences might be drawn from the evidence raises the question of whether or not the evidence is sufficient to sustain the implied finding of the jury that in the shooting the defendant was actuated by malice. If there was malice, either express or implied, the homicide was murder. Sections 187, 188, 189, Pen. Code. We think the evidence was ample to justify the finding that defendant was actuated by malice at the time of the shooting. Considerable time had elapsed since the last dispute between him and Warren. They had spoken of their foolishness in having engaged in a fight and had shaken hands. They seemed to be on friendly terms and had ridden together from the scene of the last altercation to defendant's house. There was ample cooling time between the time of the trouble at the house formerly occupied by Warren and the shooting to warrant a finding that defendant was not acting under the influence of a sudden quarrel or heat of passion. Doubtless the jury charged the act to ill will engendered by what defendant regarded as mistreatment received by him at the hands of Warren earlier in the day.

There is no need for further discussion nor citation of authorities. Our conclusion that the evidence was sufficient to justify the jury in finding that in the commission of the homicide the defendant was actuated by malice is a complete answer to the only point raised on the appeal.

The judgment and order denying a new trial are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

125 Cal.App. 372

FRATESSA et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 8593.

District Court of Appeal, Second District, Division 2, California.

Aug. 16, 1932.

Rehearing Denied Aug. 29, 1932. Hearing Denied by Supreme Court Sept. 27, 1932.

Attorney and client ⇐75(1).

Plaintiff stockholders, supplanted by corporation and receiver, could not require substitution of attorneys, particularly where other attorneys were permitted to represent them on question of compromise settlement.

Application by Paul F. Fratessa and others for a writ of mandate to be directed to the Superior Court in and for Los Angeles County.

Peremptory writ denied without prejudice.

Rollin L. McNitt and David R. Faries, both of Los Angeles, and Stanislaus A. Riley, of San Francisco, for petitioners.

Joseph L. Lewinson and Hewitt, McCormick & Crump, all of Los Angeles, for respondent.

WORKS, P. J.

Petitioners and two others, as stockholders of the Sunset Pacific Oil Company, brought suit in respondent court for the purpose of procuring an accounting and to recover a money judgment from the defendants, excepting the corporation named, which was one of them. The suit was thus commenced because of the refusal of the corporation to begin such an action and was commenced for its benefit. Later the corporation filed a cross-complaint praying for the relief which plaintiffs had demanded in the complaint. Later still the property of the corporation was placed in the hands of a receiver under order of the United States District Court, and the receiver was substituted, in the action in the superior court, as cross-complainant in the place and stead of the corporation.

Counsel for plaintiffs, as it is alleged in the petition, without the knowledge or consent of petitioners, entered into and closed negotiations with the defendants for the purpose of compromising the subject matter of the suit, and at the time when the alternative writ in the present proceeding issued respondent court was engaged in the trial of the question whether the proposed compromise should be approved. Pending this trial, petitioners moved respondent court for a substitution of certain counsel in the place and stead of those attorneys who had theretofore represented plaintiffs in the action, and the motion was denied. Petitioners then asked this court for the writ of mandate for the purpose of compelling the substitution of attorneys, and an alternative writ issued. The paper also contained language prohibiting respondent court from proceeding with the trial of the compromise question.

All of the matters above alleged appear, among other things unnecessary to point out, on the face of the petition.

Upon the return day, respondents presented a demurrer to the petition and also an answer. Stipulations were then made which disposed of all questions of fact, and argument was presented upon the facts and upon the question of law raised by the demurrer together. The proceeding was decided from the bench, but, as the minutes of the court show the orders made in a somewhat informal style, an amended or corrected order changing the form, but not the substance, of the orders as shown by the minutes, is appended to this opinion. In the orders made from the bench no disposition was made of the demurrer to the petition. That omission is supplied at the end of the amended orders to which we have referred.

The reasons for our conclusions may be very briefly stated, although many points were made at the argument. We think the petitioners, together with the two others joined with them as plaintiffs in the action, have become supernumerary parties in the trial of the question whether the compromise shall be approved by the court, this because the corporation filed cross-complaint and because the receiver was substituted for it as cross-complainant. We think this substitution was the equivalent of a substitution of the receiver as plaintiff in the place and stead of the eight persons who filed the complaint. There is therefore no room for a substitution of attorneys to represent either those eight or a majority of them.

We entertain no doubt that the receiver, under the order of the United States District Court requiring him to take possession of the assets of the corporation, took over the chose in action upon which the suit was founded, and that he is therefore a proper plaintiff in the action.

At the hearing on the facts—law and facts having been presented together as above observed—it appeared that, while respondent court denied the motion for a substitution of attorneys, it was ordered that the counsel desired to be substituted might "appear and represent the plaintiffs whom they represent." These plaintiffs were the same persons who are petitioners in the present proceeding. The counsel last mentioned were then and had theretofore been present in court. The special order made by the court would seem to have given the counsel the same powers, in so far as the question on trial was concerned,

as would have been conferred upon them by a formal substitution.

The mandatory portion of the writ is vacated, and a peremptory writ of mandate is denied without prejudice to a future application for the writ of mandate if respondent court shall refuse to approve the compromise now before it for approval. The prohibitive features of the writ are vacated. Demurrer sustained.

Justice IRA F. THOMPSON, although present on the bench when this proceeding was determined and participated in the decision, does not participate in the foregoing opinion, as he is now absent.

I concur: CRAIG, J.

PEOPLE v. SINCLAIR.*

Cr. 1663.

District Court of Appeal, First District, Division 1, California.

Aug. 11, 1932.

Rehearing Granted Aug. 26, 1932.

1. Poisons ⇐9.

In prosecution for unlawful "possession" of morphine, it was necessary to prove possession was immediate and exclusive and under defendant's dominion and control (Deering's Gen. Laws Supp. 1925–1927, Act 5994, § 8).

The word "possession," as used in Deering's Gen. Laws Supp. 1925–1927, Act 5994, § 8, means not only an immediate and exclusive possession on the part of the defendant, but also that such possession must be under his dominion and control.

[Ed. Note.—For other definitions of "Possession," see Words and Phrases.]

2. Poisons ⇐9.

Evidence *held* sufficient to sustain conviction of unlawful possession of morphine.

3. Poisons ⇐9.

It is not essential to conviction of unlawfully possessing illegal article, as morphine, to show defendant had illegal article on his person.

4. Poisons ⇐9.

In prosecution for unlawfully possessing morphine, instruction that defendant was guilty if he aided and abetted, or, not being present, advised and encouraged another to obtain possession, *held* erroneous as omitting elements of dominion and control.

5. Criminal law ⇐823(4).

Conviction for unlawfully possessing morphine *held* not reversible for erroneous charge on possession, where facts established all elements of possession as defined in instruction previously given.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

William Sinclair and another were jointly convicted of unlawful possession of morphine, and Sinclair appeals.

Affirmed.

Walter H. Duane, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

KNIGHT, J.

The appellant, Sinclair, and one Harry Stauch were charged jointly with having had in their possession unlawfully a quantity of morphine. They were tried together and found guilty; and each was sentenced to imprisonment in the county jail for ninety days. Sinclair appealed, and as grounds for reversal urges that the evidence as to him is insufficient to sustain the conviction, and that the trial court erroneously instructed the jury.

There is no dispute about the facts. It appears therefrom that, pursuant to a prearranged plan, an inspector of the state narcotic division named Nelson and an informer were standing on the corner of Hyde and McAllister streets in San Francisco about 6 o'clock in the evening, and in a few minutes an automobile driven by appellant approached the corner and stopped. The informer introduced Nelson to appellant, whereupon Nelson and the informer entered the automobile and occupied the rear seat. Nelson then told appellant that he wanted to buy some morphine for his "old lady." Appellant inquired whether he "wanted to make a regular meet with him every day," and Nelson replied that he did. Nelson and the informer then paid appellant $2.50 each in marked money for the purchase of the morphine, and appellant proceeded to drive up McAllister street. Upon reaching the corner of Polk and McAllister streets, appellant stopped the automobile and picked up his codefendant Stauch. The automobile then turned up and proceeded along Polk street, but traveled only a few yards when it was crowded to the curb and stopped by an automobile driven by another state narcotic inspector named Conley. When appellant observed the Conley car closing in on him, he directed Stauch to "drop the window and throw that out," and, complying with such

directions, Stauch immediately threw a match box out of the window into the street; and, as soon as the car was stopped, Nelson alighted, picked up the match box, and it was found to contain two cubes of morphine.

[1-3] Where, as here, possession as distinguished from sale is charged, in order to establish guilt it is essential to prove that the possession was immediate and exclusive and under the dominion and control of the person charged with such possession. People v. Herbert, 59 Cal. App. 158, 210 P. 276. The jury in the present case was so instructed, and the foregoing facts are amply sufficient to establish all of the elements of the crime. As will be noted therefrom, appellant was in the exclusive control of the automobile; he bargained for the sale of the morphine, and accepted the money therefor; he picked up the person having physical possession of the morphine; and the morphine was subject to and under appellant's dominion and control because it was thrown out of the automobile when appellant so directed. Appellant argues that it is necessary to show that the person accused has the unlawful article on his person, but he has called our attention to no case so holding; and manifestly such is not the law, because, if it were, it would exclude entirely from the operation of the statute (Deering's Gen. Laws Supp. 1925–1927, Act 5994, § 8) cases of joint possession or possession by carrying the illegal article in an automobile or other conveyance, or keeping it in some place under the immediate and exclusive control of the accused.

[4, 5] The court also gave the following instruction: "* * * All persons concerned in the commission of a crime, whether they directly commit the act constituting the offense or aid and abet in its commission, or not being present have advised and encouraged its commission, are principals in any crime so committed. So that in the case before you, if you are satisfied beyond all reasonable doubt that the defendants, or either of them, directly committed the crime charged, or that they, or either of them, aided and abetted in its commission, or not being present advised and encouraged its commission, you are justified in finding them guilty as principals." The rule embodied in said instruction evidently has no application to cases such as this where the accused is charged with possession, as distinguished from sale, for, as the court previously instructed the jury, the word "possession" as used in the statute means, not only an immediate and exclusive possession on the part of the accused, but also that such possession must be under his dominion and control. Therefore an instruction to the jury that the accused is guilty of possession if it be established merely that he aided or abetted, or not being present advised and encouraged, another to obtain and have possession of the illegal article, does not correctly state the law because it omits the elements of dominion and control. The giving of the instruction does not call for a reversal of the judgment, however, for the reason that the facts above narrated are amply sufficient to establish all the elements of possession as that term was defined in the instruction previously given.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

125 Cal.App. 196

DALTON v. LOS ANGELES COLLEGE OF CHIROPRACTIC et al.

Civ. 8431.

District Court of Appeal, Second District, Division 1, California.

July 30, 1932.

Rehearing Denied Aug. 27, 1932.

1. Appeal and error ⇐1011(1).

Judgment will not be reversed merely because there is conflict in the evidence.

2. Evidence ⇐538.

Physician, experienced in observation and treatment of burns, including electrical burns, *held* competent to testify concerning propriety of diathermy treatment given by chiropractor alleged to have burned patient.

3. Appeal and error ⇐1135.

Questions raised by appellant *held* so unsubstantial as to require judgment be affirmed (Rules of the Supreme Court and District Courts of Appeal, rule 5, § 3).

Questions raised merely involved conflict of evidence, and competency of physician to testify concerning propriety of treatment given by chiropractor charged with having burned a patient while giving a diathermy treatment.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by George E. Dalton against Los Angeles College of Chiropractic and Charles Henry Wood. From judgment for plaintiff, Charles Henry Wood appeals. On respondent's motion to dismiss or affirm.

Affirmed.

Joe Crider, Jr., and Elber H. Tilson, both of Los Angeles, for appellant.

Stephen Monteleone, of Los Angeles, for respondent.

CONREY, P. J.

This motion to dismiss appeal or affirm the judgment is made upon the ground that the appeal is taken for delay only, and on the further ground that the questions upon which the decision of the cause depends are so unsubstantial as not to need further argument. The motion is based upon appellant's opening brief, and on the transcript, and on the points and authorities of respondent in support of the motion.

This motion is made under the new section 3 of rule V of the Rules of the Supreme Court and District Courts of Appeal, which was printed in The State Bar Journal of June, 1932, at page 138. This is a new section which became effective July 1, 1932, and this is the first motion which has been presented for consideration to this court under the new rule. The new section reads as follows: "At any time after the filing of the opening brief of an appellant in a civil action, the respondent may, upon due notice, move for a dismissal of the appeal or an affirmance of the judgment or order on the ground that the appeal was taken for delay only or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. A motion to dismiss may be united in the alternative with a motion to affirm. Although the court may, upon consideration of the motion to dismiss or the motion to affirm, refuse to grant the motion, it may, if it concludes that the case is of such a character as not to justify further argument, order the cause transferred to a 'ready for submission docket.' Causes on the 'ready for submission docket' will be submitted and disposed of from time to time as the regular order of business will permit. If the respondent's brief is not on file at the time the motion is heard, the service and filing of the notice of motion to dismiss or affirm shall extend the time for filing respondent's brief until the expiration of ten days after decision of the motion, or such further time as the court may allow. The court, on its own motion, may issue an order to show cause why an appeal from any such judgment or order should not be dismissed or the judgment or order be affirmed on the ground that the appeal is frivolous or otherwise without substantial merit. If a dismissal of the appeal or an affirmance of the judgment be not ordered on the hearing of the order to show cause, the case may be transferred to the 'ready for submission docket' and be disposed of in like manner as on a motion to dismiss or affirm."

In the same number of The State Bar Journal, page 133 thereof, in an article concerning the new rule, the following statement is made:

"The genesis of this rule is found in rule 7, subdivisions 4 and 5, of the Supreme Court of the United States, promulgated in principle as early as December 22, 1911, and continued in amendments to the rules effective July 1, 1925, and July 1, 1928 (Pocket Supp., p. 10, vol. 1, U. S. Digest, 50 Sup. Court Rep. xxix), which provide as follows: 4. The court will receive a motion to affirm on the ground that it is manifest that the appeal was taken for delay only, or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. The procedure provided in paragraph 3 of this rule for motions to dismiss shall apply to and control motions to affirm. A motion to affirm may be united in the alternative with a motion to dismiss. 5. Although the court upon consideration of a motion to dismiss or a motion to affirm may refuse to grant the motion, it may, if it concludes that the case is of such a character as not to justify extended argument, order the cause transferred for hearing to the summary docket. The hearing of causes on such docket will be expedited from time to time as the regular order of business may permit. A cause may be transferred to the summary docket on application, or on the court's own motion. See rule 28, paragraphs 3 and 6.

"In the case of Grubb v. Public Utilities Commission, etc., 281 U. S. 470, 50 S. Ct. 374, 376 [74 L. Ed. 972], decided in 1930, the court, in commenting upon this rule (rule 7, sec. 4), says: 'The appellees now have interposed a motion, under subdivision 4 of rule 7 of the Rules of this court (28 USCA § 354), that the decree be affirmed without awaiting oral argument upon the ground that the objections taken to the decree are so unsubstantial as not to admit of debate; and the parties have submitted full briefs in this connection. * * * We think it follows from what has been said that the objections taken to the decree below are so unsubstantial that the motion to affirm without awaiting oral argument should be sustained. Decree affirmed.'

"To the same effect are numerous other cases, indicating the court's inclination to dispose of cases upon motion to affirm on the ground that the objections taken to the decree below are so unsubstantial as not to admit of debate.

"For the purposes of the motion to dismiss, says the Supreme Court of the United States in Louisville & N. R. R. Co. v. Melton, 218 U. S. 36, 49, 30 S. Ct. 676 [54 L. Ed. 921, 47 L. R. A. (N. S.) 84], the issue is whether it is apparent that the question has been so explicitly foreclosed as to leave no room for contention, and hence cause the question to be frivolous. The court, however, in this particular case, on motion to dismiss held that

the contention should not prevail even though it be admitted that a careful analysis of previous cases would manifest that they are decisive of the case at bar.

"These references to the rulings of the Supreme Court of the United States are illustrative of the position taken by that tribunal upon such motions. In fact, by reason of this and other expeditionary procedure, the Supreme Court of the United States is able to keep abreast of its docket.

"The new section 3, of rule 5, of the rules of the Supreme Court and District Courts of Appeal, is designed to accomplish this same purpose and to enable the court to place in a reservoir of cases that may be submitted from time to time, as the opportunity arises, all cases in which the court feels that the appeal was taken for delay or is not meritorious."

[1] In appellant's brief on this appeal it is said the questions involved are: "Whether or not appellant was guilty of malpractice; and whether or not malpractice of a chiropractor can be established by the testimony of a physician or surgeon." The first question is in substance a question arising out of appellant's contention that the evidence is insufficient to support the implied finding of the jury that the treatment administered by the defendant to the plaintiff was a treatment administered negligently and proximately resulted in the burns and other injuries alleged in the complaint. The alleged injuries occurred in connection with the application to the person of plaintiff by the defendant of an electrical appliance known as a diathermy machine. There is abundant evidence showing that appellant was a chiropractor engaged in practice as a chiropractic physician; that the plaintiff was his patient; that the diathermy machine was used by the defendant in the course of his treatment of the plaintiff and that the treatment, if administered in the manner described by some of the testimony, was improperly and negligently applied. Under these circumstances there are numberless authorities that a judgment will not be reversed merely because there is a conflict in the evidence.

[2] The second question suggested by appellant rests upon his contention that the court erred in admitting testimony of men of schools other than the chiropractic school to which appellant belonged, as to whether the treatment given was proper or improper; and particularly that the court permitted the witness Dr. Monteleone to give his opinion as to whether or not the treatment given in this particular case was proper or improper—all over the objection of appellant. Dr. Monteleone was a physician who, according to his own testimony, had professional experience in the observation and treatment of large numbers of cases wherein patients were burned in a variety of ways, including electrical burns. It also appeared that the use of diathermy is not peculiar to chiropractic practice, but is taught and included in the practice of the various schools of medicine; that the principal books and journals which discuss diathermy and the use of diathermy machines are written by medical authorities other than those of the chiropractic school. From these facts it is clear that Dr. Monteleone was a competent witness on the subject, notwithstanding the fact that he is not a chiropractic physician. Hutter v. Hommel (Cal. Sup.) 3 P.(2d) 554.

[3] Since it thus appears that, in the words of said section 3, rule V, "the questions on which the decision of the cause depends are so unsubstantial as not to need further argument," and that on the very face of the record the appeal is without merit, it is ordered that the judgment be and the same is hereby affirmed.

We concur: HOUSER, J.; YORK, J.

125 Cal.App. 201

THOMAS v. CAINE et al.

Civ. 7823.

District Court of Appeal, Second District, Division 1, California.

July 30, 1932.

Appeal and error ⇐1135.

Point presented on appeal *held* so manifestly lacking in merit as to justify inference that appeal was taken for delay only and to require affirmance (Rules of the Supreme Court and District Courts of Appeal, rule 5, § 3).

Point presented was that court erred in striking alleged affirmative defense that payee had orally agreed that note sued on would not be enforced until makers had sold realty acquired by them and in refusing to permit evidence in support of such defense.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Alfred Thomas against D. F. Caine, sometimes known as Daniel F. Caine, also known as Dan F. Caine, and another. From judgment for plaintiff, defendants appeal. On respondent's motion to dismiss appeal.

Judgment affirmed.

L. Lee Bernstein, of Los Angeles, for appellants.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Charles E. R. Fulcher, of Los Angeles, for respondent.

CONREY, P. J.

The action is on a promissory note dated March 14, 1930, and by its terms due ninety days after April 1, 1930. Judgment was entered in favor of the plaintiff, and the defendants appeal therefrom. Respondent moves to dismiss the appeal as one taken for delay only, and also as being an appeal which presents no substantial question.

For a statement concerning section 3 of rule V of this court, see decision this day rendered in Dalton v. Los Angeles College of Chiropractic, a Corporation, et al. (Cal. App.) 13 P.(2d) 546. As shown by the opening brief of appellants, the only error relied upon by them arises out of the fact that the court struck out their affirmative defense, and refused to allow them to introduce evidence in support of that defense. The alleged defense was that in the course of the transaction which led to the execution of the note there was an oral agreement between the parties that the payee would not enforce payment of the note until the defendants should dispose of certain real property acquired by them. There was no claim made by defendants asserting any fraud in connection with the making of the note, or any want of consideration therefor. The point presented in support of the appeal is so obviously without merit as to justify the inference that the appeal was taken for delay only. Lindemann v. Coryell, 59 Cal. App. 788, 212 P. 47.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

124 Cal.App. 721

W. C. COOK & CO., Inc., v. WHITE TRUCK & TRANSFER CO.

Civ. 386.

District Court of Appeal, Fourth District, California.

July 15, 1932.

Rehearing Denied Aug. 8, 1932.

1. Carriers ⇐134.

Evidence justified finding that private carrier did not use ordinary care to prevent shipment becoming rain-damaged.

2. Carriers ⇐107.

It was private carrier's duty to use "ordinary care" to prevent damage to merchandise shipped (Civ. Code, § 2114).

"Ordinary care" is such care as would be used by person of ordinary prudence under same or similar circumstances.

[Ed. Note.—For other definitions of "Ordinary Care," see Words and Phrases.]

3. Negligence ⇐136(14).

What facts are necessary to prove use of, or lack of, ordinary care, is usually fact question for trier of facts.

If different conclusion on the subject of negligence can be rationally drawn from the evidence, it is a question of fact; but, if only one conclusion can reasonably be drawn from the evidence, it is a question of law.

4. Trial ⇐105(2).

Private carrier failing to object to evidence respecting damages to shipment and to method of measuring damages accepted it as competent and that correct rule was being followed.

5. Damages ⇐157(1).

If plaintiff was entitled to recover, that he sought damages according to wrong measure would not preclude awarding damages to which he was entitled according to their true measure.

6. Carriers ⇐134.

Evidence *held* to authorize damages for private carrier's negligence in permitting shipment to become rain-damaged.

7. Carriers ⇐135.

Damages allowable for permitting shipment to become rain-damaged was difference between market values of shipment in good condition and of deteriorated product at destination.

8. Damages ⇐45.

Party who in minimizing damages from another's breach of contract incurs additional expenses in good faith may recover such expenses as item of damages.

9. Carriers ⇐135.

Private carrier *held* liable for costs of reconditioning figs and fig paste damaged through its negligence and for freight to shipper's plant for reconditioning and returning merchandise to destination.

10. Trial ⇐139(1).

Motion for nonsuit should be denied if there is any evidence tending to sustain action.

The motion for nonsuit admits the truth of plaintiff's evidence, and every inference of fact that can be reasonably drawn therefrom, and on such motion, evidence should be interpreted most strongly against defendant, and any evidence in conflict with that favorable to plaintiff may be disregarded.

11. Evidence ⊂474(20).

Shipper's employee familiar with proper condition and value of shipper's products *held* qualified to testify to damage caused to shipment by rain.

12. Appeal and error ⊂232(2).

Overruling objection to question whether shipper was damaged because merchandise was rain-soaked *held* not to authorize competency or relevancy of subsequent questions relating to damages to be raised for first time on appeal.

13. Appeal and error ⊂1010(1).

Reviewing court cannot disturb judgment, unless on no hypothesis is there sufficient substantial evidence to support it.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by W. C. Cook & Company, Incorporated, against the White Truck & Transfer Company. From an adverse judgment, defendant appeals.

Affirmed.

Louis, Quillian & Pool, of Los Angeles, for appellant.

Charles A. Hill, of Fresno, for respondent.

THOMSON, Justice pro tem.

This is an appeal by the defendant from a judgment of the trial court, sitting without a jury, in the sum of $850.26, in an action for damages for injury to certain dried figs and fig paste, by reason of rain damage, while being transported by defendant from Clovis, Fresno county, Cal., to San Pedro, Cal. Defendant also attempted to appeal from the order of the trial court denying its motion for a nonsuit. Defendant's notice of appeal also sets forth an intention to appeal from the order denying its motion for a change of venue, but appellant concedes that that part of its appeal is not well taken and it is therefore dismissed.

On or about October 30, 1927, respondent engaged the services of appellant to transport, for a valuable consideration agreed upon by the parties, two truck loads of packed dried figs and fig paste, from Clovis to San Pedro. Pursuant thereto appellant loaded the merchandise at respondent's manufacturing plant at Clovis and hauled it to the agreed point of destination, where it was found that a portion of the merchandise was wet. Respondent claimed that the merchandise became rain-soaked by reason of the negligence of appellant's agents in not properly protecting it from the rain while in transit. Appellant denied the negligence.

At the close of respondent's case in chief appellant moved for a nonsuit, which motion was denied, and appellant now claims that the trial court erred in denying such motion and sets forth the following grounds for such asserted error: (1) That there was no proof of negligence on the part of appellant, and (2) that respondent failed to prove damage.

Appellant contends that the trial court applied the law relating to the liability of a common carrier and, therefore, held the appellant to the liability of an insurer. Respondent does not claim that appellant was a common carrier, but admits that appellant was a private carrier at the time of the transaction involved in this case. Nor does the record disclose anything to indicate that the trial court applied the law relating to the liability of a common carrier, or held the appellant as an insurer.

[1] Mr. Allan H. Rabin was the only witness called by respondent to prove its case in chief. He testified, in substance, that he was employed by respondent and was in charge of respondent's sales; that he was present at Clovis when all of the merchandise was delivered to appellant and loaded on appellant's two uncovered trucks, referred to by the witness as "stakebody, flat body trucks"; that he then and there examined each case and each other package of such merchandise and that all the merchandise was dry and "in absolutely first-class condition" when so delivered; that the first load left Clovis some time on October 30th and the second on October 31st, at 4 o'clock in the morning; that there had been no rain at Clovis while the merchandise was being loaded, but that it began to rain on the morning of October 31st; that he saw the merchandise when it arrived in San Pedro and the cases containing the merchandise were water-soaked and the floor of the truck had water on it. Mr. Rabin also testified that, while the merchandise was being loaded at Clovis, he told appellant's driver that the packages contained figs. Two documents in evidence, which were identified by Mr. Rabin on cross-examination, showed that appellant knew that the merchandise to be shipped consisted of dried figs and fig paste. Mr. Rabin further testified that the tarpaulins used to cover the loads of said figs and fig paste on the trucks "appeared to be old and not in first class condition"; that the tarpaulins were thrown flat over the trucks, and flat on the load, without any ridge pole; that he was informed by the driver of one of the trucks that he was delayed for the reason that the truck "was stalled up on the Ridge Route because of a terrific rain."

[2-4] With such evidence before it, the trial court was justified in concluding that appellant, knowing the nature of the merchandise intrusted to its care, did not use ordinary

care in making such a long trip in rainy weather, with open trucks, using defective tarpaulins placed flat upon the loads of dried figs and fig paste, without the use of ridge poles. It was the duty of appellant as a private carrier to use at least ordinary care and diligence to prevent damage to such merchandise; that is, such a degree of care as would be used by a person of ordinary prudence under the same or similar circumstances (Civ. Code, § 2114; 4 R. C. L. p. 549; 4 Cal. Jur. p. 815; Garrette v. Grangers' Business Ass'n, 58 Cal. App. 396, 399, 208 P. 1010). What facts are necessary to prove the use of, or lack of, ordinary care in a given case is usually a question of fact for the jury, or the trial court if sitting without a jury (27 R. C. L. p. 1004; Garrette v. Grangers' Business Ass'n, supra. If different conclusions on the subject of negligence can be rationally drawn from the evidence, it is a question of fact; but, if only one conclusion can reasonably be drawn from the evidence, it is a question of law. Hoff v. Los Angeles Pacific Co., 158 Cal. 596, 599, 112 P. 53. In the instant case it cannot be said as a matter of law that the evidence failed to show a lack of ordinary care. In fact, there was ample evidence from which the trial court was justified in concluding that appellant failed to use ordinary care to prevent respondent's property from becoming rain damaged.

[5-7] Appellant further argues that respondent failed to prove any damages. It is appellant's contention that the basis of computing the damages to a shipment of merchandise of the character involved in this case is the difference between the market value of the commodity in good condition at the point of destination, and the market value of the deteriorated product at the same point, at the time of arrival. This is undoubtedly the rule as applied to perishable property. American Fruit Growers, etc., v. Pac. Elec. Ry. Co., 72 Cal. App. 682, 686, 238 P. 105; Murray v. Southern Pacific Co., 89 Cal. App. 741, 745, 265 P. 337; Murray v. Southern Pacific Co., 112 Cal. App. 150, 155, 296 P. 667. Although respondent apparently attempted to prove its damages in a different manner, that is, by having Mr. Rabin testify what the amount of loss was and then explain what that loss consisted of, appellant did not object to the introduction of such evidence, so far as the record discloses, nor suggest that a different method or measure be followed. This was in effect an acceptance of the evidence as competent upon the question of damage and that the correct rule for their measurement was being followed. As stated by the Supreme Court in the case of Durkee v. Chino Land and Water Co., 151 Cal. 561, 569, 570, 91 P. 389, 392: "If, in the opinion of defendant, the rule adopted" (for the measure of damages) "was not the correct one, it was defendant's duty to have objected to the evidence offered under it and to have insisted upon the proper rule being applied. This would have given counsel for plaintiff, if he was pursuing the wrong course, an opportunity for rectifying his mistake, or, in the event of dispute between counsel as to the true rule, would have afforded an opportunity to the court to declare it. * * * It is to be assumed that defendant deemed the rule which was followed as favorable to itself as any other which it might suggest." See, also, Phillips v. Stark, 186 Cal. 369, 371, 199 P. 509; Hamberger-Polhemus Co. v. Lewin, 101 Cal. App. 704, 707, 282 P. 425. If respondent is entitled to recover, the fact that he seeks damages according to the wrong measure is inconsequential and does not preclude the court from according him the damages to which he is entitled according to their true measure (Nielsen v. Swanberg, 99 Cal. App. 270, 277, 278 P. 876).

There was, however, sufficient properly admitted evidence before the court to sustain the conclusion that respondent was damaged and to support the court's conclusion as to the amount thereof, measured by the rule first above stated. Mr. Rabin testified that a certain portion of the merchandise was a total loss by reason of being water-soaked, when it arrived at its destination, and that the market value of this portion of the fruit, in an uninjured condition, was $450. He further testified that the difference in value of the damaged fruit which was reconditioned, before and after such damage, was much greater than $603. Although the witness, in using the above figures, did not specifically state that these figures represented the market value of such merchandise at San Pedro, at the time of arrival, he had just previously been testifying about the merchandise at San Pedro, and the time of its arrival there, and the market value of the merchandise, and the trial court was justified in drawing the inference that the witness meant such market value at said time and place.

[8, 9] On behalf of respondent Mr. Rabin testified that the cost of labor and other expenses for reconditioning the damaged figs and fig paste was $200, and that the freight for shipping that portion of the merchandise from San Pedro to respondent's plant at Clovis and for returning the reconditioned merchandise to San Pedro was $247.64. Appellant contends that these two items should not be allowed to respondent, and argues that the value of the merchandise after reconditioning might even be less than its value at San Pedro at the time of delivery there by appellant. But the testimony of Mr. Rabin was to the effect that the difference in market value of the merchandise before and after the damage was in excess of $603, whereas the cost of reconditioning that portion of the

merchandise and the freight thereon amounted to a total sum of $447.64. It is the duty of one who knows he is threatened with detriment to his property through another's breach of contract for which he can recover damages, to do all that he reasonably can to prevent or minimize such damages. If, in thus forestalling injury, the party against whom the breach is committed incurs expenses which he would not otherwise have incurred, and thereby succeeds in preventing a still greater loss, such expenses, if made in good faith, become an item of damages which he is entitled to recover. 8 Cal. Jur. pp. 782, 783; Ash v. Soo Sing Lung, 177 Cal. 356, 362, 170 P. 843. As stated in 8 California Jurisprudence, p. 783: "Thus, expenses incurred in the reconditioning of injured goods, whereby their value was increased beyond the expense of the process, are properly allowed as damages for the injury, the defendant having the benefit of its increased value." See, also, Olcovich v. Grand Trunk Ry. Co., 179 Cal. 332, 337, 176 P. 459; Crystal Ice., etc., Co. v. Renschler P. Co., 99 Cal. App. 417, 423, 278 P. 874; Joerger v. Pac. Gas & Elec. Co., 207 Cal. 8, 28, 276 P. 1017. The evidence shows that the loss on the reconditioned portion of the merchandise, if not reconditioned, would have been in excess of $603, whereas the cost of reconditioning which was allowed as an item of damage by the court was only $447.64.

[10] The motion for a nonsuit admits the truth of plaintiff's evidence, and every inference of fact that can be reasonably drawn therefrom, and, upon such a motion, the evidence should be interpreted most strongly against the defendant, and any evidence in conflict with that favorable to plaintiff may be disregarded. If there is any evidence tending to sustain plaintiff's action, the motion for a nonsuit should be denied. Hoff v. Los Angeles Pac. Co., supra; Scrimsher v. Reliance Rock Co. (Cal. App.) 2 P.(2d) 862, Sept. 3, 1931; Murray v. Southern Pacific Co., supra.

From the foregoing it is apparent that respondent proved, in its case in chief, both actionable negligence on the part of appellant and also the damages allowed by the trial court, and the appellant's motion for a nonsuit, therefore, was properly denied.

[11, 12] Appellant contends that all of the evidence of the witness Rabin relating to damages was inadmissible because he was not qualified to testify upon the subject. However, the evidence shows that Rabin was in charge of respondent's sales. In such capacity he would naturally be familiar with the proper condition and value of respondent's products. Such objection would go to the weight, rather than the competency, of his testimony. If appellant was dissatisfied with the evidence touching upon the qualification of the witness, he should have examined him on voir dire as to such qualifications. Appellant objected to the following question: "Q. It was wet. By reason ——— do you know whether or not W. C. Cook & Company was damaged by reason of the fact that this merchandise was wet and water-soaked?" on the ground that it called for a conclusion and opinion of the witness. The court overruled the objection. Thereafter the witness, without objection, testified at length and in detail as to the matter of damages, giving market values, cost of minimizing the damage, and other information from which the amount of damage could be ascertained. Appellant contends that, because the objection above mentioned was overruled, the competency or relevancy of all the following questions and answers touching upon the subject of damages can be raised on appeal, based upon said original objection. In support of this assertion appellant cites the case of Sharon v. Sharon, 79 Cal. 633, 674, 22 P. 26, 131. But in that case the trial court outlined exactly what questions might be asked on the subject, and the Supreme Court held that it was not necessary to renew objections to questions that were within the direction of the court as to the extent to which the examination might go. In the case at bar, so far as the record discloses, the court did not indicate what questions touching upon the subject of damages might be answered or to what length the subject might be inquired into, and we are of the opinion that the original objection was not sufficient to allow the competency or relevancy of the following questions to be raised for the first time on appeal. Burnett v. Lyford, 93 Cal. 114, 117, 28 P. 855; Watrous v. Cunningham, 71 Cal. 30, 32, 11 P. 811; Wasserman v. Los Angeles Ry. Corp., 184 Cal. 202, 209, 193 P. 130; 10 Cal. Jur. p. 824.

[13] The foregoing opinion makes it unnecessary to discuss the grounds of appeal from the judgment, except to say that the evidence quoted by appellant in its brief merely discloses a substantial conflict in evidence which must be resolved in favor of the judgment. A reviewing court is not justified in disturbing a judgment unless it appears that upon no hypothesis is there sufficient substantial evidence to support it. Packer v. Wagner, 109 Cal. App. 26, 32, 292 P. 523; Waxman v. Jennings, 72 Cal. App. 671, 674, 238 P. 98; Taylor v. U. S. Fidelity & Guaranty Co., 86 Cal. App. 382, 386, 260 P. 898.

There is ample proof to support the findings, and in that condition of the evidence an appellate court will not disturb the judgment.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

216 Cal. 174

BETTENCOURT et ux. v. BANK OF ITALY NAT. TRUST & SAVINGS ASS'N et al.

S. F. 13535, 13563.

Supreme Court of California.

Aug. 5, 1932.

Rehearing Denied Sept. 2, 1932.

1. Appeal and error ⇐110.

In action tried to jury, order granting new trial is not appealable unless jury trial was matter of right (Code Civ. Proc. § 963, subd. 2).

2. Jury ⇐13(1).

In equitable proceeding, jury trial is not matter of right, but court in its discretion may call jury to assist.

3. Trial ⇐374(2).

In equitable proceeding, court is not bound by jury's findings.

4. Jury ⇐14(3).

As regards right to jury trial, cases involving fraudulent trustees' sales for inadequate purchase price and suits for accounting are addressed to equity court.

5. Jury ⇐13(1).

As regards right to jury trial, court, in determining whether action is legal or equitable, is not bound by form of action, but by nature of rights involved as determined from whole pleadings and facts.

For such purpose, allegations of complaint, answer, and cross-complaint may be considered, as may also prayer for relief in complaint and in answer.

6. Jury ⇐13(1).

There is no right to jury trial where gist of action is for enforcement of right cognizable only in equity, though legal relief results as incidental part of recovery.

7. Jury ⇐13(1).

In determining whether proceeding is equitable, that prayer contains demand for damages is not controlling.

Such fact is not controlling since, where cause of action is essentially equitable, prayer for damages is but incidental to relief sought.

8. Equity ⇐39(3).

If action is properly brought in equity court, it will determine all issues, including claim for damages.

9. Appeal and error ⇐110.

In view of allegations, action for accounting, decree compelling reconveyance, and decree canceling deeds pursuant to trustee's sale, *held* essentially equitable, though tried to jury; hence order granting defend-

ants new trial was nonappealable (Code Civ. Proc. § 963, subd. 2).

Complaint alleged in substance that plaintiffs executed note to defendant bank, secured by deed of trust; that bank and trustees and other defendants entered into fraudulent scheme to obtain property for inadequate consideration; that defendants, when about to sell under power of sale in deed of trust, informed plaintiffs it would be unnecessary for them to appear and bid; that defendants caused property to be sold for certain price and immediately thereafter bank resold it to certain of defendants; that transfers were made pursuant to fraudulent scheme to defraud plaintiffs; and that plaintiffs were deceived by statement of one of defendants who was their personal friend and adviser.

10. Appeal and error ⇐807.

Under circumstances, dismissal of appeal from nonappealable order *held* not precluded by denial of motion to dismiss before filing of briefs.

Circumstances disclosed that proper consideration of motion would have involved examination of entire record in advance of hearing upon merits.

11. Appeal and error ⇐801(4).

Supreme Court will entertain motion to dismiss in advance of hearing on merits only where mere inspection of record discloses that appellant is not entitled to relief.

12. Appeal and error ⇐17.

Supreme Court cannot by its acts acquire jurisdiction when none exists.

13. Appeal and error ⇐843(2).

On appeal from nonappealable order granting new trial in equitable action, contention that court had no jurisdiction to grant new trial *held* not properly before court.

Contention was based upon claim that notice of intention had not been served upon all of adverse parties, and that motion was prematurely made, since no findings had been filed prior thereto.

In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Joseph Bettencourt and wife against the Bank of Italy National Trust & Savings Association, the Bank of Half Moon Bay, Manuel Bettencourt, the El Granada Holding Company and others, in which the holding company filed a cross-complaint. From an order granting the new trial motion of the Bank of Half Moon Bay and Manuel Bettencourt, against which defendants a verdict had been rendered, and from a judgment and decree quieting title of cross-complainant, plaintiffs appeal, and defendants move to dismiss the appeal from the order.

Appeal from the order granting a new trial dismissed, and judgment on the cross-complaint, quieting title of cross-complainant, affirmed.

John H. Crabbe, of San Francisco, for appellants.

Louis Ferrari, of San Francisco, J. E. McCurdy, of San Mateo, Leep, Levy & Hurd, Lelia R. Leep, Sumner Hurd, Robert L. Levy, Sullivan & Sullivan and Theo. J. Roche, and George A. Stockfleth, all of San Francisco, for respondents.

TYLER, Justice pro tem.

This controversy involves two separate appeals. The first is from an order granting a new trial as to certain of the defendants, and the second is from a judgment and decree quieting title to the lands described in the complaint based upon written findings of fact and conclusions of law in favor of defendant El Granada Holding Company. The appeals have been consolidated.

The complaint contains four counts, the first of which alleges a fraudulent conspiracy on the part of defendants to obtain a sale at an inadequate price of plaintiffs' property under the terms of a certain deed of trust held by defendant Bank of Half Moon Bay. The second cause of action alleges an accounting to be due between plaintiffs and defendants. The third is based upon a common count for money had and received, and the fourth contains allegations for quieting plaintiffs' title to the property. A demurrer to this last cause of action was sustained, and the complaint was not amended, so that the actual trial was had on the allegations contained in the three causes of action above referred to. The right to possession of the lands was also tried. The prayer of the complaint asked for judgment for damages in the sum of $65,000; for a full and complete accounting; for a decree compelling defendants to make, execute, and deliver to plaintiffs a reconveyance of the property; and for a decree canceling and annulling each of certain deeds and conveyances made by the defendants of the lands in question. A decree quieting plaintiffs' title was also prayed for.

Defendants El Granada Holding Company and Lewis W. Martin demurred to the complaint, as did also defendants A. R. Dias and Isabel Dias, his wife. These demurrers were sustained as to the fourth cause of action. In addition thereto the El Granada Holding Company filed a cross-complaint to quiet its title to the property as against plaintiffs.

The Bank of Italy National Trust & Savings Association filed an answer denying all of the material allegations and set up, in addition thereto, the special plea of laches. Defendants Bank of Half Moon Bay, Horace Nelson, J. G. Gilcrest, and Manuel Bettencourt also filed an answer denying the material allegations, and likewise pleaded the defense of laches, and in addition thereto the bank alleged, as a separate defense, that plaintiffs had executed to it their promissory note in the sum of $8,000, which note was secured by a deed of trust to defendants Horace Nelson and J. G. Gilcrest, as trustees; that thereafter plaintiffs executed to said bank a second and further promissory note, also secured by a deed of trust; that no payments were made on account of principal, taxes, or interest in connection with said loans since August, 1923. A sale of the property for $10,000 to defendants A. R. Dias and Isabel Dias under the terms of the trust deeds is then recited. As a further defense, the bank pleaded laches and special denials to the other causes of action.

When the case was called for trial, the court instructed the clerk to call a jury. Thereupon objection was made by defendants that plaintiffs were not entitled to a jury trial, as the cause was one involving purely equitable issues and an accounting. The court concluded to have a jury pass upon the issues. Upon the conclusion of plaintiffs' case, all of the defendants moved the court for a nonsuit. They also moved to strike certain testimony from the record and asked for a directed verdict. These motions were denied. On conclusion of the evidence, the trial court, at the request of defendants, submitted special interrogations to the jury as to whether fraud or conspiracy was committed, and by whom. At the same time it instructed the jury to render a verdict in favor of the defendants Lewis W. Martin and El Granada Holding Company, and against the plaintiffs. After deliberation the jury rendered a verdict in favor of the plaintiffs in the sum of $20,000, and against the defendants Bank of Half Moon Bay, Manuel Bettencourt, A. R. Dias, and Isabel Dias. Judgment was entered accordingly. In addition thereto and upon the special interrogations submitted to it, the jury found that there was fraud concerning the matters alleged in the complaint, and that such fraud was committed by the Bank of Half Moon Bay, and further that there was a conspiracy and the defendants guilty of such were said bank, Manuel Bettencourt, A. R. Dias, and Isabel Dias. Judgment was also entered quieting the title of defendant El Granada Holding Company as against plaintiffs.

Thereafter, the Bank of Half Moon Bay and Manuel Bettencourt moved the court for a new trial. The motion was based upon the grounds of excessive damages, insufficiency of the evidence; that the verdict was contrary to law, and errors of law occurring at the trial. The motion was granted, but the order did not specify that it was made upon the insufficiency of the evidence.

[1-8] Defendants here contend that this court has no jurisdiction to hear the present appeal; that the action being essentially equitable, the order appealed from is a non-appealable order. We are of the opinion that respondents are correct in their contention. Section 963 of the Code of Civil Procedure precludes an appeal from an order granting a new trial where a trial is had by jury, unless such trial is a matter of right (subdivision 2). The rule is well settled in this state that in an equitable proceeding a jury trial is not a matter of right, but the court may in its discretion, if so advised, call a jury to assist in the trial of the matter. However, the jury trial not being a matter of right, the court is not bound by the findings of the jury. 15 Cal. Jur. 331, § 11. Cases which involve fraudulent trustees' sales for inadequate purchase price are cases addressed to a court of equity, as are also suits for an accounting. In determining whether an action is legal or equitable, and consequently whether a jury may be demanded, the court is not bound by the form of the action, but rather by the nature of the rights involved, as determined from the whole of the pleadings, and the facts of a particular case. The allegations of the complaint, the answer, and the cross-complaint may be considered, as may also the prayer for relief in the complaint and in the answer. 15 Cal. Jur. 334, § 12. There is no right to a trial by jury where the gist of the action as thus determined is for the enforcement of some right cognizable only in equity, even though legal relief results as an incidental part of the recovery. The fact, therefore, that the prayer contains a demand for damages is not controlling, for where the cause of action is essentially equitable, the prayer for damages is merely incidental to the relief sought, and if the action is properly brought in a court of equity, that court will determine all the issues in the case. McCarthy v. Gaston Ridge Mill & Mining Co., 144 Cal. 542, 78 P. 7.

[9] That plaintiffs' action is of a purely equitable character in its essentials is shown from a reading of the complaint. It alleges in substance that appellants owned certain described property; that they executed a promissory note to the Bank of Half Moon Bay promising to pay the bank a certain sum of money; that they secured the note by a deed of trust on such property; that defendants J. G. Gilcrest and Horace Nelson were trustees under the deed of trust; that thereafter said note matured, and at that time defendants entered into a fraudulent scheme and collusive arrangement to obtain the property from plaintiffs for an inadequate con-

sideration; that defendants, when about to sell the property under the power of sale granted in the deed of trust, informed plaintiffs it would not be necessary for them or anyone representing them to appear and bid at said sale; that defendants agreed to sell the property at the best obtainable price and pay to plaintiffs the surplus, if any, over and above the indebtedness. It is then alleged that defendants caused the property to be sold to the bank for $10,000, and immediately thereafter the bank resold the same to A. R. and Isabel Dias, who in turn sold the same to the El Granada Holding Company. It is then charged that all of the foregoing transfers were made pursuant to the fraudulent scheme, and for the purpose of defrauding plaintiffs. Allegations follow to the effect, in substance, that Manuel Bettencourt was a very close and personal friend and adviser of plaintiffs and that they had the utmost confidence in his statements, relied thereon, and were lulled into a false sense of security, and were deceived thereby. An accounting is asked for, and a decree compelling defendants to make a reconveyance, and also for a decree canceling and annulling each of the deeds made by the defendants in the transaction.

[10-12] Without further comment on the allegations, it is plainly manifest that the action is essentially equitable. This being so, appellants were not entitled as a matter of right to a trial by jury, and therefore, under the provisions of the Code above cited, the matter is nonappealable, and this court is without jurisdiction to hear the same. Nor is this conclusion in any manner affected by the fact that a motion to dismiss the appeal upon the grounds herein discussed was heretofore denied. The action of this court in denying the motion to dismiss was made before any briefs were filed, and to have properly entertained the motion, it would have involved an examination of the entire record in advance of a hearing upon the merits. It is only where a mere inspection of the record discloses that an appellant is entitled to no relief, that this court will entertain a motion to dismiss, and thus save unnecessary delay and expense of litigation. Hibernia Sav. & Loan Soc. v. Doran, 161 Cal. 118, 118 P. 526. Moreover, this court by its acts cannot acquire jurisdiction when none in fact exists.

[13] Appellants present the further claim that the court never acquired jurisdiction to grant a new trial. In support of this claim, it is first contended that the notice of intention was not served upon all of the adverse parties. It is further contended that the motion was prematurely made, as no findings had been filed prior thereto. Assuming these facts to be true, they do not present questions properly before us.

Nor is there any merit in the appeal taken from the judgment and decree quieting title on the cross-complaint filed by El Granada Holding Company. The issues presented by the pleadings on this branch of the case were purely equitable, and the action of the trial court in directing the jury to bring in a verdict in favor of this defendant did not constitute error. There was no evidence of fraud on the part of Martin. With reference to this branch of the case, however, it may be stated that it has been brought to our attention that the trust deed executed by the Diases, to secure the payment of the amount they were indebted to the bank, the payment of which was assumed by the El Granada Holding Company, has been foreclosed. Bank of Italy National Trust & Savings Association, successor of Bank of Half Moon Bay, became the purchaser. The Diases and the El Granada Holding Company have lost all their interest in the property and are no longer interested parties, and the title is again in the bank.

It might be said in conclusion that in the event of a new trial, appellants should see to it that more satisfactory evidence be presented upon the question of the value of the land in controversy. Upon this subject the evidence shows that when the bank made the loan to Bettencourt, the value placed thereon was between $14,000 and $15,000. The property was shortly thereafter sold under the deed of trust for $10,000, and resold to the Diases for $17,500, the bank advancing nearly all of the purchase price. Horace Nelson, the president of the bank, estimated its value to be about $13,000 in 1925. It is true, plaintiff testified he was offered $65,000 for the same, at or about the time of the original trustees' sale, by defendant Martin. Martin denied ever having offered such sum, although he testified that he afterward contracted to buy the property for $100,000, but he paid only the sum of $2,500 on his contract. It further appears that the El Granada Holding Company, to which he transferred the property, was entirely owned and controlled by defendant Martin, and the property was subsequently foreclosed for the nonpayment of the Dias obligation, the payment of which was assumed by Martin. This evidence of value is mostly incompetent and it is unsatisfactory to say the least. The trial judge during the course of the trial so indicated in denying one of respondent's motions, for he stated in effect that he did not agree with the verdict as he knew the property and that plaintiffs had paid all or more than it was worth at the time of their purchase. He also stated that the evidence showed no fraud. His opinion concerning the value of the property is further evidenced in his rulings on the evidence, and in the instructions to the jury. If the value of the land is what appellants claim it to be, it should be a very

easy matter to prove such value by competent and convincing evidence.

We do not deem a further discussion of the case to be necessary. The motion to dismiss the appeal taken from the order granting a new trial is granted, and the appeal is dismissed.

The judgment on the cross-complaint, quieting the title of cross-complainant to the real property described in the judgment, is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.

McCANN et al. v. JORDAN, Secretary of State.*

S. F. 14586.

Supreme Court of California.

Aug. 10, 1932.

Rehearing Granted Sept. 8, 1932.

1. Corporations ⇐19.

In absence of statute requiring prescribed fee for filing original articles of corporation having non-par stock, secretary of state *held* unauthorized to demand fee (St. 1931, p. 1762; Pol. Code, § 409, subd. 5, as amended by St. 1931, p. 445).

2. Corporations ⇐19.

Secretary of state has no discretion in exacting statutory fee for filing incorporation articles, and his duties are purely ministerial (St. 1931, p. 1762; Pol. Code, § 409, subd. 5, as amended by St. 1931, p. 445).

In Bank.

Application by Leo C. McCann and others, incorporators of the Lincoln Shares Corporation, for a writ of mandate against Frank C. Jordan, to compel respondent, as Secretary of State, to accept and file articles of incorporation of a corporation having a non-par stock structure on payment of fees as tendered by petitioners.

Alternative writ made peremptory.

Ellis, Lyman & Steindorf, of San Francisco, for petitioners.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for respondent.

LANGDON, J.

On February 5, 1932, petitioners, the incorporators and first directors of Lincoln Shares Corporation, presented duly executed and acknowledged articles of incorporation to respondent secretary of state for filing. At such time they tendered the necessary nominal fees for comparing documents, etc. Respondent refused to file the articles unless first paid the sum of $1,000 as a filing fee, based upon the provision in the articles for 1,000,000 shares of non-par stock. Thereupon petitioners sought a writ of mandate in this court.

[1] The controversy arises out of a strange legislative omission. Section 409, subdivision 5, of the Political Code, as amended by St. 1931, p. 445, states the fees required for filing articles of incorporation. These fees are graduated in accordance with the amount of "capital stock." Thus, where the amount is $25,000 or less, the fee is $15; if it is between $500,000 and $1,000,000, the fee is $100. No method is contained in said section whereby there may be computed the fee to be charged on non-par stock. Prior to 1931, section 290d of the Civil Code made express provision for this situation by declaring that for the purpose of fixing the fee prescribed by section 409 of the Political Code, in the case of non-par stock, the basis thereof should be an amount equal to the number of shares multiplied by $10. In other words, each share of non-par stock was given an arbitrary value of $10, and in the instant case the 1,000,000 shares would have been valued at $10,000,000, and a filing fee of $1,000 would have been proper. But in 1931, with the enactment of the General Corporation Law (St. 1931, p. 1762), section 290d was repealed. No provision remains in any of our statutes which sets a valuation upon non-par shares for purposes of filing original articles of incorporation. There is, however, a provision (Pol. Code, § 409, subd. 7) for the valuation of such shares upon the filing of amended articles abolishing par stock, and authorizing the issuance of non-par stock, or authorizing the issuance of additional shares of non-par stock.

The question presented by these facts may be simply stated: Is the secretary of state entitled to collect a fee which is not required by the statutes prescribing fees? Obviously the answer is no.

[2] Whatever may have been the purpose of the omission, and it seems clearly to have been inadvertent, its effect is to leave no method by which a filing fee for non-par stock may be computed where original articles are filed. The secretary of state has proceeded to apply the same rule which prevailed under the repealed Civil Code section. We see no warrant for such action. There is nothing discretionary in the exaction of a statutory filing fee of this sort, and his duties are purely ministerial.

Respondent argues that, since the statute makes payment of the prescribed filing fees a

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 20 P.2d 47.

condition precedent to filing articles [Pacific Gas & Electric Co. v. State of California (Cal. Sup.) 6 P.(2d) 78], the duty to collect a fee remains, even though the standard of measurement has been eliminated; and that to exempt corporations with non-par stock from this requirement would result in an unconstitutional discrimination. Neither contention can justify the imposition of a fee which the statute does not require. The fact that the statute does provide for fees where articles are amended only indicates that the repeal of the provisions formerly contained in section 290d of the Civil Code was inadvertent. It is impossible by construction to make the subdivision on amended articles applicable to original articles.

It necessarily follows that respondent had no authority to demand a filing fee of $1,000, and that it is his duty to file said articles forthwith. The alternative writ heretofore issued should be made peremptory, and it is so ordered.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; TYLER, Justice pro tem.

216 Cal. 194

EPPLY v. LOS ANGELES CREAMERY CO. et al.

L. A. 11921.

Supreme Court of California.

Aug. 8, 1932.

Damages ⇐130(1).

$19,750 for abrasions, contusions, concussion of brain, and possible skull fracture, causing monetary loss of $554, *held* excessive by $9,750.

Evidence disclosed that plaintiff, at time of injury, was 21 years of age and was receiving $100 per month wages; that he was off duty for about six weeks and that at time of trial his wages had been increased to $120 per month; that injuries consisted of abrasions and contusions of both legs and ankles and in lumbar region, concussion of brain, and possible basal fracture of skull; and that injuries caused partial deafness in one ear, irritability, headaches, dizziness, loss of memory, and thought disturbance.

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Rono Carl Epply against the Los Angeles Creamery Company and others. From a judgment for plaintiff, defendants appeal.

Judgment affirmed conditionally.

Superseding opinion in 11 P.(2d) 679.

Chase, Barnes & Chase, of Los Angeles, for appellants.

Samuel J. Crawford, of Santa Monica, for defendant J. W. Anderson.

Charles A. Thomasset, C. T. Lester, and Thomasset & Lester, all of Los Angeles, for respondent.

SHENK, J.

This is an appeal from a judgment on a verdict for the plaintiff in the sum of $19,750, in an action for damages for personal injuries.

The plaintiff was, and so far as the record shows still is, an employee of the Los Angeles Gas & Electric Corporation. On May 7, 1928, he was standing, in the discharge of his duties to his employer, over an open manhole and behind a metal railing or guard within the intersection of Twelfth street and Maple avenue in the city of Los Angeles. A collision occurred between an automobile driven by the defendant Vanderlip and another automobile driven by one Anderson, an employee of the defendant Los Angeles Creamery Company. As a result of the collision the car driven by Anderson was thrown against the metal guard around the manhole, which guard in turn was thrown against the plaintiff, who was thereby projected against the curb and received the injuries sued upon. Verdict and judgment went against both Vanderlip and the creamery company.

It is not disputed that negligence was established as against the appealing defendants. In support of the appeal it is contended: (1) That the verdict was grossly excessive; (2) that testimony of an inciting and prejudicial nature was received over objections; (3) that certain instructions bearing upon the alleged contributory negligence of the plaintiff were improperly refused; (4) that the jury was misdirected on the subject of contributory negligence; and (5) misdirection of the jury on the question of damages.

After an examination of the record as to specifications 2, 3, 4, and 5, we have concluded that there is not sufficient substance in these contentions to require or justify a reversal or to merit further discussion thereof. The claim that the verdict is grossly excessive will receive more extended comment.

At the time of the accident the plaintiff was twenty-one years of age, and was receiving wages at the rate of $100 per month.

As a result of the accident he was rendered semiconscious. He recalled seeing the manhole and realized that he was being placed in an ambulance after the accident. He testified that he completely "passed out" on the way to the receiving hospital, but recalled the medical treatment he received on arriving there. The impact caused him to bleed at the right ear, nose, and mouth. He was removed to the Santa Fé Hospital, where he remained for about four weeks. Thereafter he was off duty for about six weeks, and was discharged by his physician on July 20, 1928, when he returned to work. At the time of the trial, in July, 1929, he was still working and his wages had been increased to $120 per month. His monetary loss was $250 in wages and $304 in expenses.

The extent of the injuries to the plaintiff, while greatly in dispute as to certain of them, appear to have been abrasions and contusions of both legs and ankles and in the lumbar region, a concussion of the brain, and a "possible" basal fracture of the skull, although the X-rays failed to disclose such fracture and the presence of any head injuries was not physically demonstrable.

The plaintiff testified to a partial deafness in one ear, irritability, headaches, dizziness, loss of memory, and thought disturbance. It may not be gainsaid that he received very serious and excruciatingly painful injuries, but without indulging further in details, we are persuaded from an examination of the evidence that the verdict is so out of proportion to the extent of the damage suffered as to suggest as a matter of law that the jury was influenced by considerations of passion and prejudice in fixing the amount. The absence of any contributory negligence on the part of the plaintiff, which the jury was entitled to and did impliedly find, and the wanton negligence of the defendant Vanderlip, undoubtedly caused the jury to feel outraged against said defendant and produced the result of a verdict which we find to be grossly excessive. Ten thousand dollars at the outside is the maximum which can, under all the circumstances, be permitted to stand.

It is ordered that in the event that the plaintiff, within thirty days from and after the filing of the opinion, file with the clerk of this court his written consent to a modification of the judgment in his favor by a deduction therefrom of $9,750, leaving the same to stand for $10,000 and the costs of suit, said judgment shall be modified accordingly and as so modified stand affirmed; but in the event that said consent be not so filed within said time, the judgment shall be reversed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; TYLER, Justice pro tem.

216 Cal. 117

WOLFORD v. WOLFORD.

S. F. 13941.

Supreme Court of California.

July 29, 1932.

1. Divorce ⇐133(1).

Evidence *held* insufficient to support judgment for divorce on ground of desertion by husband.

2. Divorce ⇐171.

If no new cruel acts were shown after parties had resumed marital relations, and previous final divorce decree had been denied, divorce decree on ground of cruelty was improper.

In Bank.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Divorce action by Edgar Warren Wolford against Almitta May Wolford, in which defendant filed a cross-complaint. From the judgment, plaintiff appeals.

Reversed.

William R. Biaggi, of San Jose, for appellant.

William H. Johnson, of San Jose, for respondent.

PER CURIAM.

Plaintiff brought an action for divorce on grounds of desertion. Defendant filed an answer denying the allegations of the complaint, and a cross-complaint praying for divorce on grounds of cruelty and desertion. Plaintiff filed an answer to the cross-complaint, alleging as a special defense that such allegations of cruelty were identical with those pleaded and litigated in a previous action brought by defendant wife against him, wherein an interlocutory decree of divorce was granted, but a final decree was denied when it appeared that the parties had resumed marital relations.

The lower court granted defendant's motion for a nonsuit, and granted an interlocutory decree of divorce to defendant upon her cross-complaint. The court also determined the character of and divided the community property.

Plaintiff's chief ground of attack is the insufficiency of the evidence to sustain the findings and judgment; and he also points to several errors of the court.

[1] An examination of the findings, conclusions of law, and the decree, shows that the trial court did not clearly indicate whether the decree was based upon the allegations of cruelty or desertion, although orally the court

stated that the ground would be desertion. However, on said issues, the evidence does not support the judgment. In the prior divorce action brought by the wife an injunction was issued at her request, restraining her husband from entering their home or otherwise molesting her. Subsequently the parties cohabited to such an extent that the court refused to enter the final decree. Some months later Mrs. Wolford threatened to invoke the terms of the restraining order. Mr. Wolford offered to live with her if she would go to her attorney and have the order dissolved, which she refused to do. In this state of the record we are unable to sustain a finding of desertion. There is nothing to show that plaintiff knew the order to be of no further effect, and the condition attached to his offer to cohabit was a reasonable one.

[2] On the issue of cruelty, the court failed to find on the special defense that the allegations of cruelty were identical with those made in the prior action. Obviously, if no new acts of cruelty were presented, no judgment on that ground would be proper. The absence of this finding makes it uncertain whether the judgment is supported by any competent evidence.

Having reached the conclusion that the judgment should be reversed, it is unnecessary for us to consider the contentions that the findings as to community property are erroneous, and that the award for the support and maintenance of the minor children is excessive.

The judgment is reversed.

216 Cal. 182

TOPLEY v. ZEEMAN et ux.

S. F. 14533.

Supreme Court of California.

Aug. 5, 1932.

1. Trial ⇐139(1).

Court may direct verdict for defendant only when no substantial evidence to support verdict for plaintiff may be found.

2. Innkeepers ⇐10.

Hotel keeper's negligence in maintaining bathtub, one corner of which was supported by three wooden blocks, *held* for jury.

3. Innkeepers ⇐10.

Whether hotel guest, injured while using bathtub partially supported by wooden blocks, knew of condition so as to have assumed risk, *held*, for jury.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Emma S. Topley against John Zeeman and wife. From a judgment for defendants, plaintiff appeals.

Reversed.

Superseding opinions of the District Court of Appeal reported in 5 P.(2d) 455, and 6 P.(2d) 561.

Reisner & Deming, of San Francisco, for appellant.

Charles W. Haswell, of San Francisco, for respondents.

WASTE, C. J.

Plaintiff appeals from a judgment entered for the defendants pursuant to a directed verdict. The action is one for damages for personal injuries sustained by plaintiff as the result of a fall in a bathtub in a hotel operated by the defendants.

It appears from the evidence that the plaintiff had been living at the hotel for several days, and had used the bathtub many times prior to the accident. She testified that as she stepped into the tub on the night of the accident "the legs spread out from under the tub and my feet slipped, and I fell back on my back on the rim of the tub." Plaintiff also testified that, as the legs of the tub spread, the front end thereof was precipitated to the floor, causing her to fall as above narrated.

The tub was installed against the wall of the bathroom and approximately five or six inches above the level of the floor. Originally it was supported by four metal legs, but it appears from the evidence, and defendants do not deny the fact, that several years prior to the accident one of the legs on the side next to the wall had been broken off and that side of the tub was thereafter supported by three blocks of wood piled one on top of the other. These blocks were not fastened together nor were they in any manner fastened to the floor. They were apparently held in place solely by the weight of the bathtub resting on them. Plaintiff's testimony discloses that prior to the accident she had seen the blocks under the tub but "didn't know what they were there for" because "they were way back, and it was dark in there. I just saw the ends of boards."

Immediately following the accident examination disclosed that the two metal legs on the front side of the tub were spread apart and broken off and the wooden blocks were displaced, causing the tub to tilt and rest on the floor.

Defendants' evidence was to the effect that

the blocks had been supporting the tub for over eight years; that the bathroom and the tub had been inspected frequently by Mrs. Zeeman, one of the defendants; that at no time had she ever found the tub to be in any way defective; that the blocks at all times appeared to be firmly in place; and that, when examined subsequent to the accident, they were not water logged or cracked and appeared to be in good condition. However, on cross-examination, Mrs. Zeeman stated that when inspecting the bathroom prior to the accident she did not look "to see if [the blocks] had slipped" for "they always seemed in place when I went into the room."

[1] It is the defendants' contention, in effect, that the evidence conclusively establishes that plaintiff's fall was not due to any defective condition of the tub, but that necessarily she must have slipped as she stepped into the tub, and that, in falling against the side of the tub, her weight caused the metal legs to give way and the tub to slip from the blocks. It is therefore urged that a directed verdict was not only proper but required by the evidence. We cannot accede to this reasoning. A court may direct a verdict only when, disregarding conflicting evidence and giving plaintiff's evidence all the value to which it is legally entitled, including every legitimate inference which may be drawn therefrom, no evidence of sufficient substantiality to support a verdict in favor of plaintiff, if given, may be found. Mairo v. Yellow Cab Co., 208 Cal. 350, 351, 281 P. 66; Cal. Packing Co. v. Lopez, 207 Cal. 600, 603, 279 P. 664, 64 A. L. R. 1412; Bannister v. L. A. Ry. Corp., 203 Cal. 427, 429, 264 P. 756; Estate of Caspar, 172 Cal. 147, 155 P. 631.

[2] We are not prepared to say that a verdict for plaintiff based on the evidence now before us, and the inferences reasonably deducible therefrom, would have to be reversed on appeal for want of substantial evidence to support it. This being so, it was error for the court below to direct a verdict for the defendants. It is entirely conceivable, and not at all an unreasonable inference to be drawn from the evidence, that the blocks supporting one side of the tub, while in substantially the same position in which they had been placed some eight years previously, had nevertheless imperceptibly shifted from time to time so as to be in such a position as to be easily displaced with the application of the weight of any one using the tub. A bathtub maintained in such condition in a hotel open to the public would undoubtedly be negligently maintained.

The above inference does not disappear from the case with Mrs. Zeeman's testimony that she had periodically inspected the bathroom, which inspection disclosed the blocks to be in place under the tub. Such evidence is not at all inconsistent with the theory that the blocks, while in place under the tub, had nevertheless shifted so as to be dangerous to any one using the tub.

[3] Defendants contend that, while an innkeeper is liable for his own willful acts and for his negligence, he is not an insurer of the safety of the premises nor of the hotel equipment, and therefore cannot be held liable for patent defects; the guest assuming such risks. 14 Cal. Jur. 325, § 11. While this is undoubtedly the law, we cannot agree with the defendants that the defect involved in this case was such as to constitute a patent defect of which the plaintiff had knowledge. Her testimony, as above quoted, is clear and uncontradicted to the effect that, while she was aware of the presence of certain boards under the bathtub, they were so placed in the back of the tub and against the wall, where the light was poor, as to preclude any one from definitely ascertaining the purpose they were serving. This evidence was sufficient to require the submission to the jury of the issue of knowledge on the part of plaintiff. Her testimony in this regard finds some corroboration in the testimony of Mr. Zeeman, one of the defendants, who, though he occupied the hotel as lessor for several years prior to the accident, was unable to testify as to the number or size of the blocks that had so long supported the bathtub. His testimony tends to indicate that the blocks must have been so placed as to be substantially concealed from the view of persons using the bathroom.

For present purposes at least, defendant's theory that plaintiff must have slipped and fallen against the tub and thereby dislodged it from its position is controverted by plaintiff's uncontradicted testimony that the tub went down as she attempted to step into it and that she then for the first time slipped and fell, and solely because of the tub having become dislodged and one end thereof dropping to the floor.

We find it unnecessary to detail the evidence as to the extent of plaintiff's injuries. It is sufficient to say that she introduced some evidence as to damage; the extent thereof being a matter for the determination of the jury.

In conclusion, it is our opinion that the evidence was such as to require a submission of the principal issue to the jury, and, in the absence of evidence tending to show that plaintiff as matter of law was guilty of contributory negligence, it was error for the court below to direct a verdict for the defendants.

The judgment is reversed.

We concur: CURTIS, J.; LANGDON, J.; PRESTON, J.; SHENK, J.; TYLER, Justice pro tem.; SEAWELL, J.

216 Cal. 243

SHINTAFFER v. BANK OF ITALY NAT. TRUST & SAVINGS ASS'N et al.

Sac. 4640.

Supreme Court of California.

Aug. 17, 1932.

1. Mortgages ⇐549.

Mortgagee purchaser at foreclosure sale of realty *held* entitled to wheat grown during period of redemption by lessee and deliverable to mortgagor lessor as rent, as against claim of lessor's subsequent crop mortgagee (Code Civ. Proc. § 707).

2. Chattel mortgages ⇐129.

Crop mortgagee's rights upon portion of crop due lessor as rent can be no greater than those of its mortgagor (Code Civ. Proc. § 707).

"Rent" is compensation for use of land, and need not be money.

[Ed. Note.—For other definitions of "Rent," see Words and Phrases.]

3. Chattel mortgages ⇐129.

Mortgagor lessor, by subsequent chattel mortgage of portion of crop he is entitled to receive as rent from tenant, but for intervening foreclosure and sale, cannot cut off statutory rights of purchaser under prior mortgage (Code Civ. Proc. § 707).

4. Mortgages ⇐549.

Real estate mortgage confers no lien on crops grown during term of mortgage, but, when mortgage is terminated by foreclosure and sale, purchaser is entitled to rent earned during redemption period (Code Civ. Proc. §§ 700, 707).

In Bank.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by George C. Shintaffer against the Bank of Italy National Trust & Savings Association, a national banking association, and others, in which named defendant and defendant Minnie E. Backus filed cross-complaints. From the judgment, the last-named defendant appeals.

Reversed, with directions.

Superseding opinion in 4 P.(2d) 185.

Rich & Weis, of Marysville, for appellant.

Desmond A. Winship, of Yuba City, for respondent Shintaffer.

Lawrence Schillig, of Yuba City, for respondent bank.

Erling S. Norby, of Marysville, for respondents Henry D. and Ellis Hook.

SEAWELL, J.

This action is in the nature of a bill of interpleader filed by plaintiff, George C. Shintaffer, to determine conflicting claims to a one-fourth portion of the wheat crop grown and harvested by him during the year 1930 on land in Sutter county leased from defendant Henry D. Hook, under a lease providing for delivery of one-fourth of the wheat crop to the lessor. By consent a judgment for one-third of said one-fourth portion of the crop was awarded to Ellis Hook, an incompetent person, who owned an undivided one-third interest in the leased property and did not join in the execution of said lease or any of the other instruments hereinafter referred to. The respondent Bank of Italy, in whose favor the trial court rendered judgment, and appellant, Minnie E. Backus, assert rival claims to the remaining two-thirds of said one-fourth portion, consisting of 34,706 pounds, valued by stipulation at $500. In our opinion appellant is entitled to a reversal.

The appeal is before us on a bill of exceptions, from which it appears that the case was tried on an agreed statement of facts presenting the single legal question now before this court for consideration. The land leased to Shintaffer by a lease executed on March 1, 1929, was subject to a prior real estate mortgage executed by Henry Hook. The crop in question was planted, grown, and harvested by Shintaffer in 1930 during the one-year period of redemption following the foreclosure of the real estate mortgage and sale of Henry Hook's two-thirds interest in the property to the mortgagee, appellant Backus, on August 24, 1929. Subsequent to the institution of the action for foreclosure of the real estate mortgage, but prior to the foreclosure sale, and while Shintaffer, the lessee, was in possession, Hook executed a crop mortgage in favor of respondent Bank of Italy upon the one-fourth portion of the crop which he was entitled to receive from Shintaffer under the terms of his lease. The real estate mortgage from Hook to appellant, Backus, was recorded and respondent Bank of Italy, which held a second lien on the realty, was made a party to, and appeared in, the foreclosure action. For the reason that there is no controversy as to the facts which are stipulated to, it would serve no purpose to recite them in greater detail.

[1] The claim of appellant, Minnie E. Backus, mortgagee and purchaser at the foreclosure sale, to the wheat grown during the period of redemption by a lessee of the premises and deliverable to the mortgagor as rent, must be upheld. Section 707, Code of Civil Procedure, provides as follows: "The purchaser from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, is entitled to receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof.

But when any rents or profits have been received by the judgment creditor or purchaser, or his or their assigns, from the property thus sold preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption-money to be paid. * * *" The construction placed on said section by this court in the case of Clarke v. Cobb, 121 Cal. 595, 54 P. 74, 75, is determinative of the question in the instant case. In that case, as in the instant case, the owner of land subject to a real estate mortgage leased the property under a lease providing that the lessee should give annually for the use thereof a portion of the crops of grain and other products of the land. A dispute arose between the executors of the mortgagor lessor on the one hand and the mortgagee purchasers at the foreclosure sale on the other, as to the portion of the crops harvested during the redemption period which the lessee had set aside as annual rental. This court reached the conclusion that the crops involved were rent due from the tenant to his landlord, and stated that the matter stood "exactly as though the land had been rented for a cash rental payable at harvest time," in which event the purchasers would be entitled to the portion of the annual rental earned subsequent to the purchase and prior to the redemption or expiration of the redemption period. Accordingly, the lower court was directed to enter judgment in favor of the mortgagee purchasers for an amount in proportion as the time intervening between their purchases and the expiration of the year term for which the rent was payable bore to the year rent period. The lower court had erred in entering judgment for the mortgagee purchasers for the full amount of the rent portion of the crop, and not limiting the purchasers' recovery to the amount of wheat earned as rent after the foreclosure sale.

No question of apportionment of rent arises in the instant case. The lease term began in March, 1929. The foreclosure sale took place on August 24, 1929. That portion of the crop planted and grown in 1930, and harvested in the summer of that year, which was returnable under the lease as rent, must necessarily be for a rent period commencing after the foreclosure and sale.

The language of the opinion in Clarke v. Cobb, supra, is directly applicable to the case herein. The court there said: "Rent is a compensation paid for the use of land. It need not be money. * * * These contracts are in no sense cropping contracts. The single difference differentiating them from ordinary conventional leases is that the rent is to be paid in products of the soil, after harvest, rather than in money." The court further declared that, if there is nothing in the language of the lease to indicate an intention that the crops raised on the land are to be held in cotenancy, then the products to be delivered to the landlord after harvest by the tenant will be deemed the property of the tenant until that time, and treated as rent to be then paid.

[2, 3] The rights of the respondent Bank of Italy, the holder of a crop mortgage upon that portion of the crop due the lessor as rent, can be no greater than those of its mortgagor, Hook, in and to said crop. The right of the mortgagee purchaser, Backus, to receive the rents from a tenant in possession during the period of redemption was fixed at the time the real estate mortgage was entered into. The mortgagor lessor, by a subsequent chattel mortgage of the portion of the crop which he would be entitled to receive as rent from his tenant but for an intervening foreclosure and sale, cannot cut off or abridge the statutory rights of the purchaser under a prior mortgage.

Title passes to the purchaser at a foreclosure sale. Section 700, Code Civ. Proc.; Pollard v. Harlow, 138 Cal. 390, 71 P. 454, 648; 18 Cal. Jur. 612 et seq., and cases there cited. The law grants to the mortgagor the right to redeem the property and to remain in possession pending the expiration of the period of redemption. If the mortgagor remains in possession personally, we do not doubt that he may mortgage and otherwise dispose of the crops harvested during the period of redemption. His crop mortgage would prevail over a purchaser at the foreclosure of an antecedent real estate mortgage for the reason that, even in the absence of a crop mortgage, the said purchaser would have no rights in the crop. Such cases as First National Bank of Lindsay v. Garner, 91 Cal. App. 176, 266 P. 849, relied on by respondent bank, involved a mortgagor in possession, and are not applicable where the property foreclosed is leased to a tenant, in which event the title acquired by the purchaser carries with it the right to receive rent from the tenant in possession, whether payable in cash or products of the land.

[4] The principle applicable in the instant case in no way conflicts with the rule that a real estate mortgage does not cover growing crops. First Nat. Bank of Lindsay v. Garner, supra; Simpson v. Ferguson, 112 Cal. 180, 40 P. 104, 44 P. 484, 53 Am. St. Rep. 201; Locke v. Klunker, 123 Cal. 231, 55 P. 993; Bank of Woodland v. Heron, 120 Cal. 614, 52 P. 1006; Cowdery v. London, etc., Bank, 139 Cal. 298, 73 P. 196, 96 Am. St. Rep. 115. It was by virtue of this principle that we held in Clarke v. Cobb, supra, that the purchaser was not entitled to the entire portion of the crop harvested during the period of redemption which was payable as rental, but only to the portion earned during that period. A real estate mortgage confers no lien on crops grown during the term of the mortgage, but, when the mortgage is terminated

by foreclosure and sale, the purchaser as an incident to the legal and equitable title acquired by him is entitled to rent earned during the period of redemption whether payable in money or produce.

The judgment is reversed, with directions to the lower court to enter judgment for appellant, Backus, on the findings set forth by said court.

We concur: WASTE, C. J.; TYLER, Justice pro tem.; SHENK, J.; PRESTON, J.; CURTIS, J.

216 Cal. 99

SLINACK et al. v. SUPERIOR COURT IN AND FOR TULARE COUNTY et al.

L. A. 13565.

Supreme Court of California.

July 27, 1932.

1. Prohibition ⇐10(2).

Supreme Court may issue writ of prohibition where it appears that superior court appointing receiver acted in excess of its jurisdiction because another court first acquired exclusive jurisdiction to make appointment (Code Civ. Proc. §§ 1102, 1103).

2. Courts ⇐475(1).

Where two tribunals have concurrent jurisdiction over same parties and subject-matter, tribunal in which jurisdiction first attaches retains it exclusively.

3. Courts ⇐475(5).

Superior court in Tulare county, in action wherein it appointed receiver for corporation holding trust property, *held* without jurisdiction where superior court of Los Angeles county had first acquired jurisdiction of trust res and beneficiaries and parties in second action were represented in first action.

An action was commenced in the superior court in Los Angeles county on January 15, 1932, for the construction of a trust agreement under which corporation sold certificates evidencing ownership in proportionate shares of all trust deeds and mortgages purchased by it and deposited with a named trust company. On January 26 following, a complaint in intervention was filed praying for the appointment of the interveners as trustees in the place of the depositary trust company. The action brought in the superior court in Tulare county was not commenced until January 25, and prayed for the appointment of a receiver to take charge of and operate the trust property and preserve the same from loss to the certificate holders. The beneficiaries and parties in the second action were represented in the first action, and the court in such action, in exercise of its equity jurisdiction, had power to bring before it all persons who might be affected by its decrees.

4. Receivers ⇐35(1).

Where trustees had been appointed to take possession of trust res and to actively administer trust, facts *held* not to present case of great emergency so as to authorize appointment of receiver upon ex parte application.

In Bank.

Original application by O. E. Slinack and others, as trustees, for a writ of prohibition prayed to be directed to the Superior Court in and for Tulare County, and Frank Lamberson, a Judge thereof, to restrain the respondents from exercising jurisdiction in an action brought for the partition of personal property and the appointment of a receiver.

Peremptory writ of prohibition issued.

Robert L. Hanley, Wiley J. Shannon, and Hanley & Shannon, all of Los Angeles, for petitioners.

James M. Carter and Guy Knupp, both of Los Angeles, for respondents.

PER CURIAM.

This is an application for a writ of prohibition to restrain the respondent superior court from exercising jurisdiction in an action brought for the partition of personal property and the appointment of a receiver.

The petition alleges an agreement entered into between California Reserve Company, a California corporation, and Metropolitan Trust Company of California, approved by the commissioner of corporations, whereby the former company was authorized to purchase first and second mortgages and trust deeds upon improved California real estate and to deposit the securities so purchased with said Metropolitan Trust Company of California, which is designated as the depositary. The California Reserve Company was authorized to sell and did sell to the public certificates evidencing ownership in proportionate shares of all trust deeds and mortgages so purchased and deposited. These certificates provided for interest at 8 per cent., payable quarterly. The agreement contained many provisions as to safeguards and guaranties, terms and manner of repurchase of certificates, and duties, obligations, rights, and powers of the respective parties not necessary to note. It is sufficient to state that the California Reserve Company was constituted the agent of the certificate holders to collect installments of principal and interest falling due under the mort-

gages and trust deeds, make payment of interest to the certificate holders, and reinvest the principal and deposit newly acquired securities with said depositary. In said agreement certain acts or omissions on the part of the California Reserve Company were declared to constitute a breach of the agreement on its part. In the event of a breach and written notice as provided, the company was to be considered divested of all of its rights, powers, and interest, which should thereupon become vested in the depositary which in turn should hold the mortgages and trust deeds on deposit for the account and benefit of the company and the owners of certificates then outstanding, for the purpose of enforcing the provisions of the mortgages and trust deeds and disbursing the proceeds as the interests of the company and certificate holders might appear.

It further appears from the petition that operations were conducted under this agreement until, at the times hereinafter mentioned, the certificates outstanding numbered 2493, bearing a face value of $1,882,350. The securities deposited evidenced a value of more than $2,000,000. In October, 1931, because of insufficient funds remaining after complying with demands for numerous repurchases of certificates, the company defaulted in the payment of quarterly interest due on certificates outstanding, and it appeared that it would continue to be in default. At the request of California Reserve Company and pursuant to a written waiver of notice executed by it, the Metropolitan Trust Company of California, in December, 1931, took over the management and control of the company's affairs. Subsequently in the same month the plaintiffs, who are three of the largest certificate holders, and two others who later resigned, were nominated by the certificate holders as a committee to meet and advise with the Metropolitan Trust Company of California. On January 15, 1932, the latter company commenced an action in the superior court in Los Angeles county naming as defendants the California Reserve Company and two certificate holders, W. G. Nott and J. T. Keirns. By that action the plaintiff sought to have construed the trust agreement referred to and to have declared and defined its rights, powers, and duties pursuant thereto under the circumstances noted. In the complaint in that action it was alleged that the defendants Nott and Keirns held and represented divergent views as to the rights, powers, and duties of the plaintiff trustee under said trust agreement, also held by the numerous certificate holders, and that each of said defendants Nott and Keirns was joined in the action not only individually but, because of the impracticability of joining all certificate holders in said action, also as the representative and for the benefit of all certificate holders or beneficiaries of the trust, thus divided into two classes, who held the same views as each of said defendants respectively. It was also sought by said complaint to have the court assume continuing jurisdiction of the parties and the subject-matter and the questions arising during the administration of the trust, for the purpose of giving further instructions and affording additional relief as the need might arise. The defendants in that action were served and appeared therein prior to January 22, 1932.

On January 25, 1932, Marie K. Seuss, Eloise A. Seuss, and Rheta M. Seuss, three of the certificate holders, commenced an action in the superior court in and for Tulare County against California Reserve Company, Metropolitan Trust Company, sixty-five named certificate holders, and certificate holders designated as John Doe One to John Doe Five Thousand. In the complaint in that action it was alleged that no one was authorized to protect and preserve the liens secured by second mortgages and trust deeds purchased by the California Reserve Company and on deposit with Metropolitan Trust Company of California, and that it was necessary that a receiver be appointed to take charge of and operate said property and preserve the same from loss to the certificate holders. The plaintiffs therein also sought a partition of said property, or a sale thereof and a division of the proceeds in accordance with the respective rights of the plaintiffs and defendants. On that complaint and the ex parte application of the plaintiffs, the superior court in Tulare county, the respondent herein, on the same day, ordered the appointment of S. H. Rosenthal as receiver and, upon the filing of certain bonds, vested in him authority to take possession of and operate all of the properties involved herein. It is alleged that S. H. Rosenthal qualified and is purporting to act as such receiver.

On January 26, 1932, the petitioners herein filed a complaint in intervention in the action pending in Los Angeles county praying for the appointment of themselves as trustees in the place of Metropolitan Trust Company of California on the ground that their administration of the trust, without compensation, would be for the best interests of the certificate holders. On the following day, one of the plaintiffs in the Tulare county action also intervened in the Los Angeles county action and purported to show that the issues raised by the complaint in the Los Angeles county action were then moot, inasmuch as the superior court in Tulare county had appointed a receiver and instructed him on all the questions raised by the action in Los Angeles county and that instructions from the superior court in the Los Angeles county action were then neither proper nor necessary. The issues in the Los Angeles county action came on for hearing, the Metropolitan Trust Company resigned as trustee and the court

in said action made its findings and conclusions, and on February 19, 1932, rendered judgment establishing the trust pursuant to said trust agreement, ordering Metropolitan Trust Company of California to file its account, decreeing that intervener Seuss take nothing by her complaint in intervention, and appointing the petitioners herein trustees of the trust property subject to the continuing jurisdiction of the court, upon the filing of a bond in the sum of $50,000, which was subsequently furnished. The court there also ordered that title and possession of the property involved be transferred to the trustees so appointed.

On March 1, 1932, pursuant to notice, the petitioners presented to the superior court in Tulare county, respondent herein, a motion to be substituted as defendants in the place of the defendant Metropolitan Trust Company of California in the action pending in Tulare county, for an order vacating the appointment of the receiver in that action, and for an order staying the proceedings pending in Tulare county on the ground that another and prior action involving the same subject-matter and parties was pending in the superior court in and for Los Angeles county. Those motions were based on the judgment roll in the action pending in Los Angeles county, which was received in evidence on the hearing of the motions, and on the answer of the petitioners as such trustees and successors of Metropolitan Trust Company of California to the amended complaint filed by the plaintiffs Seuss in the Tulare county action. It also appeared as an undisputed fact that all of the securities involved were in the possession of Metropolitan Trust Company of California at its offices in Los Angeles, and that all of said securities constitute second incumbrances on real property substantially all of which is situate in the county of Los Angeles, that no part thereof is situate in the county of Tulare, and that the distance between the seats of Los Angeles and Tulare counties is more than 200 miles. The respondent court denied the motions so made, on the ground, in part, that it desired not to release Metropolitan Trust Company of California as a party in the cause pending before it.

It further appears by the petition herein that on February 24, 1932, a petition in bankruptcy on behalf of California Reserve Company was filed in the District Court of the United States for the Central Division, Southern District of California, and that an ex parte order was made by said court appointing G. W. McCune and said S. H. Rosenthal coreceivers in bankruptcy to act until a trustee be appointed. The petition also shows that said S. H. Rosenthal, as such receiver in bankruptcy, has notified the Metropolitan Trust Company of California not to transfer possession or dispose of any property or funds in its hands belonging to said bankrupt; that due to the conflicting orders of the two superior courts there is no one who, with authority, can represent the interests of the certificate holders in said bankruptcy proceeding; and that in the meantime the equities in the real property evidenced by the mortgages and deeds of trust involved are in danger of becoming lost through foreclosure of prior incumbrances. It is stated that this proceeding is therefore brought to have determined the conflict of jurisdiction existing between the superior court in Los Angeles county and the respondent superior court.

The respondents by their answer herein admit all of the allegations of the petition with the exception that they deny the allegation that the petitioners have no plain, speedy, or adequate remedy at law. It may be assumed that the petitioners herein could have appeared as defendants in the Tulare county action and have prosecuted an appeal from the ex parte order appointing a receiver.

[1-3] It has been held that a proceeding in prohibition is available to test the validity of such an order although the petitioners have a remedy by appeal. A. G. Col Co. v. Superior Court, 196 Cal. 604, 238 P. 926. Parity of reasoning compels the conclusion that this court may in its discretion exercise its jurisdiction to issue a writ of prohibition if it appear that the court appointing a receiver is acting in excess of its jurisdiction by reason of the fact that another court has acquired the exclusive jurisdiction to make the appointment. Sections 1102, 1103, Code Civ. Proc.; Lieberman v. Superior Court, 72 Cal. App. 18, 26–28, 236 P. 570. Both the action commenced in Los Angeles county and that brought in Tulare county involve the appointment of an officer or officers to administer the trust res and for other equitable relief. The action in Los Angeles county was commenced and jurisdiction of the parties was obtained therein prior to January 22, 1932. The action in Tulare county was not commenced until January 25, 1932. Jurisdiction of the superior court in Los Angeles county over the subject-matter of the action and of the trust res, therefore, attached before the action in Tulare county was commenced. In view of the pending bankruptcy proceedings, it is conceded that the controversy narrows down to a conflict of the jurisdiction of the two superior courts only as to the matter of the appointment of an administrative officer. The respondents admit that the conflict in that respect exists. The case is then controlled by the application of the general rule that where two tribunals have concurrent jurisdiction over the same parties and subject-matter, the tribunal in which jurisdiction first attaches retains it exclusively. Lieberman v. Superior Court, supra; 7 Cal. Jur. 591. The respondents contend that the parties are not the same in both actions. They admit, however, that the trust res involved is the same, and

that the receiver appointed by the respondent court and the trustees appointed by the superior court in Los Angeles county cannot both act to administer the trust at the same time. All of the beneficiaries and parties in the Tulare county action are represented in the action pending in Los Angeles county and the court there in the exercise of its equity jurisdiction has power to bring before it all of the persons who may be affected by its decrees. More than that is not necessary under the circumstances existing here.

[4] Furthermore, following the principles stated in A. G. Col Co. v. Superior Court, supra, sufficient appears to justify the issuance of the peremptory writ on the ground that the respondent court under the facts disclosed acted in excess of its jurisdiction in appointing a receiver on an ex parte application. This became apparent when the several motions were made and it was revealed, if it was not theretofore known to the respondents, that the action was pending in Los Angeles county for the purpose of instructing the trustee under the trust agreement and that an officer competent to protect and preserve the property from loss had possession of and was actively administering the trust res at the time the ex parte application for the order appointing a receiver was made in Tulare county. This was not, therefore, a case of the greatest emergency, where, without such ex parte appointment, irreparable injury would unquestionably have resulted. A. G. Col Co. v. Superior Court, supra, page 613 of 196 Cal., 238 P. 926.

In addition to the foregoing it should further be apparent that in this case representation in the bankruptcy proceedings of the interests of the certificate holders by the same person who is also therein appointed a co-receiver of the property and assets of the alleged bankrupt might give rise to a conflict of interest and might result in placing the receiver in a position which he should prefer not to hold. On this application, therefore, in order better to serve the interests of the certificate holders it appears that the trustees appointed by the superior court in Los Angeles county to succeed the Metropolitan Trust Company of California as trustee should continue in their office as such trustees exclusive of representation by the receiver appointed in the action in Tulare county.

The respondents also contend that prohibition will not lie where the lower court has itself not passed or ruled upon the question of its jurisdiction. The respondents state that the court in Tulare county was never presented with a motion or proceeding nor did the court pass upon the question of its jurisdiction to entertain the action in partition. But their answer admits that motions raising the question of jurisdiction were presented and that the court failed to rule thereon for the reason that it refused to substitute the petitioners in the action. Assuming the proposition presented to be correct in law and procedure, it cannot be deemed to be well taken under the facts admitted.

The respondents do not question that the petitioners are persons beneficially interested so as to be entitled to institute this proceeding. Section 1103, Code Civ. Proc.

Let the peremptory writ issue as prayed.

216 Cal. 143

KOEHLER v. SERR et al.

L. A. 13436.

Supreme Court of California.

Aug. 1, 1932.

Rehearing Denied Aug. 29, 1932.

1. Attachment ⇐333.

To avoid liability on bond to prevent attachment, sureties must show that attachment proceedings were void and null from inception.

2. Attachment ⇐352.

Truth of recitals in affidavit for attachment that action was on contract for payment of money cannot be tried in independent action on undertaking to prevent or release attachment (Code Civ. Proc. §§ 537, 540).

3. Attachment ⇐352.

Whether action for money received and conversion was based on contract or tort was not matter of jurisdiction, but of evidence, as to which complaint on which attachment was based was not conclusive in action on undertaking to prevent attachment (Code Civ. Proc. § 537).

4. Attachment ⇐333.

Undertaking, given to prevent attachment, that sureties would pay plaintiff amount of judgment recovered "in said action," *held* not limited to cause of action for money received, so as to relieve them from liability because of court's failure to make finding on issues raised thereby.

Words "in said action," taken in their ordinary meaning, referred to "right or power to enforce an obligation," nature of which was stated by complaint comprising all counts or causes of action therein stated.

In Bank.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Action by Maurice T. L. Koehler against J. H. Serr and others. From a judgment for plaintiff, defendants Serr and others appeal.

Affirmed.

Superseding opinion in 5 P.(2d) 928.

A. P. G. Steffes, Frank T. Hennessey, Vernon L. Ferguson, and John L. Schaefer, all of Los Angeles, for appellants.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for respondent.

SHENK, J.

This is an appeal from a judgment for the plaintiff in an action to recover on an undertaking given to prevent an attachment.

The undertaking recited the commencement of an action by the plaintiff against Leonards & Co. to recover the sum of $14,748.30, the issuance of a writ of attachment in that action, and the desire of the defendant Leonards & Company to prevent the levy of the same. The sureties on the bond to prevent the attachment, who are the defendants herein, "in consideration of the premises and to prevent the levy of said attachment," undertook and promised that, "if the plaintiff shall recover judgment in said action against Leonards & Company," they will pay to the plaintiff on demand the amount of the judgment not exceeding the sum mentioned. In the attachment suit the plaintiff recovered judgment against the defendants therein including Leonards & Co. in the sum of $10,910.90, with interest.

In the present action the defendants interposed defenses on two theories: First, that the attachment proceedings were illegal and void, and the bond given to prevent such an attachment was therefore a nullity. Second, that the judgment in the attachment suit was not recovered on the cause of action upon which the attachment was issued. The trial court rejected these defenses, and rendered judgment against the sureties on the bond, from which judgment this appeal is taken. The only question presented is whether the defendants should have prevailed on either of said defenses.

On the trial the judgment roll in the attachment suit was introduced in evidence. The complaint in that action alleged four causes of action. The first was a common count for money had and received in the sum of $14,748.30. The second was for the conversion of 10,000 shares of stock of Comstock Silver Mining Company and cash in the sum of $1,750, of a total value of $9,950. The third charged the conversion of the sum of $2,010.90 paid by the plaintiff as the purchase price of stock which he never received; and the fourth was for the conversion of shares of stock and cash of the total value of $2,450. The prayer was for the recovery of the sum of $14,748.30, with interest.

The defendants contend that the plaintiff's real grievance in that action was founded in tort and not on a contract for the payment of money, as provided by section 537 of the Code of Civil Procedure, that the attachment proceedings were void, and that there was therefore no consideration for the undertaking.

The question for determination is whether the rule stated in Passow & Sons v. United States F. & G. Co., 177 Cal. 31, 37–40, 170 P. 1124, 1127, consistently applied in this state (see McMillan v. Dana, 18 Cal. 339; Smith v. Fargo, 57 Cal. 157; Pierce v. Whiting, 63 Cal. 538, 540; McCormick v. National Surety Co., 134 Cal. 510, 66 P. 741; Bailey v. Ætna Indemnity Co., 5 Cal. App. 740, 91 P. 416; Tormey v. McIntosh, 43 Cal. App. 411, 184 P. 1012; Heine v. Wright, 76 Cal. App. 338, 244 P. 955; Barrios & Co. v. Indemnity Ins. Co., 101 Cal. App. 675, 282 P. 386; 3 Cal. Jur. p. 532; see, also, 2 R. C. L. 890, 891), is applicable to the facts here presented, or whether the case is controlled by the holding in Mudge v. Steinhart, 78 Cal. 34, 20 P. 147, 12 Am. St. Rep. 17, and Pacific National Bank v. Mixter, 124 U. S. 721, 8 S. Ct. 718, 31 L. Ed. 567.

[1] Stone v. Superior Court (Cal. Sup.) 4 P.(2d) 777, 77 A. L. R. 743, and similar cases (San Francisco Iron & Metal Co. v. Abraham, 211 Cal. 552, 296 P. 82; Willett & Burr v. Alpert, 181 Cal. 652, 185 P. 976; Hallidie v. Enginger, 175 Cal. 505, 166 P. 1; Powers v. Freeland, 114 Cal. App. 146, 299 P. 736), are cited by the defendants as supporting their contention that the attachment proceedings in the action of Koehler v. Leonards & Company were void. The defendants may not rest content with the assertion that the attachment proceedings need be shown to be merely voidable in order to support their contention that they are not liable on the bond. The case of Passow & Sons v. United States F. & G. Co., and cases to like effect, hereinbefore cited, show the lack of any merit in that contention. Therefore, in order to avoid the application of the rule in those cases, the defendants must show in a proper proceeding that the attachment proceedings in the case of Koehler v. Leonards & Company were void and a nullity from their inception. See Mudge v. Steinhart, 78 Cal. 34, 20 P. 147, 12 Am. St. Rep. 17. They urge that the case of Stone v. Superior Court, supra, so determined. But that case involved, not a collateral attack as in the present case, but a direct attack upon the order discharging the attachment. There the plaintiff had joined with her cause of action for damages for fraud and deceit a common count for money had and received. On the ground that the cause of action sounding in tort was the true basis of the plaintiff's right to recover in that action, it was determined that the defendants were entitled to have the writ of attachment discharged. The other similar

cases relied upon by the defendants also involved a direct attack on the attachment proceedings, and the necessity of determining whether the attachment proceedings were void or merely voidable was not presented.

[2] The case of Passow & Sons v. United States F. & G. Co., supra, was an action upon an undertaking given to release an attachment. The defense interposed was that the averment in the affidavit in support of the attachment, that the debt was not secured by a lien, was false. There it was said: "No attack was made upon the attachment by Bowman [the defendant] in the main action. Instead of moving that it be dissolved on the ground that the affidavit that the debt was not secured by a lien was false, he procured the exemption of his property from the levy by giving the undertaking here sued on. In this condition of affairs the present defendant executed the undertaking sued on. It must be presumed to have accepted the conditions then existing as the measure of its rights, and to have executed the undertaking with that understanding. The principle is settled in this state that a surety upon an undertaking given under section 540 to release an attachment cannot interpose the objection, in a suit upon such undertaking, that the property attached, if any, was not subject to levy, or that the attachment was irregularly issued because of a false affidavit filed by the plaintiff to procure it. In McMillan v. Dana, 18 Cal. 349, the court said of such an undertaking that: The sureties promise, 'in consideration of the release of the property from the attachment, that in the event of a recovery of the judgment by the plaintiff, they will pay the amount of the judgment. * * * The object of giving the undertaking was to procure this release, and this release was had in consequence of the undertaking; and the consideration of the undertaking therefore is the release so procured. In consideration of this release, the obligors agree to pay the judgment. Whether the property was redelivered to Vischer or not was wholly immaterial. * * * Nor does it matter whether the property was subject to attachment or not. That matter cannot be tried in this collateral way. It is enough that the plaintiff had this property levied on as subject to his debt, and that these sureties procured its release upon the stipulation that, in consideration of such release, they would pay the amount of the judgment to be recovered by the plaintiff in the attachment suit. Nor was any proof necessary of the preliminary proceedings connected with or preceding the levy; for these defendants admit the levy of the attachment on this property, and this is enough.' On petition for rehearing the court said that 'by the contract the parties have bound themselves to pay in an event independent of all considerations of this sort,' referring to the fact that they had bound themselves to pay the judgment in consideration of the discharge." The court reviewed other previous decisions in this state as supporting its decision and concluded: "In view of these authorities, we are of the opinion that the defendant here is not in a position to complain of the conduct of the plaintiff in bringing the action upon a debt which was previously secured by some sort of lien upon property, which he might have enforced instead of waiving it and bringing suit for the debt. The surety must be presumed to have been aware of the facts and to have made its contract accordingly. It was an unconditional agreement to pay the amount of the judgment when rendered."

The doctrine of the Passow and like cases is controlling here. The consideration for the undertaking in the present case is, as recited therein, the prevention of the levy of the writ of attachment, and supports the promise on the part of the defendant as sufficiently as the promise to release the attachment in the Passow Case. If, on collateral attack, the fact that the affidavit is false as to the unsecured status of the debt is no defense, then the falsity of the affidavit as to the true character of the plaintiff's cause of action as disclosed by the proof can be no defense, where, as here, the allegations of the complaint and the averments of the affidavit are prima facie sufficient. If the defense is good in the one case, it should be good in the other.

In Pacific National Bank v. Mixter, supra, an attachment against the property of national banks was involved. Such an attachment was expressly prohibited by statute, and it was held that the attachment proceedings were on that account void and ineffective for any purpose because issued without any authority of law. As to the present case, there is authority of law for the attachment if the action counts upon a contract, express or implied, for the payment of money, based upon an affidavit reciting those facts; and we are of the view that the truth or falsity of such recitals cannot be tried in an independent action to recover upon the undertaking given to prevent or release such an attachment. In other words, as applied to the present case, the attachment proceedings in the former action were voidable only, and are beyond inquiry on collateral attack. If it be deemed that the Mixter Case is inconsistent with the language contained in the opinion of the Passow Case, we must conclude that nevertheless the latter controls the present case.

[3] Nor is the case of Mudge v. Steinhart, supra, opposed to this view. The action in Koehler v. Leonards & Company was in personam, wherein the court without question had jurisdiction of the parties and the sub-

ject-matter. The case of Mudge v. Steinhart was an action in rem, wherein the jurisdiction of the court depended on the validity of the attachment proceedings. Here the question whether the plaintiff's grievance in the action of Koehler v. Leonards & Company was based on contract or tort was a matter, not of jurisdiction, but of evidence, as to which the complaint upon which the attachment was based was an important but not a conclusive factor. San Francisco Iron & Metal Co. v. Abraham, 211 Cal. 552, 296 P. 82.

[4] The defendants further contend that said undertaking was issued only upon the first cause of action stated in the complaint in the case of Koehler v. Leonards & Company, and that, as the court in that action made no findings upon the issues raised by the first cause of action, they are not liable on the undertaking. A complete answer to this contention is that the undertaking is not so limited. The defendants undertook and promised that, if the plaintiff shall recover judgment "in said action" against the defendant, Leonards & Co., they will pay to the plaintiff the amount of said judgment. The words "in said action" must be taken in their ordinary meaning, unless otherwise expressly limited, and, when so considered, they refer to "the right or power to enforce an obligation," and the complaint, comprising all of the counts or causes of action therein set out, is a statement of the nature of the obligation or obligations sought to be enforced in the action. See Frost v. Witter, 132 Cal. 421, 64 P. 705, 84 Am. St. Rep. 53.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; TYLER, Justice pro tem.

216 Cal. 108

ANDRADE v. ANDRADE et al.

L. A. 13148.

Supreme Court of California.

July 27, 1932.

Rehearing Denied Aug. 25, 1932.

1. Receivers ⇐146.

Order discharging receiver appointed over co-respondent's ranch in wife's suit against husband for maintenance and division of community property, and directing return thereof to co-respondent's possession, *held* proper where ranch was adjudged co-respondent's property and receiver had fulfilled functions.

2. Receivers ⇐200.

Receivership costs are generally charge upon, and paid out of, property in receiver's possession, though sometimes directly imposed upon parties to action.

3. Receivers ⇐55.

In wife's suit against husband for maintenance and division of community property, assessing receivership expenses of co-respondent's ranch against wife procuring receiver's appointment *held* no abuse of discretion.

Assessing such expenses against the wife procuring receiver's appointment over co-respondent's property was no abuse of discretion, because, though alleged co-respondent was named as party defendant and charged as co-respondent, this should not justify the seizure of her separate property, because she consistently resisted the receivership proceeding, and because the receivership was not created for her benefit.

4. Appeal and error ⇐875.

Former judgment determining ownership of property in receiver's hands *held* not reviewable in appeal from subsequent order discharging receiver and directing plaintiff procuring his appointment to pay receivership expenses.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Helen Louise Andrade against Albert Francis Andrade and Edward H. Martin, receiver, and others. From an order discharging the receiver and directing plaintiff to pay his fees, plaintiff and receiver appeal.

Affirmed.

Edwin J. Miller and Harry K. Sargent, both of Los Angeles, for appellants.

Emil H. Koehl, of Hollywood, for respondents.

WASTE, C. J.

This is an appeal from an order discharging a receiver and directing plaintiff to pay his fees. Plaintiff brought this action against her husband for permanent support and maintenance and to secure a division of their community property. The other named defendants were alleged to improperly claim some interest or estate in the property. Among other things, the complaint averred that certain real property known as the "Sunland Ranch," standing in the name of the de-

fendant and alleged co-respondent Lavender, was in fact the property of the defendant husband and had been vested in the former solely for the purpose of defrauding the plaintiff. Defendant Lavender denied these allegations in her answer. At plaintiff's request, a receiver was appointed to take charge of the properties, including that standing in the name of the defendant Lavender, during the pendency of the cause. At the conclusion of the trial a decree was entered granting to the plaintiff support and maintenance and providing for a division of the properties of the spouses. The decree further declared, in accordance with the findings, that the "Sunland Ranch," standing in the name of the defendant Lavender, was in fact her sole and separate property and that plaintiff was without right, title, or interest therein. From this latter portion of the judgment the plaintiff noticed an appeal to this court, which was dismissed on June 3, 1930, for lack of prosecution. After the remittitur had gone down the defendant Lavender moved for a discharge of the receiver and the return of her property. In due time the court below made its order approving the final report and account of the receiver, directing that plaintiff pay his expenses and fees aggregating $2,200, and directing that the receiver return possession of the "Sunland Ranch" to its owner, the defendant Lavender. The order further provided that the expenses and fees of the receiver "should not be chargeable to the defendant Judith Lane Lavender, and should not be made a charge or lien against any property belonging to her."

From this order the plaintiff wife and the receiver have both appealed, the appeals being consolidated by stipulation. The plaintiff complains of the order in so far as it discharges the receiver and places the burden on her of paying his expenses and fees, while the receiver complains that the plaintiff is in indigent circumstances and that his expenses and fees should therefore be paid out of the property or by the third party owner thereof, the defendant Lavender.

[1] In our opinion the order appealed from was, and is, a proper order. At the time of its entry the "Sunland Ranch" was the only property remaining in the receiver's hands. Inasmuch as the judgment decreeing this ranch to be the sole and separate property of the defendant Lavender had theretofore become conclusive and final, and it appearing that the receiver had otherwise fully served and fulfilled the purpose for which he had been appointed, it was proper that the court below should direct the receiver to return the possession of the "Sunland Ranch" to the defendant Lavender and then discharge him.

[2, 3] We perceive no impropriety in assessing the receiver's fees and expenses against the plaintiff, who sought and procured his appointment, rather than against the defendant Lavender or her property. As a general proposition the costs of a receivership are primarily a charge upon the property in the receiver's possession and are to be paid out of said property. However, this is not an invariable rule. In many cases a direct liability is imposed upon the parties to the action, or upon some of them, for the remuneration of the receiver. Such direct liability may result from an irregularity in the appointment, insufficiency of the property, agreement of the parties, etc. Ephraim v. Pacific Bank, 129 Cal. 589, 592, 62 P. 177; Frick v. Fritz, 124 Iowa, 529, 531–536, 100 N. W. 513, 514; 53 C. J. 299, §§ 495–497, 501.

The language of the Iowa case, supra, is particularly applicable to the present case. It is there stated:

"The general rule is well established that the expenses of the receivership are to be satisfied out of the property or funds coming into the hands of the receiver, and this rule is so universally accepted as the starting point for all discussion that authorities supporting it need not be cited. Where the object of the receivership is to preserve the property pending a determination of the rights of the parties to the litigation with reference to such property or the proceeds thereof, there is no question but that the successful party, availing himself of the fruits of the litigation, must take subject to the burden of the costs of the receivership, and it is immaterial whether the plaintiff has succeeded in asserting the rights in aid of which the receivership has been asked, or whether the defendant has established the invalidity of plaintiff's claims. * * * And this rule is properly applied where the contest is not as to the regularity or legality of the proceedings for the appointment of the receiver, but only as to the disposition of the proceeds of the property or funds. * * *

"But where the right of the plaintiff to subject the property for which he seeks to have a receiver appointed to the payment of his claim is resisted from the beginning, and the effect of the appointment of a receiver is to subject to the control of such receiver property in which the plaintiff is, as the result of the litigation, found to have had no interest or right whatever, it would evidently be manifestly unjust that, after determination of the case against the plaintiff, he should be allowed to have the expenses of the receivership, which he has occasioned by his unfounded claim, and from which the opposite party derives no benefit, satisfied out of the property itself. Such a result would be inequitable, for it would throw upon defendant the burden of a litigation instituted by plaintiff without right. * * * And it seems to be

a well-established rule that property which should not have been brought within the jurisdiction of or taken possession of by a receiver should not be appropriated to the payment of the expenses of the receivership. In such cases the receiver must look for his compensation to the portion of the fund which was properly brought within his jurisdiction, or, if there is no such fund, then to the plaintiff on whose application the receivership was secured."

While in the instant case the defendant Lavender was named as a party defendant and charged in the complaint as co-respondent, this should not justify the seizing and sequestering of her sole and separate property. From the institution of the action she asserted her complete and separate ownership of "Sunland Ranch," denying by way of answer and otherwise that either plaintiff or defendant Andrade had any interest in or claim upon the same. For this reason she has consistently resisted the taking of her property by the receiver. The receivership necessarily was not created for her benefit. On the contrary, it could only have been detrimental to her interests, and from the beginning has been a violation of her property rights. It would be inequitable to charge the expenses and fees of the receiver against the property of one who has established her right to the property in hostility to the entire receivership proceedings. Under the circumstances, it is our opinion that the court below acted with propriety and not in abuse of its discretion when it decreed the return of defendant Lavender's property free and clear of any receivership charges.

[4] What we have said sufficiently disposes of the present appeal. We do not find it necessary, therefore, to consider the many points urged by the appellant as to the defendant Lavender's alleged relations with the defendant Andrade or having to do with the propriety of the judgment decreeing the "Sunland Ranch" to be the sole and separate property of defendant Lavender. These and many other points raised by the appellant were determined by the judgment entered in the cause on August 6, 1927, which judgment has long since become final. It is elementary that any and all matters therein determined are now beyond review.

Examination of the transcript satisfies us as to the propriety of the trial court's conclusion. We find that appellant was in no way prejudiced by the rulings on the evidence.

There is nothing in appellant's briefs calling for further discussion.

The order appealed from is affirmed.

We concur: SHENK, J.; CURTIS, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; TYLER, Justice pro tem.

216 Cal. 61

PASADENA JUNIOR COLLEGE DIST. et al. v. BOARD OF SUPERVISORS OF LOS ANGELES COUNTY et al.

S. F. 14668.

Supreme Court of California.

July 25, 1932.

1. Schools and school districts ⇐103(4).

Tax levied to reimburse junior college for educating outside students should, under stipulation, be considered as reimbursing expenditures for preceding year (School Code, §§ 4.270, 4.271 [St. 1931, pp. 2575, 2576]).

2. Schools and school districts ⇐103(4).

County supervisors have no discretion to reduce amount payable to junior college for educating outside students (School Code, § 4.271 [St. 1931, p. 2575]).

3. Schools and school districts ⇐103(4).

That new junior college district was organized in county just before tax levy *held* not to authorize deduction from amount due junior college for educating outside students (School Code, § 4.271 [St. 1931, p. 2575]).

4. Schools and school districts ⇐103(4).

County supervisors, having made illegal reduction in levying taxes to reimburse junior college, for expense of educating outside students, could make relevy in following year to make up deficit (School Code, § 4.271 [St. 1931, p. 2575]).

5. Schools and school districts ⇐103(4).

Where original levy for reimbursing junior college for educating outside students was insufficient, new levy should be made on property within new junior college district which was formerly relieved of tax (School Code, § 4.271 [St. 1931, p. 2575]).

According to the stipulation, the previous levy to defray cost of educating junior college students residing outside of junior college district was limited to property outside new junior college district, and tax on property owners in new district lower than that originally levied would be sufficient to make up deficit.

In Bank.

Original mandamus proceeding by the Pasadena Junior College District and others to compel the Board of Supervisors of Los Angeles County and others to levy a tax.

Peremptory writ granted.

William B. Wade, of Fullerton, Isaac Jones, of Ontario, W. E. Byrne, of San Bernardino, and Charles P. McCarthy, Kenneth K. Wright, Hill, Morgan & Bledsoe, and A. J. Hill, all of Los Angeles, for petitioners.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Everett W. Mattoon, Co. Counsel, and J. H. O'Connor, Asst. Co. Counsel, both of Los Angeles, for respondents.

CURTIS, J.

This is an original proceeding in mandamus to compel the defendants to levy, assess, and extend a tax sufficient to repay the plaintiff junior college districts moneys expended by them during the school year 1930–31 for educating pupils residing in the county of Los Angeles but not in any junior college district.

The plaintiffs are junior college districts organized under the laws of the state of California and the trustees of the respective districts. During the school year 1930–31, each of the plaintiff junior college districts received in their junior colleges and educated therein pupils who resided in Los Angeles county and not in any junior college district, and expended the following amounts, respectively, for such purpose:

Pasadena Junior College.....	$114,016.83
Glendale Junior College.....	44,869.86
Compton Junior College.....	94,334.75
Long Beach Junior College.....	30,163.34
Fullerton Junior College.....	25,103.24
Chaffey Junior College.....	33,512.37

The superintendent of schools of Los Angeles county on July 20, 1931, pursuant to sections 4.630 to 4.634 of the School Code (as then existing), reported these amounts to the board of supervisors of Los Angeles county, which, together with the claims of other junior college districts, constituted the amount to be raised for the junior college tuition fund. Among the students who were enrolled in plaintiff junior college districts and the cost of whose education was included in said districts, were students who resided in the Los Angeles city high school district. This district was organized as a junior college district by virtue of an election held in March, 1931, but did not become fully organized until July 1, 1931, which was after the close of the school year 1930–31. It therefore appears that, at the time the tax levy for the year 1931 was required to be made, on September 1, 1931 (Pol. Code, § 3714 [as amended by St. 1929, p. 1129]), property within the Los Angeles city high school district and the newly organized junior college district was not strictly speaking property within the county of Los Angeles outside of a junior college district, but that at all times during the school year 1930–31 and during which time the pupils were educated, the property within the Los Angeles city high school district was property in the county of Los Angeles not within any junior college district. It was urged by the defendant supervisors and auditor that the property within the Los Angeles city high school district, by reason of its creation into a junior college district, could not be taxed for the cost of educating pupils during the school year 1930–31, and therefore there was deducted from the claims of the respective districts the cost of educating pupils residing in the Los Angeles city high school district, and a supplemental report purporting to be in place of the one previously filed was filed by the superintendent of schools with the board of supervisors and auditor on August 31, 1931. This was after the time for making changes in any part of the county budget had elapsed. Pol. Code, § 3714. Deducting these costs from the claims of the district left a balance of $199,427.87 to be raised for the junior college tuition fund. However, because the board of supervisors wished to keep the total school tax levy under 48 cents per $100 valuation, and not being willing to decrease the amount of the elementary school tax, which would be necessary if the junior college tuition fund tax were increased, the superintendent of schools fixed the amount to be raised at approximately $139,998.36. At the time the board of supervisors passed its resolution fixing the tax rate for the junior college tuition fund, it fixed the amount to be raised for such fund at $139,001.45, and made the tax levy accordingly. This levy was not made upon any property situate in the newly created Los Angeles city junior college district which formerly comprised the territory of the Los Angeles city high school district, but was levied upon all other property in Los Angeles county not within a junior college district either at the time of the levy or during the school year of 1930–31. These deductions had the following effect upon the respective plaintiffs as to the amounts claimed by each:

Name of District	Deduction for Los Angeles Pupils	Further Deduction to Reduce Tax Rate	Total Still Due District
Pasadena	$ 30,999.30	$24,739.22	$ 55,738.52
Glendale	29,138.02	4,688.09	33,826.11
Compton	65,376.34	8,629.61	74,005.95
Long Beach...	22,114.57	2,398.53	24,513.10
Fullerton	784.01	7,247.13	8,031.14
Chaffey	704.80	9,776.66	10,481.46
Totals	$149,117.04	$57,479.24	$206,596.28

If the tax levy of $.026 per $100 as to real property and $.011 per $100 as to personal property fixed by the supervisors for the junior college tuition fund had been levied on all property in the county outside of junior college districts and inclusive of property within the Los Angeles city high school district, more than sufficient funds would have been raised to repay plaintiffs the amounts due them for educating pupils residing outside of junior college districts during the school year 1930–31, and, if a levy were made this year for the purpose of meeting the deficit and was levied only upon property formerly situated in the Los Angeles city high school district, the rate would not exceed the

said rate of $.026 on real property and $.011 on personal property.

It is to be noted that, while the school tax estimates are to be submitted on the 20th day of July in each year (Pol. Code, § 3714, subd. 1), and in the instant case the estimate then submitted by the superintendent included the full amount necessary to pay to plaintiffs the cost of educating pupils residing outside of junior college districts, and while these estimates cannot be changed or modified by the board of supervisors (Pol. Code, § 3714, subd. 4), and no change can be adopted even as to the county general tax after the 30th of August (Pol. Code, § 3714, subd. 4), the board and superintendent of schools, in the instant case, did, on the 31st day of August, 1931, reduce the amount of the estimate for the junior college tuition fund and on the next day, and before plaintiffs could in any way object, the board made a tax levy raising only a portion of the funds required to reimburse plaintiffs for their expenditures previously made, and plaintiffs did not learn of this action on the part of the board of supervisors until after the levy had been made.

On May 16, 1932, plaintiffs made a demand upon the board of supervisors that it recognize and allow the deficit thus created as a valid claim against the junior college tuition fund and provide funds for its payment by a levy to be made this year (1932) upon property liable for the deficit. The board, by resolution adopted on the same day, refused to recognize or allow the claim or to take any steps whatever looking toward the raising of money for the purpose of paying the same. This proceeding then followed such refusal.

It is the position of respondents in the first place that the levy for the junior college tuition fund tax made on or about September 1, 1931, was made to pay current expenses for the school year, 1931–32, and not for the next preceding school year 1930–31, and therefore, as the Los Angeles junior college district had been organized prior to the commencement of the school year 1931–32, the board of supervisors of the county of Los Angeles was without authority to levy a tax on the property situated therein to pay any expenses incurred by the plaintiffs' junior colleges for the year 1931–32. The factual situation which the respondents contend existed at the time of the levy of said tax is inconsistent with and directly contrary to the stipulation of facts signed by the parties and filed herein. Paragraphs IV and VI of said stipulation read as follows:

"IV. That at all times herein mentioned one A. R. Clifton was the duly appointed, qualified and acting Superintendent of Schools of said Los Angeles County, and G. F. Gairing was his duly appointed, qualified and acting deputy; that on July 20, 1931, the said County Superintendent of Schools, by said deputy, made to said defendant Supervisors and to said defendant Auditor a written report, in which he showed and stated that the plaintiffs had expended the sums above set forth during the school year 1930–1931, in educating junior college pupils, residing in said Los Angeles County and not in any junior college district; that said report referred to the sums so spent by plaintiffs during the school year 1930–1931 and all of the defendants above named understood and were aware of said facts. That said report was correct and correctly set forth the true amounts expended by junior college districts, including plaintiffs, during the school year 1930–1931, in educating pupils residing in said Los Angeles County and not within a junior college district.

"VI. That following the receipt of said report of said County Superintendent of Schools of Los Angeles County, the said defendant Supervisors and said defendant Auditor represented to said County Superintendent of Schools that the cost of educating pupils residing in said Los Angeles City High School District during the school year 1930–1931 could not and should not be included in the tax to be levied by said defendant Supervisors in September, 1931, for the purpose of raising money for the junior college tuition fund for educating pupils residing in Los Angeles County and not in any junior college district, for the reason that a junior college district had been organized in said Los Angeles City High School District in 1931, to-wit, said Los Angeles City Junior College District, and directed said Superintendent of Schools to deduct from the said cost incurred by plaintiffs, as aforesaid, all costs incurred in educating pupils residing in said Los Angeles City High School District."

It clearly appears from the facts thus stipulated that the report of the superintendent of schools made in July, 1931, and the action of the board of supervisors in making the levy on or about September 1, 1931, both related to and were taken for the purpose of reimbursing the junior colleges for the cost of educating students, residing in the county of Los Angeles and outside of any junior college district, for the next preceding school year (1930–31), and not for the succeeding school year (1931–32). At the time of said levy, September 1, 1931, the law governing the subject was found in sections 4.270 and 4.271 (St. 1931, pp. 2575, 2576), which are as follows:

"4.270. Not later than the twentieth day of July of each year the superintendent of schools of each county in which there is not a county junior college shall certify to the board of supervisors and to the county auditor of such county the total cost for education during the next preceding school year of all junior college pupils residing in such county and not in any junior college district

and the estimated amount needed for that purpose for the current year.

"The said total cost shall not include outlays for permanent construction or improvements, nor moneys received from state apportionment, but shall include sixty-five dollars per unit of average daily attendance for the use of buildings and equipment.

"4.271. The board of supervisors with whom such certificate is filed must, at the time of making the tax levy for that year for county purposes, levy a special tax upon all taxable property in the county not situated in any junior college district, sufficient in amount to defray the costs, during the preceding school year, of educating all junior college students residing in such county and not in any junior college district."

It will thus be seen that under the law in force at the time of said levy and which remains unchanged, it was the duty of the board of supervisors to "levy a special tax * * * sufficient in amount to defray the costs, during the preceding school year, of educating all junior college students residing in such county and not in any junior college district."

[1] It is apparent, therefore, that the superintendent of schools and the board of supervisors at the time of said levy were governed by the provisions of these two Code sections. Under the law it was their duty to provide for the reimbursement of the junior colleges for money already expended by said colleges during the preceding year for the educating of students residing in the county of Los Angeles and not within any junior college district. They made certain deductions from the amounts actually expended by the plaintiffs in the education of these outside students, and the board of supervisors refused to levy a tax on property within the former Los Angeles city high school district, then within the Los Angeles city junior college district, for the reason that said junior college district had been created during the school year 1930–31. These matters will be given later consideration. We are now concerned simply with the object and purpose of said levy made on September 1, 1931, which, as we have seen, was to reimburse the plaintiff districts for money expended by them during the school year 1930–31, and was not to provide funds for the current school year 1931–32. Respondents claim that the cost of educating said outside students for the school year 1930–31 was paid by a tax levied by the board of supervisors on September 1, 1930. We think this claim cannot be sustained. Paragraph XVII of the stipulation of facts covers this subject, and is as follows:

"That junior college districts have uniformly presented claims to the Superintendent of Schools showing the cost of educating students residing outside of junior college districts during the preceding school year and that the Superintendent of Schools has submitted this cost as being the amount necessary for the junior college tuition fund and that junior college districts have reimbursed themselves from moneys received from such fund for their expenditures made during the preceding school year for the education of such pupils."

From this stipulation it appears that it had been the uniform practice for junior colleges to be reimbursed for expenditures incurred by them in the education of outside students by a tax levy made during the school year immediately following that in which said expenditures were made. This being the case, the money raised by the tax levy of September 1, 1930, did not pay the plaintiff districts for the cost incurred by them during the year 1930–31, but was for the cost incurred during the preceding year (1929–30). Respondents contend that under the law as in force prior to the enactment of section 4.271 of the School Code in 1931, which was in reality only an amendment of section 4.631 of said Code, (St. 1929 [School Code, p. 181]) there was no authority vested in the board of supervisors for levying a tax to pay the cost of educating outside students for the next preceding year, but that said section 4.631 of the School Code, and the corresponding provision of the statute creating junior colleges (St. 1921, p. 756) each expressly provided for the levy of a tax to pay the expenses of educating outside students for the current year, which would be for the school year following the levy and not for the school year next preceding said levy. Conceding that the statute of 1921 and these School Code sections are susceptible of the construction claimed for them by respondents, it is evident that neither the officers of the junior colleges, nor the authorities charged with the administration of these laws, placed any such a construction upon them. On the other hand, these public officials followed the uniform practice of reimbursing the districts after and not before the districts had made the expenditures. Finally in 1931, evidently to clear up any uncertainty that might exist in the law upon this subject and possibly to make the law fit the practice followed by said officials, the Legislature enacted section 4.271 of the School Code expressly providing that the tax levy should cover "the cost during the preceding year" of educating said outside students. From the foregoing it is perfectly apparent that the costs of educating outside students for the school year 1930–31 were not paid to these plaintiffs by funds raised by the tax levy of 1930. These costs were unpaid at the close of said year, and, under the law in force at the time of the levy of September 1, 1931, it was the duty of the board of supervisors of the county of Los Angeles to levy a tax sufficient in amount to defray the same.

[2] Having determined that it was the duty of the board of supervisors of the county of Los Angeles to levy a tax "sufficient in amount to defray the costs during the preceding school year, of educating all junior college students residing in such county and not in any junior college district," we will now take up the deductions which the superintendent of schools under the direction of the board of supervisors and later the board of supervisors in effect made from the actual costs incurred by the plaintiffs for the education of such students for the school year 1930–31. The first of these deductions was the sum of $149,117.04, which was made by reason of the fact that the Los Angeles city junior college district had been organized on July 1, 1931, after the close of the school year 1930–31. The other deduction, amounting to the sum of $57,479.24, appears to be simply the result of an arbitrary act of the officials, and no serious attempt is made by respondents to justify such deduction. The provisions of the School Code (section 4.271) is mandatory upon the board of supervisors. It has no discretion to revise or in any manner modify the amount as fixed by legally constituted authorities. Practically the same question was before this court in the recent case of Esberg v. Badaracco, 202 Cal. 110, 259 P. 730, and it was there held that, while it was the duty of the board of supervisors to levy the tax, the determination of the amount thereof was for the board of education. The facts in that case and the law applicable thereto are in principle similar to those in the instant case. The deduction of $57,479.24 was therefore without any lawful authority, and was illegal.

[3] The deduction of $149,117.04 by reason of the fact that the Los Angeles city junior college district had been organized prior to the tax levy of September 1, 1931, is justified by the respondents under the terms of the statute (section 4.271 of the School Code), which limits the levy therein provided for to "taxable property in the county not situated in any junior college district." According to the strict letter of the statute, the action of the board of supervisors in making this deduction might be sustained. Respondents rely upon the ruling of this court in the case of Hughes v. Ewing, 93 Cal. 414, 419, 28 P. 1067. In that case the board of supervisors of Fresno county levied a tax upon land which had been excluded from the Fresno city school district. The purpose of the tax was to pay for a school building which the electors of the district had voted to construct just prior to the exclusion from said district of the lands sought to be taxed. The board levied the tax upon all property within the district at the time the vote was taken, including the excluded lands. Plaintiffs, the owners of said excluded lands, brought said action to declare the tax null and void. The action was finally determined in their favor, not because the excluded lands were not within the district at the time of the levy, but because the owners of said lands would receive no benefit whatever from the building to be constructed. In that case it was sought to justify the levy of the tax upon the excluded territory by resort to a strict construction of the statute which provided that the levy of the tax should be made upon the property "within the district voting for the same." It was argued, as the excluded lands were within the district when the tax was voted, that they were a part of the district "voting for the same," and therefore should be subject to the tax to pay for the improvement even though the owners of said lands had been excluded from all benefits to be derived from the construction of the building. In answer to this argument, this court said: "Irrespective of the construction thus given to the section, it would be difficult, upon principle, to uphold the validity of a tax upon property which is without the district to be benefited by the expenditure of the money so to be raised. The theory upon which the power of taxation is authorized is the benefit to the tax-payer. It would be manifestly unjust to compel a contribution by tax to an object or for the benefit of a class in which the taxpayer is directly excluded from participating." That case differs most materially from the instant case. Here the tax sought to be imposed upon the property owners within the newly created Los Angeles city junior college district was for the purpose of raising funds to pay for a benefit which said property owners had already received and enjoyed. It would be most inequitable and unjust to impose this burden upon the plaintiffs, or to spread it over the balance of the property in said county not within a junior college district, after the organization of the Los Angeles city junior college district. We are satisfied that the Legislature never intended to create any such indefensible condition. "It is the purpose of all revenue laws as nearly as possible to impose upon all property its just proportion of taxation, and a construction of the statute should not be had which will permit * * * properties * * * to escape their just proportion of such taxation." Chesebrough v. City and County of San Francisco, 153 Cal. 559, 568, 96 P. 288, 291. It would be contrary to the very spirit of our laws, which seeks to impose upon all property in the state its just proportion of taxation, for this court to hold that the property owners within the territory embraced within the newly organized Los Angeles city junior college district, after enjoying the privileges afforded by the several plaintiff junior colleges during the school year of 1930–31, could escape paying for these privileges by organizing a district of their own just prior to the time fixed by law for the next tax levy. We are satisfied that such result was never intended. The deduction by the

board of supervisors of the said amount for pupils residing in the newly organized Los Angeles city junior college district was therefore unauthorized and illegal.

[4] Finally the respondents contend that there is no power or authority in the board of supervisors of Los Angeles county to make a relevy of taxes to meet the amounts illegally and unlawfuly deducted by said board in their levy of September 1, 1931. By reference to section 4.271 of the School Code, it will be seen that it is made the duty of the board of supervisors to levy this tax "at the time of making the tax levy for that year for county purposes." The time fixed for the levy of taxes for county purposes is fixed as not later than September 1st. It is now argued by the respondents that as the board of supervisors levied a tax on September 1, 1931, for the purpose of defraying the cost of educating outside junior college students for the preceding year, even though the tax levied was not sufficient for that purpose, said board has no power or authority to make a relevy at the appointed time in the year 1932 to make up said deficit due to the insufficient levy of the previous year. If the board is without such authority, it follows, of course, that the court will not issue its writ of mandate to compel the performance of an illegal or idle act. Respondents have cited four cases in support of their assertion that the board of supervisors has no right or authority to make such relevy. The earliest of these cases is Board of Education of City of San Diego v. Common Council, 128 Cal. 369, 60 P. 976. This case involved an application for a writ of mandate to compel the common council of San Diego to levy a tax for the purpose of maintaining the public schools of San Diego for the fiscal year 1899. The common council refused to make such a levy. The petitioner then applied to the board of supervisors of the county to levy the tax. The board levied the tax, and that tax had been paid. On page 370 of 128 Cal., 60 P. 976, the court said: "It is * * * apparent that the object sought to be obtained by the writ asked for has already been accomplished through a different instrumentality." The court therefore held that the writ would not issue to compel the taxpayers to pay the same tax twice—such a procedure would be unjust and unfair. This was the real basis of the opinion. The court further held, however, as an additional ground for denying the writ, that the writ could not issue because the time of the levy had already expired. The court held that "a levy made after the date therein provided would be invalid." It will be noted, however, that the tax which the plaintiffs there asked to have levied was for the purpose of raising funds for maintaining said schools for the fiscal year 1899, and it was to compel the levy of this 1899 tax that the plaintiffs asked for a writ of mandate against the common council. The city charter of the city of San Diego expressly fixed the date of levying the tax as "on or before the second Monday in May." The common council refused to make the levy as demanded by plaintiffs. Plaintiffs then instituted said action to compel the levy, which action was commenced after the time fixed for making the levy for that year. The board of education in that case did not wait, as did the plaintiffs in this case, and demand a relevy at the time fixed for levying taxes for the next succeeding year, but immediately commenced their action to force the common council to make the levy during the year 1899. As the time in which the board could act in making said levy for the year 1899 has passed, the action was, of course, commenced too late, and the court very properly held that a tax levy for the fiscal year 1899, made thereafter and during that year, would be invalid.

The next case cited is the case of Board of Education v. Common Council, 1 Cal. App. 311, 82 P. 89. The opinion therein is very brief. It simply follows Board of Education v. Common Council, 128 Cal. 369, 60 P. 976. Each action arose under the charter of the city of San Diego.

McDonald v. Richards, 79 Cal. App. 1, 248 P. 1049, is the third case cited by respondents. That action was brought against the county auditor to compel that officer to levy a tax for high school purposes to meet the deficit caused by the failure of the board of supervisors to levy a sufficient tax to raise the amount required for the maintenance of the high school during the school year 1925–26. It was sought by that proceeding to change and increase the tax levy for high school purposes which had already been made by the board of supervisors. This state of facts is evident from the following statement found on page 19 of 79 Cal. App., 248 P. 1049, 1056: "The facts before us show that the time has long since gone by when any authority exists to order any change in the tax levy already made. The different sections of the Political Code relating to the levying of county taxes, the making out of the assessment rolls by the different ministerial officers having to do therewith show that the power to direct any other assessment has ceased to exist, and that any levy, if it were possible in this proceeding for this court to so order, would but lead to confusion and that, under such circumstances, mandamus will not issue." It is quite evident that by that action it was sought to change and increase the tax levy already made by the board of supervisors for that year, and that the court refused relief on the ground that the assessment rolls for that year were no longer in the custody or control of the auditor, against whom the action was directed, and therefore the power, which the auditor at one time possessed to make an assessment when the board of supervisors had neglected to do so, had ceased to exist.

The fourth and last case cited by respondents is Rice v. McClellan, 202 Cal. 650, 262 P. 1092, 1093. This action was filed September 29, 1927. It was instituted by the board of trustees of the La Ballona high school district against the members of the board of supervisors of the county of Los Angeles, and by means thereof the plaintiffs sought a writ of mandate directed to the defendants commanding them to levy a tax sufficient in amount to maintain said high school for the school year 1927–28. The time fixed for the levy of said tax was not later than September 1, 1927. This court very properly held that "The time has passed when that may be done." That case, like the others cited by respondents and discussed above, involved an application for a writ of mandate to compel the board of supervisors to levy a tax during the current year after the levy date had passed. These cases do not involve the question as to whether a tax can be levied in the subsequent year for an obligation already incurred. After the date upon which the tax can be levied has passed, obviously a writ will not issue to compel its inclusion in the levy of that year.

The authorities just discussed shed but little, if any, light upon the question before us, which is whether the board of supervisors may levy a tax during the present year to make up the deficit in last year's levy caused by the board's failure to levy a tax sufficient to meet the legal demands of the plaintiffs for educating outside students during the school year of 1930–31. We have seen that the claims of plaintiffs were legal demands against the territory situated in the county of Los Angeles and outside of junior college districts. They in reality constituted a debt due plaintiffs by the property owners residing in said territory. It would be most unjust and inequitable to hold that the plaintiffs' right to recover their just demands may be defeated by the refusal of the duly constituted officials to perform their duty. This precise question seems never to have been before the appellate courts of this state. It would seem, however, that the law is impotent indeed if it afforded no remedy for redressing such a palpable wrong. At least one California case appears to lay down a rule of law that might well be applied in the present proceeding. In the case of Nevada Nat. Bank v. Board of Supervisors, 5 Cal. App. 638, 91 P. 122, 128, the board of directors of an irrigation district failed to levy taxes for the purpose of paying certain bonds and interest thereon as required by law. Plaintiff, the owner of certain of said bonds, obtained a judgment against the district for the amount of the principal and interest due on said bonds, and thereafter brought an action to compel the levy of an assessment sufficient to pay the same. The district, like the respondents in the instant case, contended that, when the board of directors failed at the time fixed by law to levy the taxes for the payment of said principal and interest, its power became exhausted, and that it was without authority at any time thereafter to levy any tax for said purpose. This contention was not sustained by the trial court, but judgment was given in plaintiff's favor. On appeal, the court, in sustaining the judgment, said: "We are not inclined to consider the law so impotent as is implied by appellants' argument. We hold that the burdens of the property owners have not been increased since they incurred the obligation to pay these bonds. The statute, in our opinion, does not expressly nor by implication prohibit the method adopted herein for the collection of the money due."

So in the present case, the burden on the property owners is not increased by compelling them to pay this year what they by rights should have paid last year. Furthermore, there is nothing in statutes governing the levy of the tax in question which expressly or by implication prohibits a levy of the tax during the present year after the failure of the board of supervisors to perform their duty in that respect at the time fixed for the levy of last year.

In other jurisdictions there is to be found ample authority in support of petitioners' contention in behalf of the legality of the relevy. The case most directly in point is one from the Supreme Court of Iowa, Perrin et al. v. Benson, 49 Iowa, 325. In that case it was said: "As we understand, the question for determination is, where the authority of the board of supervisors is full and complete, and it is their duty to levy school-house taxes at the proper time in 1875, and they neglect to do so, whether they have the power to make such levy in 1876, at the time provided by law for levying taxes." In that case the board levied the taxes in 1876, and the action was brought to enjoin its collection. The court further held: "As it was the duty of the board of supervisors to make the levy, mandamus would lie to compel the performance of such duty. Suppose this course to have been taken, a disposition of such action in all probability could not have been obtained during 1875. If not the compulsory levy could not have been made earlier than 1876." Some discussion was had as to whether the tax could be levied after the year 1876, and, if not levied in 1876, whether the right to compel the levy might not have been thereby waived. Following this discussion, the court used this direct and significant language: "We do not determine at what time the tax will be deemed waived because of a failure to make a levy at the time provided by law. What we do hold is, that where a levy is not made at the proper time, through negligence or mistake, it may be made at the time fixed by law for making the succeeding tax levy."

A similar ruling was made by the Court of Appeals of Kentucky in the case of Morton v. City of Fullerton, 229 Ky. 76, 16 S.W.(2d) 797, 798. The facts in that case show that the city council attempted to levy a tax in 1927. It was not recorded as required by law, and it was held to be void. In 1928 the city council at the time of levying the 1928 taxes attempted to cure the defect in the 1927 levy, and relevy the 1927 taxes. In upholding this levy, the court said: "If the council has, by inadvertence or neglect, failed to perform a duty imposed upon it by law at the proper time, it may yet perform it. The city government has been established for the reason that it was deemed necessary for the peace and good order of the community, and a mere mistake of the council will not be allowed to destroy the government, or cripple its efficiency. Where the council has failed to make a proper levy it may subsequently do so."

The case of Hubert v. New Orleans, 215 U. S. 170, 30 S. Ct. 40, 43, 54 L. Ed. 144, is also in point. In this case it appears that a tax levy was required to meet the obligations of the city of New Orleans to pay certain sums authorized to be raised by taxation for the support of the metropolitan police. The tax had been levied and collected. It was not, however, paid over, but was diverted to other purposes. The court held that the board did not exhaust its power until the obligation fixed by the statute had been actually satisfied, and that, if there had been a diversion of the money raised by a levy in one year, this did not prohibit a levy in a subsequent year to take care of the obligation which should have been paid by a tax levy of the preceding year. The court there stated: "The city exerted its power, as required by law, levied and collected the taxes, but applied them to other purposes, and has failed to turn them over upon demand. We think the power to levy these taxes still exists. As to the creditor, deprived thereof by the action of the city, it is as though such power had never been exercised." That is a much stronger case than the case at bar. There the board had acted and levied the tax as required by law, but failed to legally apply the proceeds. Here the board of supervisors has failed to act at all in so far as the territory within the present Los Angeles city junior college district is concerned. If the power still existed to levy the tax after one had been levied, but the proceeds thereof diverted to other purposes than those required by the statute, we think that the same rule would apply, but with greater force, where, as here, the board charged with the duty of levying the tax failed at the appointed time to act as the law directed it should. Under such circumstances we think it clear from the case just discussed and others cited herein that the board of supervisors of the county of Los Angeles did not exhaust its power to levy a tax to meet the obligations due the plaintiffs and that the power continues to exist until said obligations have been fully paid and satisfied. As the time has long since passed to make said levy during the year 1931, the board not only has the power, but it is its duty to levy in the present year, 1932, a tax sufficient to meet the balance due on said obligations after the payment thereon of the money raised by the levy of 1931.

[5] The only remaining question for consideration is as to the manner of levying the tax, or as to the precise property on which the levy should be made. This question we think has been simplified by the stipulation of the parties filed herein. According to this stipulation, in 1931 for the purpose of reimbursing the plaintiffs for the cost of educating outside students in said year, a levy of $.026 per $100 of valuation as to real property and $.011 per $100 in valuation as to personal property was levied upon all taxable property situated in the county of Los Angeles, and outside of any junior college district, except the property situated in Los Angeles city high school district, later organized into the Los Angeles city junior college district, and "that if a levy were made for the fiscal year 1932–1933 exclusively on all taxable property situate in said Los Angeles city high school district sufficient to raise enough money to pay the balance claimed by plaintiffs, the owners of said property would not be called upon to pay as high a tax on their property for said purposes as the amount of the tax levied and paid upon all other property in said county not situate in a junior college district during the school year 1930–1931." It will thus be seen that all property situated in the county of Los Angeles (except that formerly within the Los Angeles city high school district), which was liable and subject to a tax to meet the demands of the plaintiffs, has paid its just proportion of said tax, and that by a levy of a tax equal thereto upon the property formerly situated in the Los Angeles city high school district, and now within the Los Angeles city junior college district, a sufficient amount will be raised to pay the balance due plaintiffs with some additional. The only objection that the respondents make to the application of such a levy is that it would create an inequality between the Los Angeles city territory and the balance of the outside territory. But, as long as the tax on the Los Angeles city territory will be less than that paid by the balance of the outside territory, the property owners in the Los Angeles city territory cannot complain. Those in the outside territory, not within the Los Angeles city junior college district, have already paid the tax levied against their property. There is no way of levying this tax suggested by ei-

ther of the parties to the proceeding, and none occurs to us, which will make it bear absolutely equally upon all the territory subject to the original tax. The fact that the tax rate now required is less than that paid by the balance of the outside territory under the levy of 1931 does not, in our opinion, render the levy illegal or void. It is fair and just and equitable. As stated above, it is the purpose of revenue laws as near as possible to impose upon all property its just proportion of taxation. Chesebrough v. City and County of San Francisco, 153 Cal. 559, 568, 96 P. 288. In imposing a tax to be levied against the property within the Los Angeles city junior college district sufficient to meet the claims of plaintiffs, although absolute equality is not thereby attained, we are as near as possible causing all the property originally liable for the payments of these obligations to bear its just proportion of this burden.

It is therefore ordered that a peremptory writ of mandate issue out of this court directed to the respondents commanding them to allow the sum of $206,596.28 as a proper claim and charge against the junior college tuition fund in favor of the plaintiffs for the amounts expended by them respectively during the school year 1930–31, for educating pupils residing in the county of Los Angeles but not in any junior college district, and further that said board of supervisors levy, assess, and extend at the time of making the tax levy for the year 1932 for county purposes, a special tax, sufficient to raise the sum of $206,596.28, due and owing plaintiffs as aforesaid, upon all nonoperative taxable property situated in the territory formerly comprised within the boundaries of the Los Angeles city high school district, and now constituting the Los Angeles city junior college district.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; TYLER, Justice pro tem.

216 Cal. 165

SEIDELL et al. v. TUXEDO LAND CO. et al.

Sac. 4570.

Supreme Court of California.

Aug. 4, 1932.

1. Appeal and error ⇐1008(1).

Whether promissory note, recited in deed of trust subject to which plaintiffs acquired property, bore genuine signatures of plaintiffs' grantors, *held* for trial judge, not Supreme Court.

2. Appeal and error ⇐1011(1).

Trial court's finding on conflicting evidence is conclusive.

3. Bills and notes ⇐517.

Evidence sustained finding that promissory note recited in deed of trust, subject to which plaintiffs acquired property, was signed by plaintiffs' grantors.

4. Bills and notes ⇐496(1).

Assignment in writing of promissory note, recited in deed of trust by party in whose name both were taken, was presumed to be for valid consideration (Civ. Code, § 869a).

5. Principal and agent ⇐25(3).

In action to enjoin sale of realty under deed of trust given to secure promissory note, both of which were taken in name of agent of owner, who conveyed to plaintiffs' grantors, plaintiffs cannot question validity of agent's assignment of note (Civ. Code, § 869a).

6. Mortgages ⇐235.

Assignment of promissory note recited in deed of trust by mortgagee's agent in whose name both were taken, though not passing title to property, carried with it security of deed of trust (Civ. Code, §§ 2934, 2936).

In Bank.

Appeal from Superior Court, Glenn County; R. M. Rankin, Judge.

Action by C. V. Seidell and another against the Tuxedo Land Company and others. From the judgment, plaintiffs appeal.

Affirmed.

W. T. Belieu, of Willows, for appellants.

Charles M. Jones, of Stockton, for respondents.

CURTIS, J.

Plaintiffs, who are husband and wife, are the owners of certain real property situated in the county of Glenn. They acquired the property by deed dated January 23, 1930, and executed by J. R. and Frances R. Covington, which deed contained a recital in the following words: "Subject to a deed of trust dated August 25, 1925, and recorded August 25, 1926, in Book 97 of Trust Deeds at page 313." The consideration paid by them for said real property was their own unsecured note for $500. Plaintiffs instituted this action for the purpose of enjoining the sale of said real property under proceedings brought to foreclose said deed of trust. The regularity of said proceedings is not questioned. No claim is made that the promissory note, mentioned in said deed of trust, or any part thereof, has been paid, nor that it was not long past

due at the time of the institution of said foreclosure proceeding. Plaintiffs admit that at the time they acquired said real property they had actual as well as constructive notice of said deed of trust, and of the indebtedness which it was given to secure. The principal ground upon which the plaintiffs relied for relief before the trial court against the defendants, was that while J. R. and Frances Covington executed and delivered said trust deed, they did not execute the promissory note described and mentioned therein. Upon this issue the trial court found that said deed of trust was given to secure a promissory note for the sum of $9,400 and interest, no part of the principal of which had been paid except the sum of $700, and that said note was the property of the defendant the Tuxedo Land Company. The plaintiffs have appealed and they now make the same point here that they made before the trial court.

[1-3] The evidence shows that the land described in the deed of trust was formerly owned by Lulu L. Spencer, who conveyed it to J. R. Covington and Frances R. Covington by deed dated August 25, 1925. The deed of trust involved herein bears the same date. The note for $9,400 was also dated August 25, 1925. The deed of trust was not acknowledged until March 18, 1926. It was recorded August 25, 1926. The evidence further shows that a brother of J. R. Covington, named E. P. Covington, and his wife, Nora Covington, had in the early summer of 1925 a lease and option to purchase said land, and that the two Covington brothers and their wives undertook to buy the land in August of the same year. Whether any deed to the land was made to them at this time does not clearly appear, but it was shown that the two Covingtons and their wives executed a deed of trust covering said land to secure a promissory note for $9,400, which represented either the whole, or practically the whole, of the purchase price that was to be paid for said land. While this deed of trust was executed and acknowledged, it never became effective, was never recorded, and there appears to be some uncertainty as to what finally became of it. After this transaction the Covington brothers remained on the land under a joint claim until some time in January, 1926, when E. P. Covington and his wife left the property. J. R. Covington and his wife remained in possession of the land. On August 25, 1926, a deed to said land from Lulu L. Spencer to J. R. Covington and wife was filed for record in the office of the county recorder of Glenn county in which county said land is situated. This deed was dated and acknowledged on August 25, 1925, exactly one year prior to the date of its recordation. On the same day the deed was recorded there was also filed for record in the office of said county recorder the deed of trust involved in this action. As we have seen it was executed by J. R. Covington and wife and recites that it was given to secure a promissory note for $9,400, executed by J. R. Covington and wife. These facts are undisputed, and the only contention which the appellants make is that, while J. R. Covington and his wife executed and delivered the deed of trust which was recorded on August 25, 1926, they did not execute or deliver the promissory note, which said deed of trust purports to secure. J. R. Covington and his wife testified that they, with E. P. Covington and wife, executed a promissory note for $9,400 on August 25, 1925, and on the same day executed a deed of trust on the land involved herein to secure said promissory note. This was the deed of trust heretofore referred to as never having become effective and which was never recorded. They further testified that in March, 1926, they executed and delivered the deed of trust which is the subject of this action, but they did not at that time nor at any time execute or deliver the promissory note referred to in said trust deed. In other words, their testimony is to the effect that while they executed and delivered a new deed of trust covering said land and purporting to secure a new promissory note, they did not in fact execute or deliver this new or second note. Appellants rest their case upon this testimony of the Covingtons. As against this testimony there were admitted in evidence six letters written by J. R. Covington which were admittedly signed by him and in which he admitted his indebtedness on the note. These letters with the deed of trust which was admittedly signed by J. R. Covington and his wife, Frances R. Covington, were before the trial judge who had an opportunity to, and who undoubtedly did, compare the genuine signatures of the Covingtons as shown by these documents with the signatures appended to the disputed promissory note which was also in evidence. It was for the trial judge to determine, with these writings before him, whether the promissory note which purported to be signed by J. R. and Frances Covington actually bore their genuine signatures. Having determined this issue in favor of the respondents upon the conflicting evidence, it is not for this court to disturb the finding. Besides the evidence which these writings furnished as to the genuine signatures of the Covingtons, the six letters, written over a period beginning July 9, 1927, and ending February 28, 1930, with the possible exception of the last one, contain direct reference not only to the deed of trust, but to the note of the Covingtons. In one of these letters (all of which were written to respondents) J. R. Covington refers to a promise made by him to send "a hundred dollars payment on interest due on my note." In another he asks that "$1300 credit I have on my original note" be considered as "inter-

est to date." In the same letter he writes that, "As soon as I could get the government loan through I could pay the loan from you." Other letters contain equally damaging statements against the claim of Covington that he had not signed the note which the trust deed was given to secure. With such persuasive testimony before the trial court, we are unable to perceive how it could have found otherwise than as it did. There is an utter lack of merit in the contention of the appellants that the evidence is insufficient to support the finding of the trial court that the promissory note, recited in the deed of trust involved herein, was not signed by J. R. Covington and Frances R. Covington.

[4, 5] The other grounds advanced by appellants for the reversal of the judgment are equally untenable. It is claimed that the assignment of the note by the original payee thereof to the Tuxedo Land Company was without consideration, and that the assignment was made without any right or authority. The assignment was in writing and was presumed to be for a valid consideration. There was no evidence introduced which purported to overcome this presumption. Besides this was not a matter which concerned the appellants. While the land was originally owned by Lulu L. Spencer and was conveyed by her to the Covingtons, the note and deed of trust were taken in the name of Edward F. Harris, who was a relative and agent of Lulu L. Spencer. It is contended by appellants that Harris held the note and deed of trust in trust for Lulu L. Spencer and was without authority to assign the same except with her consent. Lulu L. Spencer by permitting the note and deed of trust to be taken in the name of Harris, and thus creating him the ostensible owner of said note and deed of trust, would be thereafter estopped from denying his authority to assign these documents. She is not now complaining, and the appellants are in no position to question the validity of an assignment executed by Harris. Section 869a, Civ. Code.

[6] The assignment of the note and deed of trust by Harris to the respondent Tuxedo Land Company purported to assign not only the promissory note and the deed of trust, but also an interest in the real property covered by the deed of trust. Appellants contend that Harris as beneficiary under the deed of trust held no title to the land described therein, but that said title was in the trustees named in said deed of trust, and therefore said assignment was not effective for any purpose. It is true that Harris, as the beneficiary under said deed of trust, had no title to the land described therein. No assignment or other conveyance by him would pass title to said land. While the assignment given by him to the Tuxedo Land Company was ineffective for the purpose of passing any title to said land, it was valid as an assignment of the promissory note secured by the deed of trust, and the assignment of the note carried with it the security of the deed of trust. Section 2936, Civ. Code. The assignment was drawn and recorded in compliance with section 2934 of the Civil Code, and as a transfer of the note and security was effectual for all purposes.

Lastly the appellants contend that the Tuxedo Land Company had assigned and transferred its interest in the promissory note prior to the institution of the proceeding to foreclose the trust deed and, therefore, that it had no interest in said note which would entitle it to institute said foreclosure proceedings. There was some semblance of evidence that said company had made a transfer of said note prior to the time it began said proceedings of foreclosure; but the whole transaction was fully explained at the trial, and the evidence as a whole fully sustains the finding of the trial court that no such assignment had been made by the Tuxedo Land Company. Viewing the evidence in the light most favorable to the appellant, the most that can be said is that the evidence as to the assignment is conflicting.

There is practically no legal question presented on this appeal. The whole case involves questions of fact, and whether the evidence is sufficient to support the findings. Upon every point advanced by the appellants the record shows ample evidence to support the findings of the trial court. We have examined the record with care and find nothing therein which furnishes any justification to appellants in taking this appeal. It is entirely barren of merit and frivolous in the extreme. Appeals of this character should be discouraged, both in the interest of litigants directly interested in the particular case, and of those who have meritorious causes awaiting the consideration of the courts. If the court's time is taken up with frivolous appeals, it cannot be given to those possessing merit. The only reasonable conclusion at which the court can arrive in determining an appeal which is so destitute of merit as is the present one, is that it was taken for delay merely, and that in affirming the judgment it should impose damages upon appellants.

The judgment is affirmed, and damages imposed upon the appellants in the sum of $150, on the ground that the appeal is frivolous and was taken for delay.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; SEAWELL, J.; TYLER, Justice pro tem.

216 Cal. 81

PEOPLE v. FULLER.

Cr. 3524.

Supreme Court of California.

July 25, 1932.

Rehearing Denied Aug. 22, 1932.

1. Homicide ⇐253(1).

Evidence *held* sufficient to support conviction of murder in the first degree.

2. Homicide ⇐169(1).

In prosecution of defendant for murder of his partner, evidence regarding deceased's assignments, deeds, and mortgages, made with intent of hiding his property from his creditors, *held* properly excluded as irrelevant.

3. Homicide ⇐340(2).

In murder prosecution, instruction not clear as to meaning and inapplicable to case, given inadvertently, *held* not prejudicial.

Instruction was in substance that, if defendant was engaged in performance of unlawful act, and deceased attempted in lawful manner to prevent performance of such unlawful act, and if, while so endeavoring to prevent it, defendant in anger, and solely for purpose of revenge, or to enable him to carry out unlawful design so interfered with by deceased, attacked deceased with deadly weapon, intending to kill deceased, and carried out intention, fact that defendant was in passion would not mitigate or excuse homicide, but crime committed would be murder in first degree.

In Bank.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Albert Fuller was convicted of first degree murder, and he appeals.

Affirmed.

Strother P. Walton, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., and Mason A. Bailey, Dist. Atty., of Madera, and Frank M. Ostrander, Dist. Atty., of Merced, for the People.

SEAWELL, J.

The defendant, Albert Fuller, was convicted in the Superior Court of the county of Madera of first degree murder. The jury did not relieve him of the extreme penalty of the law, and, his punishment being fixed in such cases by the law, the court accordingly sentenced him to suffer the death penalty. The person murdered was J. W. Kipp, commonly known in the section wherein he resided as "Jim" Kipp. The crime was committed October 8, 1931. Kipp's father was of the white blood and his mother was a California Indian. He was forty-eight years of age at the time he met his death by drowning in a mine shaft, and had many years prior thereto suffered the loss of his right leg. By trade he was a shoe repairer. He used a crutch to assist him in locomotion. It seems that the deceased had spent the most, if not his entire life, in the county of Fresno and counties contiguous thereto, and had been somewhat successful in his business, which, primarily, was that of conducting a shoe repairing business. His disappearance, from the locality in which he resided, under unusual circumstances, caused a search to be organized which resulted in the discovery of his body on October 15, 1931, in a mine shaft of the old Wagner mine, which shaft was two hundred feet deep, the lower one hundred feet of which was filled with water. Said mining grounds were located in an isolated mountain district of Madera county. The nearest approach of a traveled way to said abandoned shaft was one and one-half miles distant. The dimensions of the shaft at its mouth were six by seven feet. Five feet below its surface it narrowed to three by four feet, but lower down it widened again. By reason of the uneven and broken surface of the locality the mouth of said shaft was not readily discernible until one approached within twenty feet of the opening. The locality gave evidence of earlier mining activities, and "dumps" from the mine clearly marked the locality as the site of a former mining enterprise.

The defendant, his wife, Marjorie Fuller, and the deceased had been mutually acquainted for a period of some five years. This acquaintance began at Big Creek, Fresno county, where the deceased had conducted a shoe repairing business before he became acquainted with Fuller. Kipp had also known Marjorie Fuller at Big Creek and at the city of Fresno before Fuller had made her acquaintance. It seems that prior to her marriage with Fuller, which took place less than five years before the death of Kipp, she had been employed in restaurant and hotel work at Fresno and outlying villages. The defendant at the time he became acquainted with the deceased, Kipp, was working for the Southern California Edison Power Company. He was so employed for about one year, when, according to his own admission, he had engaged in selling whisky for a period of three years in and about Big Creek. In this he claims Kipp joined him. This relationship, according to defendant's story, continued until he and Kipp bought a general merchandise business at the village of Seville, Tulare county, in October, 1930. Upon the purchase of said business defendant Fuller

applied for and was appointed postmaster of the village. Kipp seemed to have been engaged to the time of said purchase in conducting a shoe repairing business and attending to other business affairs. The defendant, his wife, Marjorie, and Kipp, after the purchase of said business, lived at the same house located near the store until July 25, 1931, on which day the wife left Fuller and went to Fresno, which circumstance will be referred to as this opinion progresses. Fuller testified that he and Kipp frequently disagreed as to the management of said merchandise business. Kipp was presumably engaged in the shoe repairing business, and seems to have attended to the financial business of the partners. Fuller was more active in the sales department. Some time after the business was taken over, the exact month does not appear in the record, Fuller and Kipp obtained three policies of fire insurance. Whether said policies were issued through the solicitation of Fuller or Kipp or both does not appear. John C. Herring, the agent of the company which issued the policies, referred to them in the procurement of said insurance merely as Al. Fuller and J. W. Kipp. The policies ran to said partners in the order named. These policies were issued in the following amounts: On stock, $2,000; on shoe equipment, $1,000; on Frigidaire, $500; total, $3,500. On September 19, 1931, said store and its contents, including the shoe repairing department, were destroyed by fire.

The fact that Fuller had allured Kipp to the mine shaft in a lonely district to accomplish the thing which actually happened was, in all probability, divulged by his wife, who was not called as a witness, to the officers of the law. This conclusion is suggested by the fact that Fuller and his wife began to consort together immediately after Kipp disappeared, and he admitted at the trial that he told his wife of the incident which resulted in Kipp losing his life immediately thereafter, and she advised him to keep the matter a secret. Upon being arrested on the third day following the commission of said crime at the home of his friend Eaton by the sheriff of Fresno county, W. H. Collins, in explanation of his arrest he said to Eaton, as he was leaving with the sheriff, "Well, I think I know what it is about, it serves a man right for trusting a woman." There were, however, other circumstances which placed Kipp, when last seen, in company with Fuller, going in the general direction of the shaft from which Kipp's body was recovered four days after Fuller's arrest and seven days after Kipp's death, at a depth of one hundred feet, floating among waterlogged timbers at the water line. The facts briefly stated in this respect are that Kipp and Fuller were seen to leave Seville in Kipp's Victoria Studebaker Six automobile on October 8, 1931, at approximately 10:30 a. m., going westerly. Kipp was driving the car. They reached Raymond between 2:30 and 3 o'clock p. m. and bought three gallons of gasoline. They then entered a restaurant and ice-cream parlor and ordered sandwiches. Fuller called for two glasses, and said to the attendant that he had what he wished to drink with him. He produced a bottle, from his pocket, containing whisky, and several rounds of drinks were had. This he admitted as a witness. He was seen upon his return passing through Raymond and going in the general direction of Fresno at 5 or 5:30 p. m., alone and driving Kipp's Studebaker car. At about 10 o'clock that night he drove into Lounsbury's garage at Merced in Kipp's Studebaker, and left the next morning, October 9th, at 7 o'clock. At 5:30 p. m. of the same day Kipp's car was stored at a Modesto garage and was checked out at 8:30 the next day. On that afternoon, October 9th, the defendant drove into another garage in Merced —Thorington's—at 3:30, in his own car, an Oldsmobile, and left at 9 o'clock that night. On October 10th, at 2 p. m., defendant's Oldsmobile was stored at Modesto and checked out the following morning at 8:30. The garage man in this instance would not undertake to identify the defendant as the man who stored said car for the night. As to said automobiles being cars personally owned or under the control of Kipp and Fuller respectively there is no dispute. Each garage owner kept records of the license numbers and descriptions of said cars as they were shifted from one garage to another. Nor is there any doubt as to the identity of the defendant with the storage of said cars as described by the several garage owners. On October 10th the defendant arrived at the Auditorium garage at Oakland in Kipp's Studebaker car, represented himself as J. W. Kipp, who was the registered owner of the car, made arrangements for the storage of said car for a year at the rate of $4 per month, paid one month's storage in advance in the name of J. W. Kipp and took the name and address of the garage for future reference in case he wished to withdraw said car at the end of the first month. He told the garage owner that he was going north, and departed. The sheriffs and deputy sheriffs and other officers of Fresno, Tulare, and Madera counties gathered such information as justified the filing of a charge of murder against the defendant, and he was placed under arrest by Sheriff Collins on Sunday, October 11, 1931. When interrogated by the officers, he said he was uncertain as to the last time he saw Kipp, but he finally decided that it was October 8th. He and Kipp drove into Fresno from Seville in Kipp's Studebaker, and before reaching Fresno the latter remarked that he had an appointment with a man named Johnson at a designated street corner in Fresno. They parked Kipp's car, and, upon Johnson's arrival in his car, the three entered Kipp's

car and proceeded to the place of a bootlegger named Sam, where they had a few drinks, and returned to the place where Johnson had parked his car; whereupon he, Fuller, left the party and went to get his car, which was being repaired by a man named Statham. He placed the time he left Kipp at noon, but later changed the hour to possibly 2 o'clock p. m. In the presence of Sheriff Overholt, Sheriff Hill, Sheriff Rhodes, Sheriff Collins, and Deputy Sheriff Tarr, he also stated that Kipp and the mysterious Johnson left him at Fresno, each in his own car driving toward San Francisco, and he believed that Kipp had gone to San Francisco to enter into a liquor transaction with Johnson. He could not name any one in Fresno who was acquainted with Johnson except himself and Kipp. Later, in accounting for the absence of his friend and former partner, he offered the theory that, inasmuch as a divorce was pending between himself and his wife, and there was some probability that Kipp, by reason of the friendship which existed between them, would be called as a witness on his behalf, and as Kipp did not care to testify in the case, he would be absent for two or three weeks. He said that he and Kipp were friendly. When it was suggested that Kipp might be dead or injured, he made the assuring reply that Kipp would show up in a couple of weeks; he would come back; he would walk right in and everything would be all right. He regarded Kipp's absence, in some strange fashion, as a friendly act on the part of Kipp. As additional reasons supporting his grim optimistic prediction that the man known by him to be dead would soon return, he said he was absent partly on business and partly because he did not want to get mixed up in his divorce action. Upon arriving at Madera in the company of the officers, they were met by two members of the Fresno police department who had in their possession a suitcase which Fuller identified as his property. It contained, among other articles of clothing, a pair of trousers from which were taken four keys which were identified as keys belonging to Kipp. Two of them were keys to his safe deposit boxes. Fuller said that they were keys to his safe deposit boxes, but the bank officials identified said keys by their records as having been issued to and used by Kipp, one of which was issued long before Fuller ever knew Kipp. Fuller never had had access to Kipp's safe deposit boxes, and he never presented himself to the bank as a person who had such a right. Fuller did not attempt to show that he had a safe deposit box at any time. On October 13th Fuller was taken to Modesto and asked to point out the hotel to which he had stated he had gone to meet a woman from Seville on the night of October 10th, and after meeting her had registered under the name "J. E. Spears, San Francisco." Upon arriving at Modesto he refused to talk further, acting upon the advice of counsel, but the officers located the hotel and inspected his registration, which appeared upon the hotel register in the manner above set forth. From the suitcase identified by Fuller as his property there was taken a shirt which he admitted belonged to him. This shirt had been recently washed, but still showed stains upon it. The stains were submitted to a chemist for examination, and were pronounced by him to be stains made by human blood.

The day following the death of Kipp, October 9th, Fuller appeared at the office of John C. Herring, the insurance agent who had issued the policies of insurance against loss by fire upon the stock and fixtures of the store, a Frigidaire, and the shoe repairing equipment, property of the partnership, amounting to $3500, with a man whom he introduced as Mr. Johnson. Fuller presented a purported executed assignment by Kipp of all his interest in the moneys due or collectible upon said policies, to Fuller. Johnson made an affidavit in which he averred that he witnessed the signature of Kipp to said purported assignment of his interest in said policies to Fuller. The assignment was acknowledged by Herring, who was also a notary, and delivered to Fuller. The assignment was not produced at the trial or accounted for by Fuller, notwithstanding his attempted explanation from the witness stand that about a week before the death of Kipp, the latter had spoken to him (Fuller) about assigning his claim to the insurance money for the purpose of hiding his assets from his creditors. Johnson was not produced at the trial nor was any evidence given which had a tendency to establish his identity in the smallest degree. A demand to produce the alleged assignment for inspection was not complied with.

The foregoing is a fair statement of Fuller's attempts to account for the absence of his partner and explain his connection with him on the day when Kipp was last seen alive. The record contains other incriminatory acts which we shall not pause to narrate. All that has been related to the present time occurred or was discovered prior to the day on which it became known that Kipp's body was in the mine shaft, to wit, October 15th, seven days after it had been cast into the shaft.

An inspection of the rocks and soil immediately in the proximity of the mouth of the shaft revealed splashes of dry blood upon rocks and upon weeds and grasses. A chemical analysis of these blood spots showed that they were human blood spots. The body, when drawn to the surface, showed a laceration over each ear about an inch long and a laceration about three inches in length above

the center of the forehead extending to the skull. About an inch above the outer corner of the left eye there was a puncture wound, described by the autopsy physician as being about the size of a person's little finger and a little bit jagged on the edges. The instrument which produced this wound entered to a depth of approximately three inches and ended at the cavity of the right jawbone. The doctor did not think any of the wounds would produce immediate death. The lungs were filled with water, which would indicate that death was immediately caused by drowning. The walls of the shaft were not exactly perpendicular, and a body dropped from the opening would likely touch the sides in its descent. Ledges of rock in certain places projected from the walls to the extent of a foot and a half. The body had other less important bruises upon it in addition to those specifically described. It seems to have been the theory of the prosecution that the deceased was struck with a miner's pick or some other sharp pointed instrument which rendered him unconscious and his body was then cast into the shaft. Fuller owned a half interest in a mining claim which he had worked, in close proximity to the old Wagner mining shaft in which Kipp's body was discovered. He had been at his mining claim many times, but denied that he had ever before seen or known of the old abandoned Wagner mining grounds. Slight reference was made to spikes, which were not described, in one corner of the shaft to which some apparatus was attached. This subject was not specially stressed in the evidence.

The defendant took the witness chair in his own behalf. After having heard the case made against him at the trial and recognizing that his first plan of defense had absolutely broken down with the discovery of Kipp's body, he boldly branded all that he had told the officers with respect to Kipp's movements and alleged plans, in the hope of discouraging further investigation, as "lies." He said there was no truth in what he had said.

His testimony in attempting to establish his second plan of defense is so fraught with inconsistencies and contradictions by other evidence, and is so definitely overthrown by the facts and by reason, as to render it of no greater strength than was his original abandoned plan of defense.

His account of the manner in which Kipp lost his life, putting out of consideration his cunningly planned attempt to possess himself of Kipp's property, is so far out of joint with all reasonable probabilities as to bring it into the realm of absurdities. Conflicting statements run through his professions of friendship for Kipp. At the particular time when he sought to make it appear that Kipp had stolen his wife's affections and that whatever happened to Kipp was a casualty brought about by his resisting a deadly assault made by Kipp with the intent of killing him in order that Kipp might possess himself of Fuller's wife, he was engaged in procuring a divorce from her and she had cross-complained against him. A divorce seemed reasonably certain. He stated that the trip was proposed by Kipp, who told him that he had a load of whisky cached in the mountains, and he went to assist in loading it into the automobile. He stated that Kipp had taken a number of drinks from his bottle, and insisted on more, and he said to him that he did not want to get too drunk, and he thought he had enough. Kipp replied that he could drink Fuller drunk any time, and Fuller acceded to the statement. Upon arriving at the locality where the liquor was supposed to be hidden, Fuller said, "Well, let's go and get it and get back home, go back to Fresno," and Kipp said "Why is it you want to go back to Fresno; I suppose you want to go back to see Marjorie?" "And I says, 'Jim, you are getting pretty drunk,' and I says, 'You have had enough to say about Marjorie now,' and I says, 'What her and I does is none of your business; you have nothing to do with it, now, and let's quit talking about it and get this whiskey and go to Fresno. * * *' He says, 'We will go down this trail and get it,' and we got out of the car and crossed a barbed wire fence and we started down this trail and walked something like twenty steps and Jim turned around all at once and says, 'You dirty son-of-a-bitch, I will see that you do not get back to Fresno to see Marjorie,' and he had a gun in his hand, and I struck that gun with this left hand and hit him right in the nose with the right hand, and the blood flew out of his nose and the gun fell to the ground and I started to reach down to pick the gun up, and as I did Jim sprang back with his crutch [illustrating] and he got overbalanced and fell right into the hole, and that is the way this Jim Kipp went into the mine shaft."

He said that he did not hear anything of Kipp after he went into the shaft. He claimed that he called three or four times, but heard no sound, and after five minutes he picked up the gun, went back to the car and drove into Fresno. On the way back he thought he would notify the sheriff at Madera, but changed his mind and went to Fresno and called Marjorie over the phone, and she met him and he told her what had happened. He informed her he was going to tell the sheriff of Fresno county, but she said to him he would have to explain why he went to the mine, and she advised him not to tell it. He offered as another reason for keeping the matter secret that he did not want to disgrace his wife's name by making public what had taken place between Jim and his wife, and they agreed to say nothing about the matter. At this very moment there was on file in the county clerk's office of Fresno coun-

ty a complaint verified by Fuller, asking for a divorce from his wife in which he charged that "the defendant has, without reason or cause, on various occasions, left the home of plaintiff and defendant, and has made extended visits in Fresno and other places, where she stayed at hotels in a drunken condition, and consorted with various men, some known to plaintiff and some unknown to plaintiff, and has appeared with such various men in public places, at late hours at night, in a drunken condition."

Kipp's hat and crutch were both in the shaft with the body. Upon his person was found a bill of sale and other papers of business import. His watch was found in his trouser pocket. His key ring containing four keys, two of which unlocked his safe deposit boxes, were afterwards found in the possession of Fuller.

The defendant offered in evidence a letter produced by him which he claimed was in his wife's handwriting. The letter was addressed to Kipp at Visalia, and was dated Fresno, July 27, 1931. Fuller's wife left him July 25th, and was driven from her home at Seville to the Rolland Hotel at Fresno by Kipp on that day. It would be strange indeed if Fuller did not, as he claims, know that his wife was to leave him at the time in question. Seville is a village of some seventeen or eighteen houses. The home of Fuller and Kipp was about one hundred yards from their store. Fuller was at the store at the time his wife took her departure in daylight. An employee of the partnership drove the company's truck in which the wife's trunk was carried to Visalia. Fuller's effort at the trial was to make it appear that Kipp was on affectionate terms with his wife, and therefore it was not improbable that he would have made the deadly assault upon him in the manner related by Fuller at the trial. Fuller's explanation as to how his wife's letter to Kipp came into his possession was, first, that he found it, and on cross-examination he said that he took it out of Kipp's coat pocket. He claimed that he charged Kipp with receiving said letter, but Kipp denied it, and he read the letter to Kipp, and the latter replied that he thought "maybe Marjorie was drunked up when she wrote it." Said letter began, "Dearest Friend Jim," and related what the lawyer she had engaged in her suit for divorce had told her. She requested that he loan her $20 or $25 to pay the costs, and said, "I will sure pay you back some how, some way when I possibly can. I told Thusen [her attorney] that you would be in Wednesday night, and I would try and have the money then * * * So dearest if you will please let me have it Wednesday night when you come in. I will sure pay you back some way or some how. And you never will be sorry. * * * I am so lonesome and I am afraid to go out much if he is coming to town today or tomorrow. * * * I have no one to talk to and nothing to look forward to only you dear. How true it is what people say. That I depend on you. I guess I do all right honey. Don't you think so. But you sort of like me to dont you, dear? * * * But I am so lonesome I just wanted to talk to you and this is the only way I can is on paper. Dearest I will look for you between 10 & 10:30 Wednesday night. So by by dearest until then. * * * You can tell me all about Al. when I see you so wont ask about him now." The letter closed with the request that he bring her sewing basket, needles, and other domestic articles. No written communication of any kind addressed by Kipp to Fuller's wife was produced. Nor was there any evidence produced aside from Fuller's testimony which indicated that Kipp was unduly familiar with his wife. Fuller makes no direct charges that Kipp was intimate with his wife. He cites circumstances which, unexplained, might afford ground for suspicion. In his divorce action he made general sweeping accusations, but named no persons specifically.

His friendship for Kipp, according to his professions, never faltered, notwithstanding the above letter which he claims to have intercepted. His profession of friendship for Kipp is somewhat shattered by the testimony of Mrs. E. L. Frieman, proprietress of the Rolland Hotel, the place at which Mrs. Fuller stopped after she left the defendant and which place was frequented by Fuller. Her testimony in this respect was that, after Mrs. Fuller had left her husband, Fuller related to her circumstances from which meretricious conduct might be inferred, and Mrs. Frieman said to him, "Why don't one of you buy the other out if you can't get along," and Fuller said, "I think I will buy his interest, and when I buy him out I will have a couple of my gang to take it away from him when I pay it to him." Later he said that, when Kipp came home late on a particular night, they sat down at the table to have a bite to eat, and he (Fuller) laid Kipp's gun and his gun on the table and said, "Now you tell me whether you have been helping Marjorie or not, and giving her anything, and we will fight it out," but Jim would not fight. Whether Fuller in good faith had substantial reason to mistrust Kipp, whose reputation was not impeached in any respect on any element involved in the case, of misconduct with his wife whom he had known for many years, was a question which the court permitted to go to the jury to play whatever part it might in the determination of the guilt and punishment of the defendant. Of course such misconduct, if shown to exist, could not justify the defendant in taking life. The jury evidently was not impressed with the stories told by the defendant, and indeed they were most incredible, and, when subjected to the test of scrutiny, their transparency becomes

apparent. In order to build up a ground of justifiable assault upon Kipp, occurring upon the brink of said shaft, the defendant would make it appear that Kipp's eagerness to possess Fuller's wife, whom he was trying to put away himself and who in turn was trying to get rid of him, furnished a motive for Kipp's conduct as described by Fuller. The jury impliedly found that it was not Kipp's love for Fuller's wife that was the immediate cause of his death, but rather Fuller's desire to enjoy Kipp's property as shown by the case presented.

[1] A number of assignments of error are made both as to the court's ruling on questions of evidence and also as to certain instructions given and refused. Appellant suggests that the record is technically sufficient to sustain the judgment, but that a close case is presented, and for that reason a careful inspection should be made of the evidence and instructions to the end that the defendant should be relieved of the extreme penalty should there be discovered any technical violation of his rights. We have read the entire record, and find that the evidence most conclusively establishes the guilt of the defendant. The main incriminatory circumstances have not been weakened in the slightest degree by contradictory evidence. In fact, the defense produced no evidence of a credible character which tended to disprove defendant's guilt or rebut the case made against him.

[2] Defendant attempted to introduce in evidence certain assignments of property made by Kipp to certain persons other than the defendant, in the early part of 1929. These were excluded. The defendant also offered in evidence an assignment of certain property made by Kipp to the defendant, which was received. The offers of the excluded assignments were made, so it was claimed, for the purpose of showing that decedent made said assignments to one Smith with the intent of hiding his property from his creditors. This transaction and others of a similar import had no materiality whatsoever to the issues involved. What we have said has reference also to all the deeds and mortgages which defendant offered to put in evidence. Such evidence was unquestionably irrelevant and immaterial. In fact, the court made no errors in its ruling upon the admissibility of evidence.

[3] The jury was fully and correctly instructed on questions of law pertinent to the case. The long approved and now codified instruction (section 1096, Pen. Code) defining reasonable doubt was given, and the importance of requiring the evidence to satisfy the minds of the jurors on every material fact or issue beyond a reasonable doubt was repeatedly called to the jury's attention.

One instruction given by the court has puzzled us both as to meaning and its applicability to the case. Said instruction reads: "If the accused was engaged in the performance of an unlawful act, and if the deceased attempted in a lawful manner to prevent the performance of such unlawful act, and if, while so endeavoring to prevent the same, the defendant in anger and solely for the purpose of revenge, or to enable him to carry out his unlawful design, so interfered with by said deceased, attacked the latter with a deadly weapon, intending to kill said deceased, and did, under such circumstances, carry such intention into execution, the fact that the defendant was in a passion would not mitigate or excuse such homicide, but the crime committed would in such case be murder in the first degree."

As to just what the thought might have been that prompted this instruction or in what way it may have been regarded as of assistance to the jury in their deliberations, we are wholly unable to make satisfactory answer. It must have been inadvertently given. We have, however, given consideration to the effect that it may have had upon the jury's verdict and have concluded that it could have had none.

No errors appearing in the record which tended to deprive the defendant of a fair and impartial trial, the judgment and order appealed from are affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; TYLER, Justice pro tem; PRESTON, J.

216 Cal. 260

MAGGIO BROS. CO., Inc., v. WOOD.

L. A. 12952.

Supreme Court of California.

Aug. 29, 1932.

1. Sales ⇨479(7).

Seller in claim and delivery action, alleging that buyer purchasing truck and agreeing to pay therefor by hauling for seller, refused to continue hauling, must show buyer broke hauling contract in order to recover.

2. Sales ⇨479(7).

Evidence in claim and delivery action did not sustain finding that buyer refused to do agreed hauling for seller in payment for truck purchased.

Under purchase contract, buyer could make all payments on truck out of work and hauling to be done for seller, and could also do hauling for other persons,

and facts disclosed that the hauling the seller permitted buyer to do for it was irregular and not of any particular amount, and that at no time did buyer refuse to do any hauling requested by the seller.

3. Sales ⊂=476.

Purchase contract requiring truck buyer to hold himself open to undertake hauling for seller did not require buyer to remain at seller's place of business, but permitted buyer to haul for others, unless his services were required by seller.

In Bank.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action by Maggio Bros. Company, Inc., against Pearl W. Wood. From a judgment for plaintiff, defendant appeals.

Reversed.

For opinion of District Court of Appeal herewith adopted, see 12 P.(2d) 971.

William M. Morse, Jr., and S. A. Shoop, both of Los Angeles, and Ray D. Johnson, of El Centro, for appellant.

Kendall B. Perkins and Utley & Nuffer, all of El Centro, for respondent.

PER CURIAM.

The petition for hearing in this matter was granted in order that this court might amend the judgment entered by the District Court of Appeal of the Fourth Appellate District; otherwise the opinion written by Mr. Presiding Justice Barnard and concurred in by Associate Justice Jennings and Associate Justice Scovel, sitting pro tempore, is adopted.

[1] This is an appeal by the defendant from a judgment in favor of the plaintiff in an action in claim and delivery for the return of a truck. The truck in question was sold by the respondent to the appellant under a contract which provides that it shall be paid for "in monthly payments," although the contract neither provides for any particular amount per month, nor, in view of its other terms, for any regularity in making the payments. The contract provides that the buyer shall have the right to make any and all payments upon the truck "out of work and hauling to be done by second party with said truck for the first party." The contract also provides: "And it is the intention of the two parties that the first party shall employ the second party, from time to time hereafter, as a truck driver to make certain trips with said truck about the State of California in hauling fruit and produce for the first party. That the second party shall, from the proceeds accruing to him from such trips, be enabled to make monthly payments on the said purchase price of said truck, to first party, until said truck of $3,200.00 has been fully paid; and that during the time from this date until said full purchase price has been fully paid, the second party shall hold himself open at all time to undertake such work with said truck, for the first party." Another contract was entered into at the same time between the parties providing that the appellant shall do "certain hauling" for the respondent for a period of two years, but failing utterly to make any provision as to what hauling, the amount thereof, when it is to be done, or that it shall be done with any regularity. While this contract fixes the price to be allowed for trips to various sections of the state, nothing is mentioned as to how many trips shall be made or when. These contracts did not even provide that the respondent should give all of its hauling to the appellant, and it fully appears from the evidence that a large part of its hauling was given by respondent to other persons, when cheaper rates could thereby be obtained. The vagueness of these contracts is only exceeded by the indefiniteness of the complaint filed. While the action purports to be in claim and delivery, the complaint neither alleges title in the plaintiff, right of possession in it, nor that demand has been made and possession refused. The prayer does ask for possession of the truck. However, the essence of the complaint seems to be that the respondent sold the truck to the appellant, to be paid for by hauling done therewith by the appellant for the respondent, and that the appellant had broken the contract by refusing to do any more hauling for the respondent. If any cause of action is set up by the complaint, proof that the appellant has broken the contract in this particular respect is essential to a recovery by the respondent. The court found that the appellant complied with all of the terms of the contracts up to March 7, 1930, and that he then failed and refused to do any more hauling for the respondent, and took the truck to "parts unknown" and absconded therewith.

[2] The only point presented which need be considered is that the evidence does not support this finding, which contention we think must be sustained. It appears that the appellant lived at Puente while the respondent had its principal place of business at El Centro. While the appellant did not haul for the respondent continuously, and while much of respondent's hauling was given to other parties, no difficulties arose until in March, 1930. It is conceded by the respondent that the appellant was given specific permission to use the truck in hauling for other people during the months of January and February, 1930. The court correctly found that the appellant fully lived up to the terms of the contracts until March 7, 1930. However, it appears

that in September, 1929, the respondent signed and delivered to the appellant the pink registration certificate applying to this truck, and the appellant reregistered the truck in his own name, both as legal and registered owner. The respondent contends that this was done only for the purpose of enabling the appellant to take out insurance on the truck. In any event, the matter was not seriously questioned until March 6, 1930, when the president of the respondent company told the appellant to bring back the pink slip. While the respondent contends the appellant agreed to bring this back on March 10th, the appellant testified that he said he would bring it back either on that day or as soon thereafter as he came to El Centro. While the appellant had previously complained to the respondent of the fact that the respondent was giving its hauling work to others at a lower price instead of calling upon the appellant under these contracts, it is fully apparent that this action arose out of a dispute over the return of this pink slip. The appellant did not return the pink slip on March 10th, as on that day he was using the truck to haul a load of hay to Ontario. On that day respondent's president and manager called the sheriff's office, and also ordered all his employees to watch for the truck. On the same day, one of respondent's agents saw the appellant with the truckload of hay in Brawley, whereupon he tried to induce an officer to take possession of the truck, asked appellant to immediately return the truck to El Centro, told appellant that he had no interest therein, and threatened him with arrest. Appellant replied that he had to deliver the load of hay, but would return with the truck to El Centro the next day. Before he could return, he was arrested and this action was started.

The respondent does not call our attention to a word of evidence and we have been unable to find any evidence in the record that even tends to support the finding of the court that the appellant failed and refused to do any hauling for the respondent, or that the respondent ever at any time requested the appellant to do any hauling which was not done. The court found that the appellant had fully complied with the contract up to March 7th. Respondent's president and manager testified that he had no conversation with appellant in the month of March, 1930, concerning hauling. The evidence as to a conversation between the president of the respondent company and the appellant on March 6th shows that it related entirely to the return of the pink slip by the appellant. The evidence as to the conversation between respondent's agent and the appellant on March 10th related to this pink slip, the ownership of the truck, and the demand for its possession and the claim that the appellant had no further interest therein. There is not a word of evidence that on either occasion the appellant was asked to do any hauling or that he refused any such request.

[3] Apparently respondent relies upon the contention that the clause in the contract to the effect that the appellant "shall hold himself open at all time to undertake such work" required the appellant to be at respondent's place of business at all times with the truck; that respondent's permission to use the truck in hauling for others was limited to two months, which had expired; and that appellant breached the contract when he failed to come to respondent's office in El Centro on March 10th. No such an interpretation of the contracts is tenable. Under the terms of the contracts, the appellant had the absolute right to haul for other parties at any time he chose, unless his services were required by the respondent, and any special permission to so haul was both unnecessary and immaterial. The respondent did not agree to give him any particular amount of hauling or with any regularity. The parties lived at different places, and, under the vague and loose provisions of the contract, the clause as to holding himself in readiness must be given a reasonable interpretation in the light of its other provisions. It was not incumbent upon the appellant to sit in respondent's office waiting until they should need him and he was entitled to be notified when his services were required. The provision that he should hold himself in readiness, the absence of a provision that he should report regularly for duty, the fact that he lived in a city many miles away, the indefiniteness as to when his services would be required, and the fact that the other party to the contract was left free to give him much or little of its hauling, all import the necessity for a reasonable notice to appellant when his services with the truck were required. This is especially true, in view of the additional evidence that he had been particularly told that work was slack with the respondent, and that he might obtain work elsewhere during the next "couple of months." Both the terms of the contract and the nature of this consent demanded a reasonable notification when his services were required before he could be put in default and his interest in the truck taken from him. Even if he had been notified at the conversation on March 10th that his services were then required, under the circumstances, it would have been a sufficient compliance with the contracts for the appellant to have delivered the load he then had upon the truck and reported to the respondent for work the next day. However, no such notice was given him, and the action was started at a time when all of the evidence in the record shows he was not in default.

All of the evidence being contrary to this particular finding, and there being no other findings to support the judgment, the judgment is reversed.

216 Cal. 119

HOLZER v. READ et al.

S. F. 13917.

Supreme Court of California.

July 30, 1932.

1. Quieting title ⇐44(2).

Witness' voluntary statement, in action to quiet title, that property had belonged to plaintiff's predecessor in title, *held* relevant.

2. Quieting title ⇐44(3).

General rules as to weight and sufficiency of evidence are applicable to proceedings to quiet title.

3. Witnesses ⇐248(1).

Answer given by witness, though not in response to any question of counsel, if relevant and permitted to stand, should be considered as competent evidence.

4. Appeal and error ⇐837(11).

In considering sufficiency of evidence, full weight must be given to evidence which would have been excluded if objected to and even to evidence erroneously admitted over objection, provided it be relevant.

5. Quieting title ⇐44(4).

Evidence *held* sufficient to establish plaintiff's title in action to quiet title.

6. Adverse possession ⇐66(2).

Holding of land is not adverse where occupant holds by mistake as to boundary line, with intention to claim only to true line.

7. Adverse possession ⇐90.

Payment of taxes raised no issue of adverse possession where there was no established boundary line between parties, and each paid taxes on land described in his deed.

8. Estoppel ⇐93(1).

Plaintiff *held* not estopped in action to quiet title by having aided defendant in construction of improvements on land which plaintiff now claims, where services were performed through honest mistake concerning true boundary line.

9. Estoppel ⇐52.

Party is not estopped in equity from assertion of title, unless there is some degree of turpitude in his conduct.

10. Estoppel ⇐110.

Estoppel, to be available, must be specially pleaded.

In Bank.

Appeal from Superior Court, Santa Cruz County; H. C. Lucas, Judge.

Action by John Holzer against E. C. Read, John MacKenzie, and others, in which defendants last named and others filed a cross-complaint. Judgment for plaintiff, and defendants last named and others appeal.

Affirmed.

Frank Thunen, of San Francisco, for appellants.

Wyckoff & Gardner, of Watsonville, Hubert C. Wyckoff, Jr., of San Francisco, Wyckoff, Gardner & Parker, of Watsonville, and George M. Naus, of San Francisco, for respondent.

TYLER, Justice pro tem.

Action to quiet title to certain lands situated in the county of Santa Cruz. The land described in the complaint consists of about fifty acres. Some seventeen persons were made defendants, all of whom defaulted except John F. MacKenzie, Maria MacKenzie, Peter Colly, and Mary Ann Colly. These defendants denied title in plaintiff to a certain portion of the lands, and by way of cross-complaint alleged title to such portions in themselves by adverse possession. The trial court found all the allegations of the complaint to be true and all of the allegations of the cross-complaint of defendants to be untrue. Judgment was accordingly rendered in favor of plaintiff and against defendants, who have appealed from the judgment.

The MacKenzies claimed an irregular-shaped parcel containing approximately one acre of land, which overlaps the fifty-acre tract claimed by plaintiff. The Collys' claim involves the westerly line of plaintiff's tract and a portion of the southerly line forming common boundaries between their respective lands. The main controversy is based upon the location of the proper boundary line of what is known as Rancho San Augustin. Plaintiff, in support of his claim of title, introduced testimony by three surveyors to establish the true boundary line. These witnesses located the original monuments and made surveys, and, with the aid of government notes, established a retracement of the original survey which fully supported plaintiff's claim to all of the lands. In further support thereof, plaintiff then establishd a connected chain of title as to the entire tract described in the complaint, beginning with a patent from the federal government dated May 20, 1870, and extending down by regular muniments of title to one Clementina M. Howe in the year 1885. Appellants concede that down to this point respondent's chain of title is regular. A deed was then introduced in evidence dated December 4, 1885, running from Clementina M. Howe, James H. Howe, and J. J. Johnson to Joseph Orr, but this deed does not embrace the lands in dispute. Another deed dated the 29th day of July, 1886, executed by Clementina M. Howe to John Kiley was in evidence. This last deed embraces the lands in question. There was then introduced a deed executed by John Kiley dated the 13th day of September, 1886, to Helena Jane Orr.

Plaintiff herein claims title under a warranty deed dated May 3, 1916. This document was in evidence, and it includes the land described in the complaint. It is signed by Mrs. E. C. Read, A. F. Orr, and G. J. Orr, and recites that the property described therein was duly awarded the grantors under a decree of distribution on the 25th day of April, 1916, in the matter of the estate of Joseph Orr, deceased. At the time of the trial, the then attorney for appellants conceded that plaintiff had established a prima facie case under this deed. It is now claimed, for the first time on appeal, that respondent's paper chain of title lacked one link, as nowhere in the record does it appear that any conveyance or transfer of title was ever made from Helena Jane Orr to Joseph Orr, for which reason, irrespective of the true location of the disputed boundary line, respondent failed utterly to prove his title. Had counsel for appellants not made the concession he did, respondent might have been able to supply evidence to complete his paper title. Aside from the right of appellants to raise this question for the first time on appeal, the record does not support their contention of lack of proof of title in respondent.

[1] Plaintiff did not rely alone on a connected paper chain of title, he having alleged that by himself and his predecessors in interest he became and was for twenty years prior to the commencement of the action the owner of the lands in dispute and in the possession thereof. During the course of the trial, a neighbor who had lived on adjacent land for a period of twenty-four years volunteered the statement during the course of his examination, without objection, that the property in question had belonged to Joseph Orr during his lifetime. While this evidence might have been stricken out and plaintiff thereby put to better proof, it was relevant to the issue of ownership, and tended to prove such issue.

[2-4] The general rules as to the weight and sufficiency of the evidence in all forms and character of actions are applicable in determining the sufficiency of the evidence in proceedings to quiet title. Where a witness goes beyond the scope of the questions and makes an answer not responsive thereto, if it furnishes relevant facts, they are none the less admissible merely because they are not specifically asked for. 2 Wigmore on Evidence (2d Ed.) § 785. If the answer is in itself proper evidence, the party who is examining the witness has the right to take and retain it if he chooses to do so. Hirshfeld v. Dana, 193 Cal. 143, 148, 223 P. 451, and cases cited. While opposing counsel may move to strike it out if for any reason it is improper to be admitted, so long as it stands it is competent evidence to be considered. Where, as here, the insufficiency of the evidence is the question to be determined, full weight must be given to evidence which would have been excluded had objection been made, and even to evidence erroneously admitted against objection provided it be relevant. Evidence may tend to prove the issues and yet be incompetent. Hayne on New Trial and Appeal, § 98.

In Goode v. Smith, 13 Cal. 81, one of the questions involved was as to the ownership of land. A witness had been permitted to testify upon the subject. In discussing this evidence, the court held that, while it was not the best mode of proving the fact, nevertheless no objection having been taken to its admissibility, it was proper for the purpose. See, also, Janson v. Brooks, 29 Cal. 214; Wright v. Roseberry, 81 Cal. 87, 91, 22 P. 336.

[5, 6] We are of the opinion, therefore, that plaintiff, notwithstanding the break in his paper chain of record title, sufficiently proved his title by tracing back a chain descending in Joseph Orr and thence from his estate. We are of the further opinion that plaintiff's title as proved was in no manner affected or impaired by appellants' claim of title by adverse possession. This controversy arose over a mistaken boundary line wrongfully established by a surveyor employed by defendants. No one is here disputing plaintiff's title to the major portion of his lands. By the great weight of authority, where the occupation of land is by a mere mistake, and with no intention on the part of the occupant to claim as his own, land which does not belong to him, but with the intention to claim only to the true line wherever it may be, the holding is not adverse. 2 Cor. Jur. p. 139, § 242.

[7] The same may be said with reference to the payment of taxes. Here there was no established boundary line by the parties, and each paid his taxes upon lands described in his deeds. Under such circumstances the question of the payment of taxes is not an element in the case. 1 Cal. Jur. p. 568, § 50; Reynolds v. Williard, 80 Cal. 605, 22 P. 262; McDonald v. Drew, 97 Cal. 266, 32 P. 173; Wilder v. Nicolaus, 50 Cal. App. 776, 195 P. 1068.

[8-10] The further contention that appellant MacKenzie is entitled to the land he claims by virtue of an estoppel in pais is also without merit. In this connection it appears from the record that MacKenzie constructed valuable improvements on the portion of the lands claimed by him, and that such improvements were made in good faith. Upon this subject there was evidence to show that plaintiff aided MacKenzie in the construction of the improvements and was paid for his services. But the evidence also shows that plaintiff was misled concerning the true boundary line through the mistake of defendants' surveyor, and he performed his services through an honest mistake concerning the true line. There must be some degree of tur-

pitude in the conduct of a party before a court of equity will estop him from the assertion of his title. Here there was none, and the invoked doctrine does not apply. Biddle Boggs v. Merced Mining Co., 14 Cal. 279, 368; Stockman v. Riverside L. & I. Co., 64 Cal. 57, 28 P. 116. Moreover, defendants failed to plead an estoppel. The rule is well established in this state that an estoppel, to be available, must be specially pleaded. Promis v. Duke, 208 Cal. 420, 426, 281 P. 613.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

216 Cal. 40

HARTFORD ACCIDENT & INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 14572.

Supreme Court of California.

July 20, 1932.

1. Master and servant ⇐383.

Provision for giving of bond by employer on securing certificate of consent to self-insure against compensation claims, *held* within power of Legislature (Const. art. 20, § 21; St. 1917, p. 857, § 29, subd. a, par. 2, as amended by St. 1925, p. 494).

2. Master and servant ⇐397.

Industrial Accident Commission had jurisdiction to render award against surety on self-insurer's bond, in proceeding instituted by employees for compensation (St. 1917, p. 868, § 55; p. 857, § 29, subd. a, par. 2, as amended by St. 1925, p. 494).

3. Master and servant ⇐397.

Industrial Accident Commission having jurisdiction over subject-matter can determine every issue raised.

4. Master and servant ⇐417(8).

Failure to make commutation of compensation awards in ordering payment thereof by surety on self-insurer's bond, *held* not prejudicial, where amount actually due exceeded amount of bond (St. 1917, p. 856, § 28, subd. d).

5. Master and servant ⇐416.

Order directing payments by surety on self-insurer's bond in pro rata proportion to compensation claimants *held* not objectionable (St. 1917, p. 868, § 55; p. 857, § 29, subd. a, par. 2, as amended by St. 1925, p. 494).

It was not likely that the distribution provided would subject surety to additional liability beyond penal sum of bond, since the claimants were bound by the awards and were required to give surety full release of all claims, and since provision was made in the awards for protection and payment of claims filed pending distribution moreover the order contained requirement for retaining portion of funds and surety's payment of full amount of bonds in state compensation insurance fund, to be disbursed under direction of Industrial Accident Commission, would bar further claims against surety.

6. Master and servant ⇐417(9).

Award to compensation claimants against surety on self-insurer's bond for full penal sum thereof should be annulled as to portion granting attorney's fees in addition, though bond provided for surety's liability for attorney's fees (St. 1917, p. 868, § 55; p. 857, § 29, subd. a, par. 2, as amended by St. 1925, p. 494).

The bond contained a provision that the surety was bound for payment of reasonable attorney's fees incurred in proceedings to enforce payment of the bond, but further provided that in no event should total liability of surety exceed penal amount of bond.

In Bank.

Original proceeding by the Hartford Accident & Indemnity Company for writ of certiorari to be directed to the Industrial Accident Commission, and others, to review an order directing petitioner to pay compensation awards under self-insurer's bond, and to pay attorney's fees.

Award of Industrial Accident Commission affirmed in part and annulled in part.

Jesse H. Steinhart and John J. Goldberg, both of San Francisco, for petitioner.

A. I. Townsend and Alfred C. Skaife, both of San Francisco, for respondents.

CURTIS, J.

The Pickering Lumber Company, at all the times herein mentioned, was a corporation organized under the laws of the state of Delaware, and duly authorized to transact business in this state, and during the same time the petitioner herein, the Hartford Accident & Indemnity Company, was a corporation organized under the laws of the state of Connecticut, duly authorized to become sole surety on bonds and undertakings in this state. On the 14th day of May, 1926, said Pickering Lumber Company, pursuant to section 29, subd. (a), par. 2 of the Workmen's Compensation, Insurance and Safety Act of 1917 (as amended by St. 1925, p. 494), as an employer under said Compensation Act, secured the payment of compensation to its injured

employees and to the dependents of its killed employees by securing from the Industrial Accident Commission a certificate of consent to self-insure, said certificate being issued on May 14, 1926, and the same remained in force and effect continuously from said last-named day to and including the 17th day of July, 1931, at which date it was revoked. As a prerequisite to the issuance to said Pickering Lumber Company of said certificate to self-insure, the Industrial Accident Commission pursuant to the power given it by said section 29, subd. (a), par. 2 of the Workmen's Compensation Act, required said Pickering Lumber Company to execute and deposit a surety bond with the treasurer of the state of California. The amount of said bond was fixed by the Industrial Accident Commission at $20,000. The form of said bond was prepared and furnished by the Industrial Accident Commission and was in the usual form then required by the Industrial Accident Commission in connection with the issuance of certificates of consent to self-insure. Pursuant to said requirement of the Industrial Accident Commission, and in order to secure the issuance of said certificate of consent to self-insure, said Pickering Lumber Company, as principal, and said Hartford Accident & Indemnity Company, as surety, on the 13th day of May, 1926, executed and delivered to said Industrial Accident Commission a surety bond as required by said commission as aforesaid. Said bond was deposited with the state treasurer, and thereupon the Industrial Accident Commission issued to the Pickering Lumber Company a certificate of consent to self-insure. Said bond remained in full force and effect continuously from its date to June 12, 1931. During the time said bond was in full force and effect, a large number of awards, some forty in number, were made by the commission against said Pickering Lumber Company in favor either of injured employees of said company, or of dependents of killed employees of said company whose injuries arose out of and in the course of their employment by the Pickering Lumber Company, and all of said awards were covered by said bond.

On May 9, 1931, in the District Court of the United States for the Western Division of the Western District of Missouri, Geo. R. Hicks was appointed receiver of all the property and assets of the Pickering Lumber Company located in Missouri, and on May 12, 1931, in the District Court of the United States for the Southern Division of the Northern District of California, said Geo. R. Hicks was appointed ancillary receiver of all of the property and assets of said Pickering Lumber Company in the state of California. Said receiver and ancillary receiver after his said appointment stopped payment of all of said awards, and refused to make any payments of compensation out of the property of the Pickering Lumber Company to any of said injured employees, or to the dependents of said deceased employees. At the time said receiver stopped payment on said awards, the total amount due thereon far exceeded the sum of $20,000, the amount of said bond. Whereupon the beneficiaries under said awards, as applicants, filed their petition before said Industrial Accident Commission for an order requiring the Hartford Accident & Indemnity Company, as surety on said bond, to pay or provide payment of the compensation remaining unpaid on account of said awards. The Hartford Accident & Indemnity Company appeared in said proceeding and contested the petition of said applicants. A hearing was had and at the conclusion thereof, the commission made findings embodying the facts recited herein, and upon said findings made its order or award that the Hartford Accident & Indemnity Company forthwith pay the sum of $20,000 to the state compensation fund, and to the attorney for said applicants the further sum of $2,500 as attorney's fees; that upon the payment of said sum the Hartford Accident & Indemnity Company "shall be released from all liability" and "that upon receipt by said state compensation fund of said sum of $20,000, the said sum shall, on the order of the Industrial Accident Commission, be distributed to the applicants herein and to such other persons whose claims are covered by said bond as shall assert their claim prior to the distribution of said sum of $20,000 on the following basis:

"Compensation, including that due under section 9 (a) of the Workmen's Compensation Insurance and Safety Act of 1917, for the earliest week shall first be paid and thereafter compensation shall be paid for each succeeding week, or portion of a week until the full sum of $20,000 shall have been paid.

"Said payments shall be made only to applicants whose awards have become final and in the event that, pending the distribution of said moneys petitions shall be filed, or shall be pending, to rehear or review any award. an amount sufficient to cover the amount of said award shall be held pending the decision on said rehearing or review, distribution of said retained sum to be made after such decision on the basis of payment above ordered, and in the meantime payments shall be made on any awards which shall have become final."

The Hartford Accident & Indemnity Company asked for a rehearing of this order which was denied. It then instituted this original proceeding in this court for a review of said order and an annulment of said award.

[1] It first contends that the Industrial Accident Commission has no jurisdiction to render an award against the surety on a self-insurer's bond. The jurisdiction of the Industrial Accident Commission is determined

and fixed by section 21 of article 20 of the Constitution of the state and the provisions of the Workmen's Compensation, Insurance and Safety Act (hereinafter referred to as the Workmen's Compensation Act). By the foregoing section of the Constitution, the Legislature is vested with plenary power to create and enforce a complete system of workmen's compensation. It is expressly provided therein that such a system includes "full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for regulating such insurance coverage [against liability] in all its aspects * * * [and] full provision for otherwise securing the payment of compensation." In carrying out this grant of power, the Legislature has enacted the Workmen's Compensation Act, and by section 29 thereof (as amended) has provided two ways or methods which may be followed by employers in securing the payment of compensation due under said act. One method requires the employer to insure and keep insured against such liability in one or more insurance carriers duly authorized to furnish compensation insurance in this state; the other method requires the employer to secure from the Industrial Accident Commission a certificate of consent to self-insure. This certificate is issued by the commission under certain conditions, one of which provides for the giving of a bond in the discretion of the commission and in an amount to be determined by the commission. This bond is placed and kept on deposit with the state treasurer. That section 29 of the Workmen's Compensation Act is within the power of the Legislature to enact under the terms of section 21 of article 20 of the Constitution, we have no doubt. The first method of securing payment of compensation under said act is the one in common use, and no question is raised as to the power of the Legislature to provide therefor. The second method of securing compensation was undoubtedly enacted under that declaration in said section of the Constitution which, after providing that a complete system of workmen's compensation includes "full provision for adequate insurance coverage against liability to pay or furnish compensation," also provides that it includes "full provision for otherwise securing the payment of compensation." That the provisions of the act regulating a self-insurer employer and providing for the giving of a bond, is simply one method of "securing the payment of compensation" and, therefore, within the grant of power to the Legislature to enact, we think it so clear as to require no further discussion.

[2] By section 55 of the Workmen's Compensation Act (St. 1917, p. 868), the Industrial Accident Commission is given jurisdiction of "all proceedings for the recovery of compensation, or concerning any right or liability arising out of or incidental thereto." There may be other provisions of this section of the act which might be construed to give the commission jurisdiction over a proceeding instituted by an employee, or employees, to enforce payment against a surety on a self-insurer's bond. This portion of the section just quoted is sufficient for our present purpose. The proceeding instituted before the commission against the petitioner herein was one to recover compensation due the employees and certain dependents of killed employees of the self-insurer employer from the surety upon the bond given by the said self-insurer employer to secure the payment of said compensation, and comes clearly within the terms of said section 55 quoted above. There can be no question of the jurisdiction of the commission to entertain such a proceeding and to determine all issues arising therein and to render an award in accordance with the facts produced before it.

[3] Petitioner complains that the granting of relief against it in the proceeding before the Industrial Accident Commission deprived it of legal and equitable rights to which it would otherwise be entitled. These rights petitioner claims are given it under sections 2845 and 2846 of the Civil Code and section 1050 of the Code of Civil Procedure. If petitioner is entitled to any rights under these sections of the Code which it could not enforce before the commission, it might be relegated to the courts for the purpose of enforcing them. This result would not affect the jurisdiction of the commission if the Constitution and statutes have conferred jurisdiction upon the commission to determine the matter involved. However, if the commission is vested with jurisdiction over any given subject-matter, it has the power to hear and determine every issue raised by the parties in the controversy. Employers' Liability Assur. Corp. v. Indus. Acc. Com., 177 Cal. 771, 171 P. 935; General Acc., etc., Corp. v. Indus. Acc. Com., 196 Cal. 179, 190, 237 P. 33. In such cases the parties are not required to resort to the courts. General Acc. etc. Corp. v. Indus. Acc. Com., supra.

Petitioner states that the point just discussed is merely preliminary to the further contention that there is nothing in the bond which indicates an intention that the surety therein is to be deprived of the statutory rights given under said three Code sections. In this connection petitioner calls attention to the fact that there is nothing in the act that indicates that the bond of a self-insurer is to be other than the usual surety bond to which these Code sections would apply. It is true that the provisions in the act relative to the form of the bond and its contents are extremely meager. In providing for the form of bond to be used by self-insurers, the commission evidently followed as a guide the form of bond required of insurance carriers under the statutes of this state. Stats.

of 1917, p. 292, amended Stats. 1919, p. 611. It is contended that a bond in that form is inapplicable to the situation where a bond is required of a self-insurer employer. That it followed the form prescribed by statute of bonds required of insurance carriers is at least some evidence of its reasonableness and fairness. Petitioner has not pointed out to us any provision in the form of the bond which works an undue hardship upon the surety or upon any other person. Its only claim is that it is deprived of certain rights given to sureties by the three sections of the Code above mentioned. This claim we think we have adequately answered. We might also refer to the fact that petitioner freely and voluntarily executed the bond as a further showing that the terms of the bond did not appear unreasonable to it at the time of its execution. After voluntarily executing the bond and accepting premiums thereunder for a period of something like three years, petitioner is not in a very advantageous position to question the validity or binding effect of any of its provisions.

[4] A further objection is made to the main award for the failure of the commission to follow the terms of the bond in fixing the amount due thereon. The bond provides that the surety will pay the awards, in case the principal fails to do so within thirty days after they became final "to the State Compensation Insurance Fund, as trustee, for the beneficiaries thereof, at the present worth of such awards, commuted pursuant to the terms of Section 28 (d) of said [Workmen's Compensation] Act." The commission failed to make such commutation. It did find, however, that the total amount due or to become due on thirty-one of said awards which had then become final commuted in compliance with the terms of said section 28 (d) far exceeded the sum of $20,000. In fact, the commission found that the amount "Due Forthwith" (at the date of said award) was the sum of $22,637.98. It would have been a useless act on the part of the commission to have commuted the present worth of the awards, for it is apparent from the findings of the commission that the amount actually due at the time the award was made far exceeded the amount of the award. If there was an error on the part of the commission in failing to formally commute the present worth of the awards, the petitioner was not prejudiced by such error.

[5] Petitioner also complains of the method of distribution of the penal sum of the bond as provided in said award. The only persons entitled to participate in this distribution are those who have recovered or may recover awards before the commission for injuries, or as dependents of the employees who were killed under circumstances entitling them to compensation. The present respondents, with the exception of the Industrial Accident Commission, comprise all claimants for compensation whose claims therefor were pending before the commission at the time the proceeding now under review was finally determined. These claims with the possible exception of four had then all become final. As parties to said proceeding they are bound by the award and the method of its distribution as none of them has asked for any review thereof. Besides the award provides that each applicant upon receiving the pro rata amount due him of said $20,000 shall be required to give petitioner a full release of all claims against it. Petitioner is, therefore, fully protected against any and all claims of the respondents herein. Petitioner appears apprehensive that other claimants for compensation, in addition to the said respondents, might proceed against it on its said bond, and to the extent that it should be compelled to pay their claims, in event they or any of them should prevail, the petitioner would be required to make payments under said bond beyond the maximum penalty. It is hardly probable, in view of the limited time within which under the Workmen's Compensation Act claims for compensation may be initiated before the commission, that any further claims of that character will arise in the future. However, ample provision is made in the award of the commission for the protection and payment of all claims of applicants which may be filed pending distribution, by the requirement that an amount sufficient to cover the probable amount to become due thereon be retained for the purpose of meeting the payment of such claims. Furthermore, the payment by the surety of the full amount of the bond to the state compensation insurance fund to be disbursed under the direction of the Industrial Accident Commission would be a bar to any and all further claims against the surety.

[6] The award, as stated above, was for $20,000, the full penal sum of the bond and $2,500, attorney's fees, in addition. Petitioner has advanced a number of reasons why the award as to the attorney's fees should be annulled. It will only be necessary for us to consider one of these grounds as we regard it well taken and sufficient to compel the modification of the award by striking therefrom the allowance of attorney's fees contained therein. The bond provides that, "in no event shall the total liability of the surety exceed the penal amount herein stated in the sum of Twenty Thousand Dollars ($20.000.00)." It contains also the further provision that "the undersigned [principal and surety] are held and firmly bound for the payment of all legal costs, including reasonable attorney fees, incurred in all or any actions or proceedings taken to enforce payment of this bond, or payment of any

award or judgment rendered against the undersigned surety, on account of the execution by it of this bond." Petitioner contends that this paragraph of the bond is to be read and construed with the provision of the bond which fixes the total liability of the surety at a sum not exceeding $20,000, and that, when these two provisions are read together, they provide for attorney's fees only in case the combined amounts of the award and the attorney's fees do not exceed the penal sum of the bond. This seems to be the construction which courts have placed upon bonds containing provisions like or similar to the terms of the bond in this case.

"Even where the bond stipulates that damages shall include attorney's fees, under the rule that a surety on a bond is not liable beyond the penalty named therein, the surety is not liable for attorney's fees in excess of the penalty named." 50 Cor. Jur., p. 92, § 149. In the case of Hartford Fire Ins. Co. v. Casey, 196 Mo. App. 291, 191 S. W. 1072, 1076, the court ruled as follows: "The general rule has always been that plaintiff cannot recover more than the penalty of the bond. Farrar v. Christy's Adm'rs, 24 Mo. 474; State ex rel. v. Woodward, 8 Mo. 353; State ex rel. v. Sandusky, 46 Mo. 381; Board of Education v. National Surety Co., 183 Mo. 166, 184, 82 S. W. 70; Showles v. Freeman, 81 Mo. 540. An attorney's fee is a part of the loss sustained by an obligee when compelled to sue on a bond. In other words, it partakes of the nature of the damages sustained, and the agreement to pay same makes it a part of such damages. But the bond does not provide for protection against damages beyond the amount of the penalty. As to such damages in excess of the penalty, the obligee must stand the loss himself or at least look elsewhere than to the surety. Consequently when the attorney's fee, made a part of the damages by a clause to that effect in the bond, forms a part of the excess above the face of the bond, then the obligee must stand the loss of that too, at least so far as the surety is concerned."

A similar ruling was made by the Court of Civil Appeals of Texas in the case of Hill Mercantile Co. et al. v. Rotan Grocery Co., 127 S. W. 1080, 1082. It was there said: "There is more plausibility in the contention that the contract of guaranty limits liability to $7,000. It is a well-settled rule of law that contracts of guaranty and suretyship are to be strictly construed, and all reasonable doubts resolved in favor of the guarantor or surety. It is distinctly stated in the first paragraph of the guaranty contract that the sum guaranteed is not to exceed $7,000, while in the last paragraph the guarantors agree to pay interest at the rate agreed upon between the Hill Mercantile Company and the Rotan Grocery Company, and to pay 10 per cent. attorney's fees if the debt is sued upon or placed in the hands of an attorney for collection. It is nowhere stated in the contract that the agreement to pay interest and attorney's fees was intended to create liability in addition to the $7,000 previously specified as the limit of liability. * * * Hence we conclude that the court below erred in rendering judgment against appellants J. A. Hill and R. N. Hill [two of the guarantors] in excess of $7,000, and the judgment will be reformed so as to limit their liability to $7,000, with interest thereon at the rate of 10 per cent. per annum from February 4, 1909, the date of the original judgment."

We are of the opinion that the above authorities announce the correct rule in fixing the liability of the surety on the bond here involved. There is nothing in this bond indicating that the liability to pay attorney's fees is to be in addition to the sum of $20,000 fixed by the bond as the total liability of the surety. It follows that the award in so far as it provides for an attorney's fee of $2,500 must be annulled.

There is nothing at all helpful for the respondents to be found in the case of Texas Employers' Ins. Ass'n v. Nunamaker et al. (Tex. Civ. App.) 278 S. W. 889, cited by respondents. In that case it was held in an action to enforce an award of the Industrial Accident Board that under the statutes of that state an allowance of attorney's fees in addition to the amount of the award was proper. While that action was against the surety on the bond of an employer, there is nothing in the reported decision which would indicate that the combined amount of the award and attorney's fees allowed exceeded the penal sum of the bond. We do not mean to hold in the instant case that in a proceeding against the surety on a self-insurer's bond to enforce an award of the commission against the employer, an award for attorney's fees could not be upheld in any case. It is only where the amount of the award and the attorney's fees combined exceed the penal sum of the bond that the award of attorney's fees to the extent that the combined award exceeds the amount of the bond is disallowed.

It is therefore ordered that the award of the Industrial Accident Commission against the petitioner is affirmed in all respects except as to that part thereof allowing attorney's fees of $2,500 in favor of the attorney for applicants, and that portion thereof allowing said attorney's fees is hereby annulled.

We concur: WASTE, C. J.; LANGDON, J.: PRESTON, J.: SHENK, J.; TYLER, Justice pro tem.; SEAWELL, J.

216 Cal. 235

VAN HORN v. JUSTICE'S COURT OF SAN BERNARDINO TP., IN AND FOR SAN BERNARDINO COUNTY et al.

L. A. 13703.

Supreme Court of California.

Aug. 17, 1932.

1. Justices of the peace ⇐42.

Action on $500 note against defendant residing in San Bernardino county, outside San Bernardino township, in township having less than 30,000 population, should have been commenced in San Bernardino county superior court, not San Bernardino township justice's court (Const. art. 6, §§ 1, 5, as amended; art. 6, § 11, as amended, and § 11a, as added in 1928; Code Civ. Proc. § 106; § 112, as amended by St. 1929, p. 834; §§ 831h, 832, 835a, 900b; Pol. Code, § 4185a).

While general effect of St. 1929, p. 834, Code Civ. Proc. §§ 112, 831h, 835a, 900b, and Pol. Code, § 4185a, was to enlarge the jurisdiction of justices' courts in townships having a population of thirty thousand or more, so that they might hear and determine civil actions at law in which the demand or damages sought to be recovered do not exceed $1,000, it did not enlarge the territorial jurisdiction of a justice's court, which Code Civ. Proc. § 106 still limits to the boundaries of his township.

2. Justices of the peace ⇐42.

Statute *held* not to extend jurisdiction of justices' courts in townships of over 30,000 population to that enjoyed by municipal courts, but only to apply municipal court procedure to such justices' courts (Code Civ. Proc. § 831h).

3. Justices of the peace ⇐84(2).

Action on $500 note against defendant residing in township having less than 30,000 population was within exclusive jurisdiction of superior court, and defendant's general appearance in justice's court of township having over 30,000 population could not waive its lack of jurisdiction over subject-matter (Const. art. 6, §§ 1, 5, as amended; art. 6, § 11, as amended; and § 11a, as added in 1928; Code Civ. Proc. § 106; § 112, as amended by St. 1929, p. 834; §§ 831h, 832, 835a, 900b; Pol. Code, § 4185a).

In counties where a justice's court of larger jurisdiction exists and there is no municipal court if, under Code Civ. Proc. § 832, the action can be commenced in the justice's court, then that court has exclusive jurisdiction thereof; but if it cannot be commenced in the justice's court, and the amount of the demand exceeds $300, then the action must be commenced in the superior court.

In Bank.

Petition for a writ of mandate by Jay Van Horn prayed to be directed to the Justice's Court of San Bernardino Township in and for the County of San Bernardino, George W. Holbrook, Justice of the Peace, directing respondents to proceed with the trial of a civil action.

Writ denied.

Superseding opinion in 10 P.(2d) 167.

N. C. Peters, of San Bernardino, for petitioner.

Joseph R. Rensch, of San Bernardino, for respondents.

Fred A. Wilson, of San Bernardino, amicus curiæ, for respondents.

CURTIS, J.

This proceeding was originally brought in the District Court of Appeal, Fourth District, where an opinion was rendered, written by Mr. Justice Marks, and concurred in by Mr. Presiding Justice Barnard and Mr. Justice Jennings. We adopt as our own the following portion of said opinion:

This is an original proceeding instituted in this court whereby petitioner seeks a writ of mandate compelling respondents to proceed with the trial of the case of Jay Van Horn v. H. R. Van Horn, instituted in the respondent court on September 25, 1930. Summons was served on May 14, 1931. An amended complaint was filed, to which the defendant made written answer, and the case was set for trial in the respondent court on February 26, 1932. On this day the respondent justice of the peace refused to proceed with the trial because of lack of jurisdiction.

From the amended complaint it appears that the action was brought to recover judgment upon a promissory note in the sum of $500, executed and made payable in the state of Texas. The note bears interest and provides for attorneys' fees in case it be placed in the hands of an attorney for collection. It is alleged that the entire amount of principal and interest is due and unpaid, and that the defendant is a resident of the county of San Bernardino, but not of the township of San Bernardino therein.

The answer denied all the allegations of the amended complaint except the execution of the promissory note; that its obligation was incurred and was to be performed in the state of Texas; that the defendant at all times has resided outside of the township of San Bernardino. These latter facts are expressly admitted.

San Bernardino township has a population in excess of thirty thousand. The sole question to be considered here is whether jurisdiction over the case of Van Horn v. Van

Horn rested in the justice's court of San Bernardino township or in the superior court of the county, there being no municipal court in the city of San Bernardino, which is within the township of the same name.

The legislative enactments of 1929, giving an increased jurisdiction to justices' courts in townships having a population of thirty thousand or more, have presented many new and interesting questions and have been the prolific source of numerous decisions by the Supreme and Appellate Courts of the state since they went into effect, in August, 1929. We are cited to no case in which the problem here presented has been decided.

Section 1 of article 6 of the Constitution (1879) as originally adopted provided that the judicial powers of the state be vested in the state senate, sitting as a court of impeachment, the Supreme Court, the superior courts, justices of the peace, and such inferior courts as the Legislature might establish in any incorporated city, town, or city and county. This section was amended in 1904 to provide for the creation of District Courts of Appeal. It was again amended in 1911, omitting direct reference to justices of the peace, but continuing legislative authority to establish inferior township courts. In 1924 it was again amended to provide for the creation of municipal courts in cities and cities and counties. The provisions relating to inferior township courts were not changed.

Section 5 of article 6 of the Constitution of 1879 gave superior courts original jurisdiction in numerous civil cases which we are not concerned with here, and in all civil cases "in which the demand, exclusive of interest or the value of the property in controversy, amounts to three hundred dollars." It also gave the superior courts appellate jurisdiction "in such cases arising in *Justices' and other* inferior Courts in their respective counties as may be prescribed by law." The section was amended in 1911 by the omission of the italicized words from the sentence just quoted. It was again amended in 1924, which amendment does not concern us here. By an amendment adopted in 1928 it was provided that "the superior courts shall have original jurisdiction in all civil cases and proceedings except as in this article otherwise provided, and except also cases and proceedings in which jurisdiction is or shall be given by law to municipal or to justices' or other inferior courts."

Section 11 of article 6 of the Constitution originally provided as follows: "The Legislature shall determine the number of Justices of the Peace to be elected in townships, incorporated cities and towns, or cities and counties, and shall fix by law the powers, duties, and responsibilities of Justices of the Peace; provided, such powers shall not in any case trench upon the jurisdiction of the several Courts of record, except that said Justices shall have concurrent jurisdiction with the Superior Courts in cases of forcible entry and detainer, where the rental value does not exceed twenty-five dollars per month, and where the whole amount of damages claimed does not exceed two hundred dollars, and in cases to enforce and foreclose liens on personal property when neither the amount of the liens nor the value of the property amounts to three hundred dollars."

The amendment of this section in 1911 is not important to the question we are considering. The reference to "justices of the peace" was omitted in the amended section and "inferior courts" substituted therefor. Two amendments were adopted in 1924, one of which was repealed in 1928. The other provided for the creation of municipal courts and continued the power of the Legislature to determine the number "of the inferior courts in incorporated towns, and in townships or counties, or in incorporated cities or cities and counties, where there is no municipal court" with other powers in the Legislature not necessary for us to consider. In 1928 there was added to the Constitution section 11a of article 6, which provides as follows: "The legislature shall determine, according to population, the number and jurisdiction of each of the inferior courts in incorporated cities or towns wherein there is no municipal court, and in townships, counties or cities and counties, and the number of judges or justices thereof and their qualifications and compensation, and shall fix by law the powers, duties and responsibilities of each of such courts and of the judges or justices thereof; and may provide that the jurisdiction of such courts shall be exclusive."

It is apparent from the foregoing constitutional provisions that at all times material to this proceeding the jurisdiction of the superior court in civil actions for money ended when the amount involved in the litigation was less than the amount specified as the maximum amount that could be recovered in a justice's court. There was no constitutional line of demarkation separating the jurisdiction of the two courts, such matter being left entirely to legislative enactment. A law increasing the jurisdiction of the justices' court would automatically reduce the jurisdiction of the superior court by the exact extent that jurisdiction had been granted to the inferior court.

Under the authority granted to it in 1879 the Legislature in 1880 proceeded to provide for the establishment of justices' courts throughout the state. We need only concern ourselves with the legislation applicable to township justices' courts. Section 106 of the Code of Civil Procedure, as then adopted (Code Amdts. 1880, p. 34) and still in force, provided as follows: "The civil jurisdiction of justices' courts extends to the limits of the townships in which they are held; but mesne

and final process of any justices court in a county may be issued to and served in any part of the county." Section 112 of the same Code, as adopted in 1880 (Code Amdts. 1880, p. 35), in so far as its provisions are involved here, limited the jurisdiction of justices' courts to an amount of not to exceed $300 sought to be recovered in actions on contracts. An important amendment to this section was enacted in 1929 (Stats. 1929, p. 834), which we will consider in connection with the legislation following the adoption of section 11a of article 6 of the Constitution. Section 113 of the Code of Civil Procedure (Code Amdts. 1880, p. 35) gave justices' and superior courts concurrent jurisdiction in certain actions of forcible entry and detainer and to foreclose liens on personal property. Section 114 of the same Code (Code Amdts. 1880, p. 36) contained a legislative declaration of some of the provisions of section 11 of article 6 of the Constitution as it was first adopted. These two latter sections were repealed in 1929 (Stats. 1929, p. 834). Section 832 of the Code of Civil Procedure, in effect at the time the case of Van Horn v. Van Horn was instituted, placed the venue in such an action (omitting here the consideration of the amount involved) "in the township or city in which the defendant resides."

It clearly appears, and has been held in numerous cases, that prior to the Code amendments of 1929, giving enlarged jurisdiction to justices' courts in townships having a population of thirty thousand or more, the plaintiff, Jay Van Horn, should have brought his action in the township of the residence of the defendant had the recovery he sought been less than $300, and in the superior court of the county of the residence of the defendant where he sought to recover a greater amount.

Following the adoption of section 11a of article 6 of the Constitution, the Legislature in 1929 passed several acts increasing the jurisdiction and changing the procedure in justices' courts in townships having a population of thirty thousand or more. No change which it is necessary to note was made in justices' courts in townships having a lesser population. Sections 112, 831h, 835a, 900b, Code Civ. Proc.; section 4185a, Pol. Code. The general effect of these amendments was to enlarge the jurisdiction of justices' courts in townships having a population of thirty thousand or more, so that they might hear and determine civil actions at law in which the demand or damages sought to be recovered do not exceed $1,000. Jurisdiction was also increased in other instances not necessary to detail here.

It was also provided that in these justices' courts actions be commenced and prosecuted in the same manner and under the same rules of pleading as were provided by law governing civil action and the enforcing of judgments in municipal courts of the state. The qualifications for justices of the peace in these courts was also fixed.

It should be observed that San Bernardino township has had a justices' court with a justice of the peace presiding therein since the adoption of the Codes. His jurisdiction over the subject-matter of actions has been changed by previous amendments of the Codes. His territorial jurisdiction has always been limited to the boundaries of his township by section 106 of the Code of Civil Procedure since its adoption in 1880. This section has not been amended.

[1] The case of Proctor v. Justice's Court, 209 Cal. 39, 285 P. 312, 313, contains a careful review of the legislation in California since 1850 affecting justices' courts. The conclusion is there reached that "section 112 of the Code of Civil Procedure relates to the kind of civil causes * * * of which the justices' courts may take cognizance" and that this section does "not purport to fix the territorial jurisdiction of these courts."

It has been very generally held that in actions based upon contract for recovery of a money judgment the action must be commenced in the township in which the defendant resides (Holbrook v. Superior Court, 106 Cal. 589, 39 P. 936), unless there is an agreement to perform elsewhere, or unless the defendant submits himself to the jurisdiction of the court. Section 106 of the Code of Civil Procedure still limits the territorial jurisdiction of a justices' court to the boundaries of his township, and we do not find that any of the amendments of 1929 have changed this rule. We conclude that the action of Van Horn v. Van Horn should have been commenced in the superior court of San Bernardino county, the recovery being sought for more than $300 and the defendant residing without the boundaries of San Bernardino township and within San Bernardino county in a township having less than thirty thousand population and he not having undertaken to perform within San Bernardino township.

[2] We do not believe that the provisions of section 831h of the Code of Civil Procedure were intended to extend the jurisdiction of justices' courts in the larger townships to that then enjoyed by municipal courts, but only to apply municipal court procedure to these justices' courts.

[3] We are in accord with the conclusion reached by the District Court of Appeal, as above stated, that the action of Van Horn v. Van Horn should have been commenced in the superior court of the county of San Bernardino. In other words, the superior court had jurisdiction of the subject-matter of said action. If so, its jurisdiction was exclusive, and the justice's court of San Bernardino township had no jurisdiction over the same. Shipp v. Superior Court, 209 Cal. 671, 289 P.

825. There can be no such thing as concurrent jurisdiction over the same subject-matter of an action in the superior court and in the justice's court, except in the few cases mentioned in the Constitution, and this is not one of them. As is said in a previous part of this opinion, where the jurisdiction of the justice's court ends, the jurisdiction of the superior court begins. There is no overlapping of jurisdiction, and no option is given to a litigant to select one or the other of these two courts in which to institute his action. The law has done this for him. The Constitution and statutes of this state, above cited, have definitely fixed and determined the respective jurisdictions of these two courts. In counties where a justice's court of larger jurisdiction exists and there is no municipal court in said county, if under section 832 of the Code of Civil Procedure the action can be commenced in said justice's court, then that court has exclusive jurisdiction thereof; but if it cannot be commenced in the justice's court and the amount of the demand exceeds $300, then the action must be commenced in the superior court. As the action filed in the justice's court was within the exclusive jurisdiction of the superior court, the appearance of the defendant therein did not confer jurisdiction of said action upon the justice's court. Shipp v. Superior Court, supra; Marin M. W. Dist. v. North Coast W. Co., 178 Cal. 324, 328, 173 P. 473, 474; 7 R. C. L. 1043. In Marin M. W. Dist. v. North Coast W. Co., supra, it is said: "It is the universal rule that jurisdiction of the subject-matter cannot be conferred upon a tribunal by consent, and it follows that the parties cannot make an effective waiver of a lack of such jurisdiction." The cases of Olcese v. Justice's Court, 156 Cal. 82, 103 P. 317; Vance v. Superior Court, 48 Cal. App. 327, 191 P. 945; and Gulick v. Justice's Court, 101 Cal. App. 619, 281 P. 1031, relied upon by petitioner, are not applicable here as they involve simply the waiver of jurisdiction of the person, while the jurisdiction which we are considering involves the jurisdiction of the subject-matter of the action.

Petitioner relies with some assurance upon our decision in People v. Justice's Court, 212 Cal. 603, 299 P. 731, which was a proceeding in mandate to compel the respondent court to set aside its order quashing summons and to proceed with the trial of the action pending before it. That action had been brought in the justice's court of the township of Sacramento, which township had a population exceeding 30,000 inhabitants, under a statute directing that the same should be commenced "in a court of competent jurisdiction in the County of Sacramento." As the amount involved therein was over $300 and less than $1,000, it was brought in the justice's court of the township of Sacramento. No question was raised in the proceeding of People v. Justice's Court, supra, but that the action in the justice's court was brought in the proper court. The only point made was that the action having been brought in the justice's court, the summons therein could not be served out of the county in which the justice's court was situated. We held that section 831h of the Code of Civil Procedure applied in such a case, and authorized the service of summons as in actions pending in the superior courts. There is nothing in that decision inconsistent with the conclusion at which we have arrived in this action. We simply held that the order quashing the summons was unauthorized and directed the justice's court to proceed with the trial of the action.

The peremptory writ is denied.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.; TYLER, Justice pro tem.

216 Cal. 125

AMERICAN AUTOMOBILE ASS'N et al. v. AMERICAN AUTOMOBILE OWNERS' ASS'N et al.

S. F. 13625.

Supreme Court of California.

Aug. 1, 1932.

Rehearing Denied Aug. 29, 1932.

1. Trade-marks and trade-names and unfair competition ⇐68(1).

Test of unfair competition by use of emblem similar to that of competitors is whether person exercising care, caution, and power of perception which public may be expected to exercise would mistake one emblem for the other.

2. Trade-marks and trade-names and unfair competition ⇐70(3).

Words "American Automobile," being in common use, are common property, which may be used by others than original appropriator in combination with other descriptive words, if not probably misleading persons possessing ordinary powers of perception.

3. Trade-marks and trade-names and unfair competition ⇐3(1).

Generic terms and words descriptive of place are not subject to exclusive appropriation.

4. Trade-marks and trade-names and unfair competition ⇐70(2).

Automobile associations cannot impinge on "AAA" symbol, previously adopted and used by American Automobile Association, es-

pecially if such letters do not correctly initial other associations' names.

5. Trade-marks and trade-names and unfair competition ⇐21.

Diamond-shaped labels, having been in use for many years, cannot be exclusively appropriated as trade-marks.

6. Trade-marks and trade-names and unfair competition ⇐67.

Law of unfair competition does not protect purchasers against salesmen's falsehoods nor perform functions of penal statutes.

7. Trade-marks and trade-names and unfair competition ⇐67.

Deception by resemblance of competitors' trade-marks in features to which original appropriator had no exclusive right is not actionable.

8. Trade-marks and trade-names and unfair competition ⇐70(2).

Whether one emblem resembles another must be determined by inspection of points of difference and resemblance as whole after placing them side by side.

9. Trade-marks and trade-names and unfair competition ⇐70(2).

Emblems of California State Automobile Association and American Automobile Owners' Association *held* so different as to preclude injunction against latter's use of emblem.

10. Appeal and error ⇐1024(2).

It is trial court's function to judge sufficiency and weight of evidence in injunction suit.

11. Trade-marks and trade-names and unfair competition ⇐69.

Bad or evil intent to design emblem similar to that of competitor does not render such act unlawful, where it would not deceive ordinarily careful persons.

12. Torts ⇐1.

In civil, as well as criminal, law, there must be joint operation of act and intent to constitute unlawful act.

13. Trade-marks and trade-names and unfair competition ⇐69.

Party's intent to draw custom from his competitor is not actionable, unless his acts are unlawful.

14. Appeal and error ⇐1010(1).

Supreme Court cannot substitute its judgment for that of trial court supported by substantial evidence.

PRESTON, J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the American Automobile Association, a corporation, and another, against the American Automobile Owners' Association, a corporation, and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Rehearing denied; CURTIS and PRESTON, JJ., dissenting.

G. E. Sandford, of San Francisco, for appellants.

Hugh L. Smith and Chas. J. Wiseman, both of San Francisco, and Arthur V. Kaufman, of Los Angeles, for respondents.

PER CURIAM.

Plaintiff corporations, American Automobile Association and California State Automobile Association, appeal from a judgment denying their application to enjoin defendant corporation from doing business under its corporate name, American Automobile Owners' Association, and from using and displaying its official emblem, on the ground that said name is so similar to the name of the American Automobile Association, and its emblem so closely resembles the emblem of the California State Automobile Association as to tend to deceive and mislead.

The California State Automobile Association was incorporated in this state in 1907 as a nonstock corporation, with its principal place of business in the city of San Francisco. Its objects, as stated in its articles of incorporation, are to promote improvement of the highways, encourage proper highway maintenance, accomplish proper marking of the highways, urge just and rational highway legislation, further all good roads projects, and protect the interests of its members. At the time of the trial said association had a membership of more than 68,000. In consideration of annual dues, it furnishes its members with towing service, either directly, by towing cars operated by it, or through privately owned garages, and also gives them emergency road service in changing tires and repairing minor mechanical defects. It obtains extensive road and touring information for the benefit of members; supplies them with maps; designates official hotels and garages, which are required to maintain a certain standard; assists members arrested for traffic violations; and otherwise renders services in line with its objects. Its activities in marking the highways of Northern California with road signs are well known. It maintains a separate insurance bureau, which issues certain types of automobile insurance, and it acts as a broker in placing public liability insurance for its members.

Under an arrangement of years' standing with the Automobile Club of Southern California, the appellant California State Auto-

mobile Association is not active in the thirteen southern counties of the state. It does not solicit members in said counties, nor does it accept members who reside in Southern California without first advising that they join the Automobile Club of Southern California. By agreement between the two organizations, members of the State Association are entitled to the services of the Automobile Club when in Southern California, and members of the southern club have reciprocal privileges when in Northern California.

The California State Automobile Association and similar associations in all but a few states are members of, or affiliated with, the appellant American Automobile Association, which was incorporated in Connecticut in 1910 as a nonstock corporation, and had existed prior to that time, since 1902, as an unincorporated association. The American Automobile Association is generally known as the "AAA," and local organizations affiliated with it as "AAA," or "Three A" clubs or associations. Members of the California State Automobile Association when traveling outside California are entitled to receive from the organization affiliated with the American Automobile Association in the territory where they are traveling such services as said affiliate association renders to its own members. The California Association in turn accords similar privileges to members of other state associations affiliated with the American Automobile Association when they travel in the territory of the California Association. The AAA in this phase of its organization is a centralizing agency through which automobile owners, by membership in a state club affiliated with the AAA, may secure the services rendered by automobile clubs throughout the country. The AAA promotes and facilitates the organization of local associations. Not more than one local organization in any given territory is permitted to affiliate with the AAA. A portion of the annual dues of each member of the state associations are remitted to the AAA, which maintains offices in New York, Washington, D. C., and Detroit. The AAA also carries on national activities to secure constructive automobile legislation and promote the maintenance, construction, and improvement of highways, and disseminates touring information. Individuals, as well as organizations, may join the AAA directly, but it does not solicit or accept members in the territory of a local association affiliated with it. The Automobile Club of Southern California is not a member of the AAA. The AAA does not maintain an office in Southern California, nor engage in business there. However, it accepts voluntary applications from persons residing in the southern territory and has a number of individual members there.

The respondent American Automobile Owners' Association was incorporated in this state in January, 1924, but did not commence doing business until August, 1926. Unlike the California State Automobile Association and the American Automobile Association, it is a stock corporation. It is in no way affiliated with either the State Association or the AAA. In actual operation the corporation furnishes similar services to those rendered by the California State Automobile Association and automobile associations generally. At the time of trial in November, 1927, its membership had grown to 17,000. It asserts that its activities are confined to the thirteen southern counties of the state. Its principal place of business is in the city of Los Angeles. It also maintains an office in San Diego.

Both the appellant California State Automobile Association and respondent American Automobile Owners' Association issue to their members a diamond-shaped enameled metal emblem for display on their automobiles. The official emblems of the respective associations are also prominently featured on their stationery and advertising matter, and on maps and road information distributed to members. The emblem of the parent organization, AAA, is wholly dissimilar to the other emblems. On the California State Automobile Association emblem the dark blue letters AAA are a distinctive type and are inclosed in two large interlocking blue circles resembling automobile tires, arranged so that the outer letters are encircled once and the middle letter is doubly encircled by said two tire-shaped circles. The blue letters stand out conspicuously on a field of orange yellow. The legend California State Automobile Association in small lettering, approximately a quarter of an inch high, appears on the half-inch blue border of the diamond. The AAA on the emblem signifies that the California State Automobile Association is affiliated with the American Automobile Association. This practice of making the letters AAA the central feature of the insignia is followed by the state associations throughout the country which are affiliated with the American Automobile Association.

The emblem of the American Automobile Owners' Association is also diamond shaped, with two corners of the diamond stubbed or truncated, and approximately of the size of the State Association emblem. The State Association emblem has the blue letters AAA enclosed in interlocking blue circles resembling automobile tires upon a yellow background, while the emblem of the American Automobile Owners' Association has the white letters AAOA on a red background. The two middle letters AO are of the same height, and are the largest of the group, the O being oblong in form. Said letters AO stand out conspicuously in said group. The AAOA emblem also has a blue border of the same width as the State Automobile Associa-

tion emblem, and on the border of said AAOA emblem are stamped the words "American Automobile Owners Association." Upon the emblems of both the State Association and the American Automobile Owners' Association the smaller letters stating the name of the association are nickel-colored.

Previous to the adoption of its present emblem the American Automobile Owners' Association, from the time it commenced doing business in August, 1926, until November, 1926, distributed an emblem which differed in design from the present emblem only in that instead of the letters AAOA, it bore the letters AA, in line, but widely separated, with the word "owners" in lettering less than a quarter of an inch high written underneath, and the third A appearing below the word "owners." Viewed at a distance of twenty feet the word "owners" is not visible, and and the three A's appearing in triangular form are quite outstanding. The use of said emblem was discontinued in November, 1926, but the court in the present action nevertheless enjoined its use.

We may observe that although the officials of respondent AAOA testified, and the court found upon the evidence before it, that the AAOA did not extend its activities beyond the thirteen southern counties of California, there is no such limitation in its articles of incorporation. If the emblems are so similar as to fall under the ban of unfair competition, we do not think that it would be a defense to the suit for injunction to answer that the respondent AAOA had not at the time of trial, as found by the court, extended its activities into northern California. Upon argument before us it admitted that it had since established an office in San Francisco.

[1-4] The important question presented by the appeal must be determined by an application of the well-established test, which no doubt the trial court applied to the case, to wit: Would a person exercising that care, caution and power of perception which the public may be expected to exercise in the matter which it has in mind, mistake one of said emblems for the other? The only points of similarity are to be found in the size and diamond shape (waiving the difference which exists as to the fact that all of the points of the diamond design of plaintiff California State Automobile Association are pointed, and two of said points of the diamond design of respondent are truncated), and in the small blue border, and in the similarity as to metal color of the smaller lettering on the border. In all other respects they are different as to name, abbreviations, size and style of letters, design of motto, and color. Placed at any point within the distance of visual discernment they present an entirely different picture which could not deceive a person of normal discernment into the error of mistaking one for the other. No claim is made as to the right of monopoly by reason of copyright or trade-mark of the letters AAA, or as to the exclusive right of appellants to appropriate the words "American Automobile," for the reason that these words are in common use and are regarded by the law as common property, which may be used by others in combination with other descriptive words, provided they are not used in combination with such other words or symbols or designs as to render it probable that they would mislead persons possessing ordinary powers of perception. Generic terms and words descriptive of place are not subject to exclusive appropriation. No legal objection could be urged against the formation of an association to be known as the American Automobile Association of South America, or the American Automobile and Motor Association, as such. That neither could impinge upon the AAA symbol adopted and used by the American Automobile Association is clear for the sufficient reason that said three letters in combination had previously been adopted by the American Automobile Association as its symbol. The fact that said letters do not correctly initial the true name of either of said other associations would be an additional circumstance against a claim of right.

[5] No claim of exclusive appropriation of diamond-shaped labels can be sustained, because diamond-shaped designs have been in use for many years and are commonly used in magazine, periodical, label, and sticker forms of advertising.

Justice Brewer, in Lorillard v. Peper (C. C. A.) 86 F. 956, 960, in giving consideration to the rule which should guide courts in determining whether there exists in fact such a similiarity of names, letters, symbols, forms, colors, shapes, and sizes as would be likely to deceive a person of ordinary discernment, reduces the subject to the following formula: "The difference [labels] is such that the eye will take it in at a moment's glance. Summing it all up, while there are certain minor points of resemblance which have been forcibly urged upon our attention, * * * their labels,—taking the tout ensemble,—it appears to us clear that they are so essentially different that no one of ordinary intelligence, desiring to buy the one kind of tobacco, would be misled into buying a package of the other. * * * We cannot surrender our own judgment in this matter because others may be of a different opinion, or because it happens, in isolated instances, that some purchaser was so careless as not to detect the differences. It may well be that, where many sales were made, some individuals, not particularly attentive, may have purchased the defendant's supposing they were purchasing the plaintiff's package. Such things will happen in the ordinary course of business, no matter how great the differences; and the fact that they do happen, while it is not to be

ignored, is not to outweigh the evidence which comes from a personal inspection of the packages and labels."

The question here presented is by no means a novel one in the judicature of our federal courts, or of the courts of this state and sister states. The law has many times been considered in its application to wide and diversified subjects of mental and manual production, manufacture, industry, business, and trade. The rule has been most frequently applied in controversies arising between publishers of magazines and periodicals, compounders of patent medicines and chewing gums, and candy manufacturers, where the claim of unfair competition has been made the issue. In Collegiate World Publishing Co. v. Du Pont (D. C.) 14 F.(2d) 158, 160, plaintiff was the publisher of a publication entitled "College Humor," and defendant subsequently began the publication of a magazine entitled "College Comics." Both publications occupied the same field. The general dress and size of the two publications were strikingly similar. This case has a special bearing on the instant case, inasmuch as it makes reference to a new enterprise entering the field of competition, and the confusion which, if created in the minds of inattentive or careless persons, could at best be but short lived, and would soon disappear, if it seriously existed. The instant case does not in all respects resemble cases dealing with chewing gums and prepared articles for consumption, which are often hurriedly purchased by the traveling public in small packages and consumed before the deception is discovered, but the transaction of the kind of business in which the respondent is engaged is attended with deliberate action and possible investigation, and above all it is a business in which a good name for square dealing with the public is absolutely essential to success and continuance in business. The relationship between its members and the association is necessarily one of trust and confidence. It is also a business in which fraud or deception are certain sooner or later of detection if either is practiced. No doubt the trial court in considering the rationale of the situation encountered difficulty in bringing itself to understand how a membership consisting of 17,000 persons, or any considerable portion of that number, if obtained by the practice of fraud or deception, could have been induced to retain membership therein after it became known to them that they had been tricked into becoming members of respondent organization. The depositions of the five witnesses offered to establish the claim of fraud will later receive attention.

The court in the case of Collegiate World Publishing Co. v. Du Pont, supra, in considering the question as to the likelihood of the name of one magazine being mistaken for the other, said:

"There was some confusion, but it was due to the carelessness or inattention of dealers and purchasers who did not know a new magazine had come out. Such confusion is to be expected at first, where a new magazine enters the field dealing with the same general subject-matter as a magazine already on the market. This confusion was negligible, and would soon disappear as the reading public came to know there were two magazines dealing with the humorous side of college life. The confusion that existed was due to the fact that plaintiff selected descriptive words for its name.

"Similarity in names of magazines dealing with the same subject is not unusual, but on the contrary is quite common, such as Popular Science, Popular Mechanics; Outdoor Life, Outdoor Recreation; Field and Stream, Forest and Stream; Boy's Life, Boy's Magazine; Ladies Home Journal, People's Home Journal; Radio Doings, Radio Digest, Radio World, Radio Age, Radio Progress, Radio News, Radio Broadcast; Motor, The Motor, Motor Transport, Motor Record, Motor World, Motor Age, Motor Life; etc."

To the above a long list of other comparative cases might be added in which similarity of association and corporate names was held not to be in violation of the unfair competition rule. We will cite relatively a few from outside jurisdictions, and three or four from this state. Practically every point made by appellants is covered in these cited cases and the law is applied to analogous situations. In Choynski v. Cohn, 39 Cal. 501, 2 Am. Rep. 476, it was held that the name Antiquarian Book Store did not vest its author with an exclusive right in said name to the extent that it could enjoin the use of the name Antiquarian Book & Variety Store by its later business rival. See, also, on this and other kindred points, Tasty Baking Co. v. Tasty Pound Cake Co. (D. C.) 32 F.(2d) 1009; Umpqua Broccoli Exchange v. Um-Qua Valley Broccoli Growers, 117 Or. 678, 245 P. 324; Viavi v. Vimedia Co. (C. C. A.) 245 F. 289; Parker Pen Co. v. Finstone (D. C.) 7 F.(2d) 753; Supreme Lodge of Pythias v. Improved Order Knights of Pythias, 113 Mich. 133, 71 N. W. 470, 38 L. R. A. 658; Elgin, etc., v. Elgin Creamery Co., 155 Ill. 127, 40 N. E. 616; Farmers' Loan & Trust Company v. Farmers' Loan & Trust Company of Kansas (Sup.) 1 N. Y. S. 44; Richmond Remedies Company v. Miles Medical Company (C. C. A.) 16 F.(2d) 598; Italian Swiss Colony v. Italian Vineyard Company, 158 Cal. 252, 110 P. 913, 32 L. R. A. (N. S.) 439.

In this state the question of unfair competition received critical attention in Dunston v. Los Angeles Van & Storage Company, 165 Cal. 89, 131 P. 115, 117, and Southern California Fish Company v. White Star Canning Company, 45 Cal. App. 426, 187 P. 981. In the Los Angeles Van & Storage Case, former

Justice Henshaw gave consideration to the particular questions presented by the appeal in the instant case. Plaintiff Dunston established his business in 1896 and gave to it the name Los Angeles Van, Truck & Storage Company. In 1902 a certificate was issued to him by the secretary of state granting him the sole and exclusive right to use said name. In 1910, defendants, so the complaint alleged, organized a corporation for the purpose of conducting a similar business to that of plaintiff in the city of Los Angeles, and fraudulently appropriated a similar name, to wit, Los Angeles Van & Storage Company. Plaintiff alleged that the name of the company last named was in imitation of his company's name, and was selected for the purpose of deceiving, and had deceived, his patrons and the general public. In disposing adversely of plaintiff's claim that the trade-name was susceptible of exclusive use, citing section 991, Civil Code, the court says: "It is too apparent to need discussion that the name here employed by plaintiff has reference in its first words to the place of business; in the remaining words to a description of the business. Such names, titles or designations are not the subject of exclusive copyright or trade-mark." (Citing numerous cases.) The court then points out that as the judgment cannot be supported upon the theory of an invasion of an exclusive right to property in a trade-mark, the only hope for the judgment must rest upon the ground of unfair trade dealing. This principle, says the opinion, will protect the person first in the field to the extent of making competitors "use reasonable precautions to prevent deceit and fraud upon the public and upon the business first in the field." Continuing, the decision reads: "But, as has been intimated, relief in such cases really rests upon the deceit or fraud which the later comer into the business field is practicing upon the earlier comer and upon the public. Like all other kinds of fraud and deceit this is not presumed but must be pleaded and shown. Since plaintiff had no exclusive property right by way of trade-mark in the use of the name, it follows that the mere similarity of names does not establish the fraud. It must be such a misuse of the name by advertising and soliciting as amounts to fraud, and without this proof no relief may be granted, for, as is said by the Supreme Court of the United States in [Delaware & H.] Canal Co. v. Clark, 13 Wall. 311, 20 L. Ed. 581: 'True it may be that the use by a second producer, in describing truthfully his product, of a name or a combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product; but if it is just as true in its application to his goods as it is to those of another who first applied it and who, therefore, claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth.' The findings absolutely fail to show such fraud, imposition or deceit. Since the use by the defendants of the similar name which they have selected is not forbidden by law, the use of it even for conspicuous advertising, so long as the advertisements are true, is not a violation of any of plaintiff's rights. The fact that confusion to the business of the plaintiff has resulted from acts not in themselves illegitimate of itself affords no ground for relief."

The judgment for plaintiff was reversed. In the instant case, as in the case last above cited, the findings absolutely fail to show "fraud, imposition, or deceit." Southern California Fish Company v. White Star Canning Company, supra, is another illuminating case as to what constitutes unfair competition, and answers many of the objections made by appellants. It has to do with the labels and containers used in canning tuna fish products for the market. Without going into detail as to all the points of resemblance and difference as to cans, labels, and emblems used by the rival companies, which are specifically considered in the decision, it is sufficient to make reference to portions of the decision which have application to the principle of law involved in the instant case. It is coincident in the decision that the cans used by the contending fish packers, with their wrappers, bore considerable resemblance to each other, but all of said resemblances arose from features that were common to the trade or business, to which no one had an exclusive right. It is there said that the fact that any one is deceived by the size and general make-up of the can, or by the prevailing color scheme of the wrapper or labels, does not help plaintiff's case. All of those features were old, separately and in combination. Plaintiff must show deception arising from some feature of its own, not common to the public.

"Passing from the features that are common to the trade—size and shape of cans, color scheme of labels, etc.—we find that, with but one exception, presently to be noted, the label used by defendant is substantially unlike that used by plaintiff. The exception to which we refer is the figure or design of the fish. But the figure of the fish is a symbol that is indicative of the article sold. And the rule is that there can be no exclusive appropriation of a sign or symbol that represents or is descriptive of the article to which it is attached * * *, or which indicates the ingredients of the package, or the mode of composition. To give the right of exclusive appropriation, the sign or figure must be some arbitrary form or figure, not suggestive of the nature of the article to which it is affixed." Southern California Fish Company v. White Star Canning Company, 45 Cal. App. 426, 432, 187 P. 981, 984.

[6] The decisions of this court and courts of other jurisdictions make it plain that the law of unfair competition does not pretend to protect purchasers against falsehoods which salesmen may tell. It does not assume to perform the functions of penal statutes. The law is well stated in Southern California Fish Company v. White Star Canning Company, supra, as follows: " 'The law of unfair competition does not protect purchasers against falsehoods which the tradesman may tell; the falsehood must be told by the article itself in order to make the law of unfair competition applicable.' Hill Bread Co. v. Goodrich Baking Co. (N. J. Ch.) 89 A. 863. Each of the housewives whose testimony plaintiff relies on to show specific instances of actual deception admitted that, by using her eyes, she could readily detect the difference in the two packages. 'A resemblance which would deceive an expert or very cautious purchaser may still give a right of action, but a resemblance which would deceive only an indifferent or careless purchaser gives no right of action. The true rule lies between these extremes, condemning what would be reasonably calculated to deceive the common or usual purchaser of the given article when exercising ordinary care.' " See, also, Howe Scale Co. of 1886 v. Wyckoff, 198 U. S. 118 at page 140, 25 S. Ct. 609, 614, 49 L. Ed. 972.

[7] Many other cases might be cited to the effect that it is not enough to entitle a complainant to relief that some purchasers might be influenced to accept a competitor's product when his was desired because the competitor's product bore upon the container some figure or words in common with his own, if the differences in other respects are such as to make them readily distinguishable by an ordinarily observant purchaser; nor is it a ground of action that deception was due to resemblance in features as to which the complainant had no exclusive right. Wunderlich v. Cash (C. C. A.) 33 F.(2d) 118.

[8, 9] Of course, the only rule by which resemblances or differences can be detected is by physical comparison. Placing the objects of disputed similarity side by side is the method adopted by all courts, that not only the size, shapes, and forms may be brought into juxtaposition, but also that the color effect will be brought into the picture. There can be no other fair method of arriving at the truth. This is the approved test and the only way by which similitudes and differences may be compared. Whether one emblem resembles another is to be determined by an inspection of the points of difference and resemblance, as a whole, and not merely of points of resemblance. Richmond Remedies Co. v. Dr. Miles Medical Co. (C. C. A.) 16 F. (2d) 598; Postum Cereal Co. v. American, etc., Co. (C. C. A.) 119 F. 848; Viavi Co. v. Vimedia Co. (C. C. A.) 245 F. 289; Southern California Fish Co. v. White Star Canning Co., 45 Cal. App. 426, 187 P. 981. When so examined, the emblems of the contending competitors differ in so many conspicuous and essential features—in name, coloring, number and formation of letters, symbol—that it does not seem possible the one should be mistaken for the other by persons of ordinary intelligence, exercising ordinary care in the concerns of business. The form of the diamond is not absolutely identical. Of course, that is not susceptible of exclusive appropriation. But even should mistakes infrequently occur, the error would be with the person who fails to use his powers of perception in distinguishing differences where they actually exist. The similarity between numerous types of automobiles themselves is more striking than is the similarity between the emblems in the present case.

The court found, in line with the pleadings, that the plaintiff California State Automobile Association had a membership of approximately 68,000 members, and respondent had a membership of approximately 18,000 members at the time of trial, to wit, November, 1927, totaling a membership of 86,000 persons. This number is far from comprising the total number of persons owning or operating automobiles in this state. Appellants, in an effort to prove specific instances of deception claimed to have been practiced by agents employed by respondent in its business, introduced the depositions of four persons taken in their behalf, which are specifically set out in the briefs, from which it is claimed that respondent's representations and emblems influenced them to join respondent association. In one case the transaction was with a housewife. She testified that she joined the respondent association when her intentions were to join the California State Automobile Association, and she believed she was joining it. She claims that she was misled by the three A's. As near as she recollected it, the agent said, as she understood him, that he represented the American Automobile Association. She admitted her membership card made no reference to the California State Automobile Association. Her testimony is clearly so uncertain as to have justified the trial court in holding that her action could not be charged to deception on the part of respondent association. A second deponent averred that he glanced at the application before he signed it, and saw the Three A emblem; that he didn't observe the word "owners" on the emblem; that the salesman told him that he could only get service from a garage having the official Three A sign; that the salesman told him to go to appellant's office on K street in Sacramento for information and maps; that the Three A was all that was talked about. This witness, when asked if he made an examination of the emblem which the person displayed to him, answered: "No, sir, because I

know that is the 'Three A's,' and I don't have to examine." He did not read over a paper which he signed. A third deponent said that a salesman displayed the emblem AAOA, herein described, to him and he joined thinking it was "Three A's." He was told he could get service anywhere in the country. A fourth deponent said that the letters AAA on the respondent's emblem indicated to him that it was appellant's emblem. He testified that said salesman represented that his organization was the one that placed the road signs on the highways. The deponent admitted that he was not shown an emblem of the California State Automobile Association, and while he signed a paper which said "make all checks payable to the American Automobile Owners Association," he did not observe the word "owners" on the literature or otherwise.

The deposition of the fifth deponent was practically along the lines of the four herein reviewed. In commenting on this class of evidence in Moebius v. Louis Dejonge Co. (D. C.) 215 F. 443, 447, the court made the following observation:

"Complainant has introduced testimony as to misrepresentations of salesmen of defendants and confusion and mistakes by purchasers of these two articles. The salesmen are not identified, and, where only sporadic incidents are ascertained, a merchant is not chargeable with an occasional remark of an unidentified occasional salesman.

"Little aid is furnished by the testimony of witnesses as to confusion when that testimony is taken by deposition. In open court the judge can form his opinion of the point of view and mental attitude of the person who gives testimony of this character. There is no reason to doubt that the illustrations given by the witnesses in the case at bar are truthfully stated, and, of course, in doubtful cases actual instances of confusion may be helpful in arriving at a correct decision; but, generally speaking, the court must, if possible diagnose the subjective symptoms of the purchasing public from the appearance of the articles themselves, unless a course of conduct is proved which shows the employment of methods and means indicating unfair competition."

[10] It is the trial court's function to judge of the sufficiency of the evidence in the case and give it such weight as it finds it entitled to receive.

The appeal is taken from that portion of the judgment rendered in favor of the defendants and against plaintiffs which adjudges that: "It is further ordered, adjudged and decreed that said plaintiffs nor is either of them entitled to any other, further or additional relief whatsoever as against said defendants or either or any of them as prayed for in said complaint, and that said defendants are entitled to recover judgment against said plaintiffs for their costs of suit taxed in the sum of ——— Dollars." The prayer of the complaint asks for an order of injunction restraining the use of said emblems and insignia by respondents, and for an order restraining respondents "from doing business under or using or displaying the title and corporate name 'American Automobile Owners Association,' or any title or name similar to the respective titles and names of plaintiffs; from distributing to any person any printed or written matter, or erecting any signs containing or bearing said emblems, or corporate title similar to those of plaintiffs; from representing that defendant corporation is in any way connected with or affiliated with either of plaintiffs; from representing that members of defendant corporation will receive any services whatsoever from either of plaintiffs, and for costs and such further relief as may be equitable and just."

No money judgment was sought by the pleading and no attempt was made to prove money damages.

The court conceded that the California State Automobile Association and its parent corporation had performed a great and valuable service to the traveling public in the ways herein described, but found that their fears as to the deception that would ensue to the public if respondent were permitted to use the emblems and other means of publicity which it had adopted, were unfounded and unsupported by the evidence. The court found squarely upon the issue of fact presented by the pleading, "that said defendants have adopted said emblems and title for the purpose of so practicing deceit and fraud upon the public and prospective members are thereby deceived, deluded," etc., by said emblem, and similar allegations, and its finding was in each instance that said allegations were untrue. It also found, upon evidence fully developed, that respondent corporation was not at the time of, or prior to the filing of the complaint herein, in competition with the plaintiffs in the territory in which it solicited and did business, to wit, Central and Northern California, but that it confined its field of activity and business transactions to the thirteen counties named in the findings. This finding has become obsolete, inasmuch as respondent stated in the hearing before this court that it had since established an office in the city of San Francisco. This being so, the appeal presents the sole question of unfair competition, which issue was really the controlling one passed on by the trial court, for our consideration.

[11-13] Appellants have argued that the evidence in the record would justify or compel a finding that the respondents have been prompted by a bad or evil intent to design their emblems in the manner described. The

court has found that they would not deceive an ordinarily careful person, in the manner and form of the law. If that is so, the act is not unlawful. An uncompleted intent is not actionable. In civil law as well as in criminal law there must be a joint operation of act and intent to constitute an unlawful act. If the act is not unlawful, the intent would not make it so. Every one who enters the field of competition desires and plans to draw custom from his competitors. Unless his acts are unlawful, his avarice is not actionable.

[14] We do not understand that there is any contention on the part of appellants that respondents have ever used the combination of letters AAOA as a separate symbol or emblem. The initial letters have always been a part of the emblems which are before this court as exhibits. In no case are the four letters AAOA inclosed in circles resembling automobile tires, as is the case with the California State Automobile Association, and there can be no contention that the American Automobile Association's emblem in any respect resembles the respondent's emblem in form, or color, or shape, or size. The question presented is one of fact. This court is not permitted to substitute its judgment for that of the trial court where, as here, there is substantial evidence to support the trial court's judgment.

The judgment appealed from is affirmed.

I dissent: PRESTON, J.

216 Cal. 150

NEILSEN v. NEILSEN et ux.

Sac. 4566.

Supreme Court of California.

Aug. 1, 1932.

1. Appeal and error ⇐1011(1).

Findings on conflicting evidence could not be disturbed.

2. Trusts ⇐365(2).

Action to impress trust on property, brought over nine years after conveyance and about five months after plaintiff had notice of alleged fraud, *held* commenced seasonably.

3. Judgment ⇐527.

Conclusion of law, not carried into judgment, *held* not part thereof.

4. Appeal and error ⇐1073(7).

In successful action to have defendant declared trustee of note given by third party, defendant *held* not prejudiced by holding that, because of injunction, note bore interest until judgment.

5. Interest ⇐52.

In action to have defendant declared trustee of note given by third party, injunction restraining third party from paying principal and interest pendente lite *held* not to relieve him from interest accruing during injunction period.

Result of service of injunctive order on third party who was not party to action was merely to abate payment of principal and interest to defendant during time injunctive order was in effect and to save such third party from default on account of nonpayment thereof during pendency of action.

In Bank.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by Karoline J. Neilsen against Nicolai Neilsen and wife. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

Thomas Maul, of Placerville, for appellants.

Abe Darlington and Henry S. Lyon, both of Placerville, for respondent.

SHENK, J.

The plaintiff is the mother of the defendant Nicolai Neilsen. The defendants are husband and wife. In 1920 the plaintiff, then of the age of seventy-five, was the owner of two parcels of real estate in El Dorado county. One was known as the home place and the other as the mountain property. The defendants were then living with the plaintiff on the home place. On April 1, 1920, an agreement was entered into between mother and son, with full knowledge of the son's wife, whereby the title to both properties was conveyed to the son. The consideration of the conveyance was to be the payment to the plaintiff by her son of $6,000 in money; providing a home and support for the plaintiff for the rest of her life; and conducting to conclusion certain litigation in which the plaintiff was involved. The son thereupon placed a mortgage on the home place and from the proceeds of the loan paid the plaintiff $2,000. He also executed to her an unsecured note for $4,000 payable in six years. Thereafter he borrowed $2,600, giving as security a mortgage on the mountain property. In February, 1929, he sold the mountain property for $10,000 to one Kyburz, receiving therefor the sum of $4,000 in cash and a note for $6,000 secured by a mortgage on the property sold. On July 1, 1929, the plaintiff left the home place and has not returned to live with the defendants. This action was commenced about two weeks later to have it declared, pursuant to subdivision 4 of section 1572 and section 2224 of the Civil Code, that

the defendants hold the title to the home place as trustees for the plaintiff; and that the defendants hold the $6,000 Kyburz note and mortgage also as trustees for the plaintiff. An injunction to prevent the defendants from disposing of the Kyburz note or further incumbering the home place was also sought.

[1] The court found that a confidential relationship existed between the plaintiff and the defendant son at the time the aforesaid agreement was entered into; that the treatment of the plaintiff by her son was of such a nature as to compel the plaintiff to leave the home place, and that the agreement was entered into by the defendant son without any intention of performing the same. In view of the conflict in the evidence, which was substantial, the findings on these matters may not be disturbed.

By its judgment the court awarded to the plaintiff the sum of $4,000, which was the amount of the unsecured note given by the son to his mother; impressed a trust in favor of the plaintiff on the home place until the money judgment was satisfied; decreed that the $6,000 Kyburz note should be the property of the plaintiff; and directed its assignment to the plaintiff. In its conclusions of law the court stated that, inasmuch as Kyburz had been prevented by the issuance of the injunctive order when the action was commenced from paying the principal or interest on the $6,000 note when the same became due, the principal should not bear interest after that time until the entry of judgment. This latter conclusion was not, however, carried into the judgment.

[2] In support of the appeal from the judgment it is contended that the evidence is insufficient to support the findings of the court. This point, on the record, must be determined adversely to the contention. The statute of limitations is also urged. The determination of this point depended primarily on when the plaintiff first suspected the fraudulent intent on the part of her son. While the evidence is meager on this point, we think there is sufficient to justify the court in finding, under all the circumstances that the plaintiff was not chargeable with notice of the alleged fraud until after the mountain property was sold in February, 1929. This action was commenced thereafter within seasonable time.

[3-5] The defendants complain of the provisions in the conclusions of law relieving Kyburz from paying principal or interest on his mortgage note from the time the injunction order was served on him until the entry of judgment. There are two answers to this contention. In the first place, this order, as above noted, was not carried into the judgment, and cannot be deemed a part thereof; and, secondly, the defendants were in nowise prejudiced by reason thereof, assuming that it was properly made, for the reason that it operated only against the interests of the plaintiff, and she has not taken an appeal therefrom. For the guidance of the parties in the adjustment of the interest on that obligation, we incline to the view and hold that the service of the injunctive order on Kyburz did not have the effect of relieving him of the payment of interest accumulating on the note during the period mentioned. Kyburz is not a party to this action, and the result of the service upon him of the order of injunction was merely to abate the payment of principal and interest to the defendants during the time the injunctive order was in effect and to save him from default on account of nonpayment thereof during the pendency of this action.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; TYLER, J.; LANGDON, J.; SEAWELL, J.

216 Cal. 153

HALL v. BRU et al.

S. F. 14418.

Supreme Court of California.

Aug. 2, 1932.

Judgment ⇐143(13).

Refusal to relieve defendants, delayed by traffic, from default, *held* not abuse of discretion; defendants not having telephoned or telegraphed court.

In Bank.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Partition action by Jura Lawrence Hall against Howard H. Bru and wife and others. From an interlocutory judgment, and also from an order made after the entry of the interlocutory judgment, refusing to set aside an order confirming the report of a referee, defendants appeal.

Affirmed.

Frank J. Golden, of Los Angeles, and Grant & Zimdars, of San Francisco, for appellants.

A. L. Weil and Harris F. Shaw, both of San Francisco, for respondent.

SHENK, J.

This is an appeal by the defendants from an interlocutory judgment in an action in partition and also from an order made after the entry of the interlocutory judgment refusing to set aside the order confirming the report of the referee.

The plaintiff is the owner of seven-ninths of the real property in question. The defendants Bru are the owners of one-ninth and the defendants Schlaffer are the owners of one-ninth. The complaint is in due form. It alleges, among other things, that the premises are so situated that partition in kind cannot be made without great prejudice to the owners thereof, and prays that, if the court so find, the premises be sold and the proceeds be distributed in due proportion. The defendants answered, denying for lack of information and belief that the property cannot be partitioned in kind without great prejudice to the owners. At the trial all parties were present or represented. The plaintiff introduced evidence in support of the controverted allegation of the complaint. The defendants offered no evidence on the issue at that time, but it was stipulated that the court appoint a sole referee to ascertain and report to the court whether the property could or could not be partitioned without great prejudice to the owners. The referee was appointed and reported to the court that after due notice and in the presence of counsel for all parties he personally inspected and examined the premises and found that partition could not be had without great prejudice to the owners. Thereafter the plaintiff's counsel duly served and filed a notice of motion for an order of court confirming the report of the referee. The motion was noticed for 2 o'clock p. m. on March 14, 1930, in the appropriate department of the Superior Court in Oakland. At the appointed time, the plaintiff appeared with counsel, introduced evidence in support of the referee's report and moved that the report be confirmed. The motion was granted, and on March 21, 1930, the court signed and filed its interlocutory decree ordering the property to be sold and appointing the same referee to conduct the sale. Thereafter defendants' counsel moved the court to set aside the order confirming the report on the ground that the order was taken through defendants' inadvertence, surprise, and excusable neglect as detailed in the affidavit of the defendant Bru confirmed by the affidavit of his counsel. The affidavit of the defendant Bru averred that he and his counsel left their offices in San Francisco in time, so they estimated, to arrive at the Alameda county courthouse at 2 o'clock p. m. on March 14; that because of a delay in traffic they were unable to board the 1:20 p. m. ferryboat, and were compelled to take the 1:40 p. m. boat, which caused them to arrive at the courthouse eighteen minutes after the matter set for 2 o'clock had been heard and determined; that the defendant was prepared to offer testimony to the effect that the property could be partitioned in kind without great prejudice to the owners; and that the market for real estate in the locality was then in such condition that the property could not be sold without great loss to the parties. The motion was denied, and gross abuse of discretion is charged against the trial court in denying the same.

The defendants rely on Fulweiler v. Hog's Back Con. Mining Co., 83 Cal. 126, 23 P. 65, in support of their position. A reading of the opinion in that case at once discloses that the defendants here have fallen far short of the diligence exercised by the defaulting party in that case. When the defendants here found themselves in the predicament disclosed by their affidavits, it would appear to have been an easy matter to have communicated by telephone or telegraph to the court or the clerk thereof the facts causing their delay and requesting that the matter be continued for sufficient time to permit them to be present. No such showing was made. Considering all of the facts appearing in the record, and assuming that the trial court might well have relieved the defendants from their default, we are not prepared to say that the trial court was guilty of such an abuse of discretion as would justify a reversal.

The judgment and order are affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; LANGDON, J.; TYLER, Justice pro tem.; SEAWELL, J.

216 Cal. 171

MAYOCK v. KERR, Registrar of Voters.

S. F. 14743.

Supreme Court of California.

Aug. 4, 1932.

Statutes ⇐35½.

Registrar of voters *held* justified by self-executing constitutional provision in rejecting initiative petitions without signers' precinct numbers, regardless of statutory provisions (Const. art. 4, § 1; Pol. Code, § 1083a, as amended by St. 1931, p. 805, § 1).

In Bank.

Application by Welburn Mayock for a writ of mandate to compel W. M. Kerr, as Registrar of Voters of the County of Los Angeles, to accept for filing and certification certain sections of an initiative petition without the signers' precinct numbers thereon.

Alternative writ discharged and prayer for peremptory writ denied.

Leslie H. Kranz, Harry A. Goldman, Hugh E. Macbeth, Welburn Mayock, and Rosalind Goodrich Bates, all of Los Angeles, Reeves Aylmore, of Santa Ana, and H. Ross Hubbard, M. Mitchell Bourquin, Leo R. Friedman, and Thomas M. Foley, all of San Francisco, for petitioner.

Everett W. Mattoon, Co. Counsel, of Los Angeles, for respondent.

PER CURIAM.

Petitioner seeks by writ of mandate to compel the respondent as registrar of voters of Los Angeles county to accept for filing and certification certain sections of a petition seeking to place upon the ballot at the next general election an initiative measure relating to the foreclosure of mortgages and trust deeds. The respondent refuses to accept the petition or to certify the names thereon for the reason that there does not appear on the petition the precinct numbers of the respective signers thereof. It is the contention of petitioner that the duty of affixing the precinct numbers rests upon the registrar of voters and not upon the signers or proponents of the petition. Respondent contends that the duty to affix such precinct numbers does not rest upon him, and that he cannot be compelled to certify any names unless such precinct numbers appear on the petition. It should be noted that the respondent has offered to the proponents of the petition a reasonable time within which to place the precinct numbers thereon.

We are of the opinion that the respondent has properly refused to examine the petition and to certify the names thereon, when such precinct numbers do not appear on the face of the petition. The Constitution expressly provides in reference to referendum and initiative petitions (article 4, § 1) that "each signer shall add to his signature his place of residence, giving the street and number if such exist. *His election precinct shall also appear on the paper after his name.* * * * This section is self-executing, but legislation may be enacted to facilitate its operation, but in no way limiting or restricting either the provisions of this section or the powers herein reserved." Thus the Constitution itself provides that the precinct numbers must appear on the petition, and this must necessarily mean that such precinct numbers must appear on the petition at the time the petition is presented to the registrar of voters. Inasmuch as the Constitution plainly requires this information to appear on the petition, it is needless to speculate as to why the framers of the Constitution saw fit to insert this limitation on the exercise of the right. The provision was probably inserted as a mechanical aid to the registrar of voters in investigating, identifying, and verifying the persons and signatures of the purported signers. See Osborn v. Board of Supervisors, 27 Cal. App. 85, 148 P. 970; Ley v. Dominguez, 212 Cal. 587, 299 P. 713.

It should be noted that the construction or constitutionality of section 1083a of the Political Code, as amended in 1931 (St. 1931, p. 805, § 1), is not involved in this proceeding. That section provides, in part, "Such signer shall at the time so signing such petition or paper affix thereto the precinct, also the date of such signing." In the instant case the respondent does not contend that the signers of the petition must insert the precinct numbers, but simply contends that such precinct numbers must appear on the petitions before he can be compelled to certify the names. Respondent expressly concedes that if such precinct numbers are inserted by the proponents or the signers he will proceed with the examination of the petitions. We are of the opinion that regardless of the provisions of section 1083a of the Political Code, since the constitutional provision above quoted is self-executing, the registrar was justified in refusing to accept the petitions until the precinct numbers appear thereon.

Petitioner relies on the case of Ley v. Dominguez, supra, involving a provision of the city charter of the city of Los Angeles. In that case it was held that the omission of the precinct numbers did not justify the city clerk in refusing to accept certain petitions. That case is not controlling here for several reasons. All that was involved in that case was a city charter provision. The constitutional provision above quoted was not involved. Moreover, in that case the proponents offered to supply the precinct numbers, but the city clerk declined to permit them to do so. In the instant case the proponents have refused to affix the precinct numbers to the petitions.

Petitioner also refers to and relies upon the minute order of this court of July 8, 1932, in the case of Burke v. Backs, L. A. No. 13783, which involved the same point involved in the instant case, and in that case a peremptory writ of mandate was issued directing the proper officer of Orange county to file the petitions. However, as the minute order discloses, the respondent in that case failed to make an appearance and in no way contested the petition. Under those circumstances the court issued the writ based upon the prima facie showing of petitioner. Upon a proper presentation in the instant case, however, we are of the opinion the writ should not issue.

The alternative writ is discharged and the prayer for a peremptory writ is denied.

216 Cal. 27

DELANOY v. DELANOY et al.

S. F. 14169.

Supreme Court of California.

July 20, 1932.

1. Divorce ⇐327.

Divorce decree of Pennsylvania court, where court did not have personal jurisdiction over defendant, or jurisdiction over marital status, *held* not entitled to full faith and credit (Const. U. S. art. 4, § 1).

2. Divorce ⇐7.

Divorce proceeding, in so far as affecting marriage status, is action in rem.

3. Divorce ⇐59.

Court to obtain jurisdiction over action for divorce, must get jurisdiction over res, the marriage status.

4. Divorce ⇐326.

Where record of foreign divorce decree discloses that foreign law was complied with, presumption of validity arises and decree will be recognized unless successfully attacked on jurisdictional grounds.

5. Divorce ⇐327.

Foreign divorce decree may be collaterally impeached by extrinsic evidence showing that foreign court lacked jurisdiction.

6. Divorce ⇐327.

Where husband interposed Pennsylvania divorce decree as defense to wife's action for divorce, plaintiff, on collateral attack, may show that husband's foreign residence was not bona fide.

Husband, by way of affirmative defense to wife's action for divorce, alleged that he secured a divorce from the plaintiff while he was a bona fide resident of the state of Pennsylvania. Record of proceedings in Pennsylvania divorce action disclosed that service on the defendant in that action was secured by means of publication of summons, and that defendant therein did not appear and was not personally served. Defendant therein at all times since marriage of parties was and is a resident of and domiciled in California.

7. Divorce ⇐329.

Foreign divorce decree interposed by husband as defense to wife's action will not be recognized, as matter of comity, if husband obtained decree on false testimony, constituting fraud.

Under the foregoing rule, if one spouse wrongfully lives separate and apart from the other nonoffending spouse, the latter spouse has not subjected his interest in marriage status to the jurisdiction of the foreign court where the offending spouse may be domiciled, and a decree rendered there on constructive service will not be entitled as matter of comity to recognition in California.

8. Divorce ⇐326.

Foreign decree of divorce, interposed by husband as defense to wife's action for divorce, will be recognized, as matter of comity, where husband was innocent of any wrongdoing.

Under the foregoing rule, if one spouse puts it in power of the other, due to his wrongful conduct, to rightfully live separate and apart, and to acquire a new and separate domicile, the wrongdoer must be deemed to have consented to have his interest in the marriage status determined in the state where the nonoffending spouse is domiciled.

9. Judgment ⇐815.

Foreign decree, regular on face, is presumably valid, and burden to prove contrary is on party attacking it.

10. Judgment ⇐818(1).

Foreign decree is always subject to collateral attack on ground petitioning party did not have bona fide domicile in foreign state.

In Bank.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Theresa Louise Delanoy against Frederick William Delanoy and another. Judgment in favor of the defendants, and the plaintiff appeals.

Reversed.

W. L. Albert, of Oakland, for appellant.

Calkins, Hagar, Hall & Linforth, of Oakland, for respondents.

PER CURIAM.

Plaintiff brought this action against the defendant Frederick William Delanoy for divorce on the grounds of desertion and extreme cruelty. The mother of the above-named defendant was joined as a party defendant because of her claim to certain real property, alleged by plaintiff to be community property. So far as pertinent here the complaint alleges that plaintiff and defendant Frederick Delanoy were married in San Francisco June 30, 1906; that the parties separated March 1, 1926; that there are two children of the marriage; and that defendant husband has the control and possession of certain property alleged to be community property. Plaintiff prays for a divorce, for all the community property, and for alimony.

The defendant Frederick Delanoy answered the complaint and denied all the material

allegations thereof, except that he admitted marrying plaintiff in 1906. However, defendant denies that the parties are still husband and wife, alleging by way of affirmative defense that in 1927 while he was a bona fide resident of the state of Pennsylvania he secured a divorce from this plaintiff.

When the case came up for trial, by motion properly made, plaintiff requested an allowance for attorney fees. Defendant opposed this motion on the ground that the parties had been validly divorced in 1927 by the Pennsylvania decree. In support of this contention the defendant offered and there was received in evidence the transcript of the proceedings in the Pennsylvania divorce action. For the purposes of this appeal we will assume that the record is in proper form and shows a compliance with the Pennsylvania statutes. The record shows that service over the plaintiff herein was secured by means of publication of summons. It is admitted that plaintiff herein did not appear in the Pennsylvania action and was not personally served. The trial court in this action permitted the plaintiff to show that the last place the parties lived together as husband and wife was California, and that at all times since the marriage in 1906 the plaintiff herein was and is a resident of and domiciled in California. The trial court then ruled that the plaintiff would be limited in her proof to evidence as to whether or not the residence of defendant herein in Pennsylvania was bona fide. The plaintiff thereupon testified that the husband left the state of California in June, 1924; that she talked to him on the day he left; that he told her he was going to Pennsylvania on business and that he would return in about six months; that he took one of the children with him; that he did not return; that he did not write to her after he left, nor did he ever request her to come to Pennsylvania; that after his departure he sent no money to her; that her husband at no time notified her that he was not coming back to California. The trial court was of the opinion that this evidence was not sufficient to show that the residence of defendant herein in Pennsylvania was not bona fide. The plaintiff herein then offered to prove all of the allegations of her complaint in reference to the charges of desertion and cruelty. The trial court ruled that until it was shown that the Pennsylvania decree was not regularly obtained, the plaintiff would be foreclosed from offering any evidence as to the allegations of her complaint. The effect of the trial court's ruling was to limit plaintiff in her attack upon the Pennsylvania decree to a showing either that the husband's residence in Pennsylvania was not bona fide or that the statutes of that state were not complied with.

[1] Appellant contends that the Pennsylvania decree not having been rendered by a state having personal jurisdiction of her, and Pennsylvania not being the state where the parties last lived together as husband and wife, the divorce decree of that state is not entitled to full faith and credit under the United States Constitution. This is undoubtedly the law. Haddock v. Haddock, 201 U. S. 562, 26 S. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1; Thompson v. Thompson, 226 U. S. 551, 33 S. Ct. 129, 57 L. Ed. 347; Bruguiere v. Bruguiere, 172 Cal. 199, 155 P. 988, Ann. Cas. 1917E, 122. Appellant next contends that such decree not being entitled to full faith and credit, it should not be recognized as a matter of comity, for if recognized it will affect the status of one of our own citizens who had no opportunity to be heard in that action. Respondent husband admits that the Pennsylvania decree is not entitled to full faith and credit, but contends that as a matter of comity such decree should be recognized by this state. The question thus presented is whether or not California will, as a matter of comity, recognize the validity of a foreign decree of divorce rendered against a California citizen on constructive service, and, if so, how far this state will permit a collateral attack on such a decree.

The proper determination of this question requires a brief reference to the development of the law applicable to jurisdiction in divorce actions.

[2, 3] It is universally conceded that a divorce proceeding, in so far as it affects the status of the parties, is an action in rem. 19 Cor. Jur. 22, § 24; 3 Freeman on Judgments (5th Ed.) 3152. It is usually said that the "marriage status" is the res. Both parties to the marriage, and the state of the residence of each party to the marriage, has an interest in the marriage status. In order that any court may obtain jurisdiction over an action for divorce that court must in some way get jurisdiction over the res (the marriage status). The early cases assumed that such jurisdiction was obtained when the petitioning party was properly domiciled in the jurisdiction. Ditson v. Ditson, 4 R. I. 87, is the leading case so holding; see, also, Andrews v. Andrews, 188 U. S. 14, 23 S. Ct. 237, 47 L. Ed. 366. Until 1905 the overwhelming weight of authority was to the effect that, if the petitioning party was domiciled in good faith in any state, that state could render a divorce decree on constructive service valid not only in the state of its rendition, but which would be recognized everywhere. In Atherton v. Atherton, 181 U. S. 155, 21 S. Ct. 544, 45 L. Ed. 794, the United States Supreme Court apparently recognized that doctrine. In that case the parties were living together and domiciled in Kentucky. That state was the last state where the parties lived together as husband and wife. The wife left the husband and came to and became domiciled in

New York. She brought an action for divorce in New York, her husband defending on the ground that he had secured a divorce in Kentucky on constructive service. New York refused to recognize the validity of the Kentucky decree, on the ground that Kentucky could not in such an action affect the status of a citizen of New York. The United States Supreme Court reversed the New York decisions (82 Hun, 179, 31 N. Y. S. 977; Id. 155 N. Y. 129, 49 N. E. 933, 40 L. R. A. 291, 63 Am. St. Rep. 650) and held that the Kentucky decree was entitled to full faith and credit even though the wife was not served with process and did not appear in the Kentucky action, and even though at the time the decree was rendered the wife was a resident of and domiciled in New York. In so holding, however, the court pointed out that the reason the Kentucky decree was entitled to full faith and credit was because Kentucky had jurisdiction over the marriage status by virtue of the fact that that state was the matrimonial domicile, i. e., the last place the parties lived together as husband and wife. Then in 1905, the United States Supreme Court decided the Haddock Case, supra. Here the parties were married and domiciled in the state of New York. The husband, without cause, abandoned his wife and went to and acquired a domicile in Connecticut. Thereafter the husband secured in Connecticut a divorce on constructive service. Several years later the wife sued for divorce in New York, and secured personal service on the husband. The husband set up as a defense the Connecticut decree. New York refused to recognize it. The Supreme Court of the United States held that although the Connecticut decree was probably good in that state, it was without binding force in New York, and was not entitled to full faith and credit. The court pointed out that the matrimonial domicile of the parties was New York, and that in such a case Connecticut had no jurisdiction over the marriage status so as to affect the status of a New York resident. New York could recognize the Connecticut decree, but it could not be compelled to do so under the full faith and credit clause. The result of this decision has been to create a hopeless conflict of authority as to the status of a foreign divorce rendered against a nondomiciled defendant on constructive service. Some courts refuse to recognize foreign decrees so rendered as against their own residents. It should be noted that Pennsylvania, the state rendering the decree involved in the instant case, is a state which refuses to grant any efficacy to a foreign decree secured on constructive service against one of its own citizens, at least where Pennsylvania is the matrimonial domicile. Colvin v. Reed, 55 Pa. 375; Duncan v. Duncan, 265 Pa. 464, 109 A. 220. Other states recognize such decrees to their full extent, permitting them to be attacked solely on jurisdictional grounds. Among this latter group of states there is hopeless conflict of authority as to what constitutes a jurisdictional defect which can be collaterally attacked in a sister state. See 39 A. L. R. 603 and 42 A. L. R. 1405, notes where the cases are exhaustively collected and commented upon.

[4, 5] The policy of the courts of this state seems never to have been exactly defined. It is well settled in this state that, when a foreign divorce decree is relied upon, and the record shows that the foreign law has been complied with, a presumption of validity arises, and, in the absence of a successful attack on the ground the foreign court had no jurisdiction, the foreign decree will be recognized here. However, it is equally well settled that it is always competent to collaterally impeach a decree of divorce rendered in another state by extrinsic evidence showing that the court pronouncing it did not have jurisdiction either of the parties or the subject matter. Thus the decree may always be attacked on the ground that the foreign court had no jurisdiction because the petitioning party was not a bona fide resident, or that the law of the sister state was not complied with. Bruguiere v. Bruguiere, supra; Estate of James, 99 Cal. 374, 33 P. 1122, 37 Am. St. Rep. 60; Estate of Pusey, 180 Cal. 368, 181 P. 648; Estate of Pusey, 177 Cal. 367, 170 P. 846; Estate of Hancock 156 Cal. 804, 106 P. 58, 134 Am. St. Rep. 177; Broder v. Broder (Cal. App.) 10 P.(2d) 182; Anthony v. Tarpley, 45 Cal. App. 72, 187 P. 779; Steinbroner v. Steinbroner, 30 Cal. App. 673, 159 P. 235; In re Culp, 2 Cal. App. 70, 83 P. 89. The courts of this state have not determined whether the foreign decree may be attacked on other grounds. Respondent relies on Estate of James, supra, contending that that case determined that foreign decrees, except as above stated, will be recognized in this state. In that case two persons, Sarah James and Leonora James, claimed to be the widow of the deceased. The evidence showed that the deceased married Sarah in 1859 in New York, which state was the last matrimonial domicile of the parties. The husband, the decedent, left New York and came to Missouri. In 1874 he obtained a divorce in the last-named state on constructive service against Sarah, who was still domiciled in New York. The husband then moved to California and in 1883 married Leonora. Leonora and the decedent lived together in this state until 1887 when the husband died. Both Leonora and Sarah claimed to be the surviving widow. At page 375 of 99 Cal., 33 P. 1122, 1123, the court stated:

"It will be seen from the foregoing statement that the decision of this case must turn upon the question of the validity of the de-

cree of divorce which the deceased obtained in the state of Missouri [and as to what effect shall be given to it in this state].

"While there is some conflict in the decisions upon this point, we entertain no doubt that a decree of divorce which has been regularly obtained in one state, by a citizen thereof, against a nonresident defendant, constructively served with process in the action, and without other notice, and which is valid and effectual in the state in which such decree is rendered, is equally valid in a sister state. [Citing cases.]

"We do not understand the appellant to question this proposition. * * *"

We do not think that this case is authority for the proposition that foreign decrees will be recognized in this state as a matter of comity if valid where rendered, at least in so far as it affects the status of one of our own citizens.

In the first place this decision was rendered in 1893, long before the Haddock Case was decided. The theory of the decision seems to be that the Missouri decree was entitled to recognition under the full faith and credit clause. That theory is of course incorrect.

In the second place the Missouri decree did not affect the status of a California citizen. When the Missouri decree was rendered the wife was a citizen of New York. It is readily conceivable that California might recognize a foreign divorce decree when such decree only affects the status of foreign citizens, but might refuse to recognize such foreign decree when it affects the status of a California citizen. California has no particular interest in the status of foreign citizens. This distinction is well recognized. 19 Cor. Jur., p. 373, § 841.

In the third place the last sentence above quoted clearly indicates that the appellant therein conceded the very point involved in the instant case.

The only other California case necessary to discuss is Bruguiere v. Bruguiere, supra. In this case the parties were domiciled in California. The husband went to Nevada and secured a divorce on constructive service. Both the parties remarried on the faith of the decree. The first wife then got the second marriage annulled, and brought the present action against the first husband for separate maintenance. The court was of the opinion that the husband's residence in Nevada was not bona fide, but as an alternative ground of the decision stated at page 202 of 172 Cal., 155 P. 988, 989:

"The decision in Haddock v. Haddock * * * declares that a husband who without cause, abandons his wife and takes up his residence in another state than that of their residence, thereby changes the matrimonial domicile to the state of his new residence so that a divorce granted in that state on his complaint and upon constructive service only, may be valid in that state, as an adjudication of the res, the res being the marriage relation, but that he does not thereby carry the entire relation to that state so as to make the adjudication binding upon all the states as a judgment in rem, and that, notwithstanding the divorce in Connecticut, the courts of New York could proceed to adjudge another divorce. * * * Upon the principles thus established, it seems clear that the decree obtained by the husband in Nevada is not binding upon the courts of California, even if his residence there was bona fide. * * *

"The invalidity of the Nevada decree is not due to any vice apparent upon the record, but to the policy of the state of California which refuses faith and credit to such a decree."

[6] In the instant case the trial judge properly permitted the plaintiff to introduce evidence tending to show that the residence of her husband in Pennsylvania was not bona fide. For the purposes of this appeal we will assume that the proffered evidence was insufficient, and we will therefore assume that the residence of defendant husband in Pennsylvania was bona fide. The question next presented is whether or not appellant should have been permitted to prove the allegations of her complaint to the effect that the defendant deserted her, and that he was the one that was guilty of cruelty. In other words, although Pennsylvania found in a noncontested action where the wife was not present and had no opportunity to refute the charges, that she was guilty of cruelty, and inferentially found that the husband was the innocent party, can the wife in this state collaterally attack that finding and show that she was the innocent party, and that the husband by means of false testimony secured the divorce in that state? If the wife was in fact the innocent party, would it not constitute a fraud as against her, and a fraudulent evasion of the laws of this state, if this state as a matter of comity should recognize the foreign decree when such decree affects the status of a resident of this state, and such decree was secured on false testimony as to who was the wrongdoer? We think that the Bruguiere Case, above cited, indicates that such evidence should be admitted.

[7-9] So far as the courts of this state are concerned this state has sole and exclusive jurisdiction over the status of those domiciled within its borders. Assuming that the wife can prove the allegations of her complaint, as she offered to do, and can show that she was deserted by her husband, and that he was the one that was guilty of cruelty, and that she was innocent of wrongdoing, if, under such circumstances, this state enforces as against her the Pennsylvania decree, this state will be recognizing a foreign decree se-

cured without the presence of one of its own citizens, affecting the status of one of its own citizens, when such decree was obtained on false testimony. This state would be thus placing its sanction on a fraud committed on the Pennsylvania court. On the other hand, if the evidence shows that the husband left California and went to Pennsylvania due to his wife's fault, and that she was the wrongdoer and that he was innocent of wrongdoing, then we think the true rule to be that this state should, as a matter of comity, recognize the Pennsylvania decree. We think this rule will result in no hardship. The foreign decree, regular on its face, is entitled to a presumption of validity. The burden is on the party attacking it. But if the spouse domiciled in this state can show that the foreign decree was obtained on false testimony amounting to a fraud on the foreign court, the decree will not be recognized. Moreover, we think that, if such proof be made, it can properly be considered as showing a jurisdictional defect in the foreign decree, at least as far as the courts of this state are concerned. As already pointed out, the res involved in a divorce proceeding is the marriage status, in which both parties and the state have an interest. Under the rule above enunciated, in order that a state other than the state of the matrimonial domicile can grant a divorce against a nondomiciled spouse on constructive service which this state will recognize, the foreign state must in some way get jurisdiction over the interest of the nondomiciled spouse in the marriage status. If one spouse puts it in the power of the other, due to his wrongful conduct, to rightfully live separate and apart, and to acquire a new and separate domicile, the wrongdoer must be deemed to have consented (by such wrongful conduct) to having his interest in the marriage status determined in the state where the nonoffending spouse is domiciled. On the other hand, if one spouse wrongfully lives separate and apart from the other nonoffending spouse, the latter spouse has not subjected his interest in the marriage status to the jurisdiction where the offending spouse may be domiciled, and a decree rendered there on constructive service will not be entitled as a matter of comity to recognition here. It therefore follows that evidence as to who is the wrongdoer goes to the jurisdiction of the foreign court.

[10] It is true that under the test above outlined, whether this state will recognize a foreign divorce decree rendered on constructive service against one of its own citizens is made to depend upon the fact of who is the innocent party. But it is also true that it is universally recognized that a foreign decree may always be collaterally attacked on the ground that the petitioning party did not in fact have a bona fide domicile in the foreign state. Both the question of residence and the question of who was the wrongdoer, in our opinion, go to the jurisdiction of the foreign court.

The rule adopted in this opinion is the rule that has been adopted in some of the most recent and best reasoned cases. In Dean v. Dean, 241 N. Y. 240, at page 245, 149 N. E. 844, 846, 42 A. L. R. 1398, Judge Cardozo states the rule as follows: "The wife, domiciled in Canada, and there abandoned by her husband, became by her marriage a party to a relation which the courts of Pennsylvania have attempted to destroy. They have done this, though there has been no submission to the jurisdiction by her, upon the basis of a domicile which the erring husband has wrongfully set up apart from her. We think the judgments of this court leave no escape from the conclusion that, according to the standards of justice prevalent among us, injustice would be done if that attempt were to prevail."

See, also, Wagoner v. Wagoner, 287 Mo. 567, 229 S. W. 1064; Montmorency v. Montmorency (Tex. Civ. App.) 139 S. W. 1168, at page 1171; 39 Harvard Law Review, 417. It should also be mentioned that the test adopted in this opinion is the one adopted by the American Law Institute in the Restatement of the Law of Conflict of Laws (1930), § 119.

There is a strong public as well as private interest in the marriage relationship. As a matter of policy and justice it can hardly be gainsaid that California should not place its sanction on a foreign divorce decree which adversely affects the status of one of its own citizens, and which, incidentally, if recognized in the instant case, will cut off the wife's right to alimony and support, if the spouse domiciled here can show that she was innocent of wrongdoing and that the Pennsylvania decree was secured on false testimony. If one spouse may pick out a state far removed from the matrimonial domicile and acquire a residence there, and then get a divorce on constructive service on testimony which is false, and, if this court should hold that such decree must be recognized in this state so as to terminate the marriage relationship of a spouse domiciled here, when the resident spouse was innocent of wrongdoing, this court would be aiding and abetting the fraud practiced on the foreign court and on the resident here. This we are not inclined to do.

It is, therefore, our opinion that it was error for the trial court to prevent appellant from proving, if she could, that the respondent husband deserted her, and that he was the one guilty of cruelty. For that reason the judgment appealed from must be reversed. This conclusion makes it unnecessary to consider the other contentions advanced by appellant for the reason that all property rights of the parties may be determined on the retrial.

The judgment appealed from is reversed.

216 Cal. 216

TREAT v. BURNS et al.

S. F. 13948.

Supreme Court of California.

Aug. 10, 1932.

Rehearing Denied Sept. 8, 1932.

1. Appeal and error ⇐1010(1).

Finding cannot be disturbed on appeal, if there is any evidence in record to sustain it.

2. Chattel mortgages ⇐157(2).

Evidence established that buyer of hotel lease and furnishings had actual knowledge of unrecorded chattel mortgage on furnishings before purchasing, and therefore took subject thereto (Civ. Code §§ 2957, 2973).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Nettie Treat against Virginia B. Burns and another. From an adverse judgment, plaintiff appeals.

Reversed.

A. V. Dalrymple and Eric Lyders, both of San Francisco, for appellant.

Emil G. Buehrer, of San Francisco, for respondent.

WASTE, C. J.

Plaintiff appeals from an adverse judgment entered in this action to foreclose a chattel mortgage. Defendant Coffin failed to appear in the action, and her default was duly entered.

It appears from the evidence that one Max Rosenberg advanced to plaintiff and her husband the necessary money with which to purchase the lease and furnishings of a certain hotel. After conducting the establishment for a time, plaintiff sold the lease and furnishings to defendant Julia A. Coffin for $2,800, the purchaser paying $1,200 in cash and giving her note and chattel mortgage on the furnishings for the $1,600 balance, which balance at the time of the trial had been reduced to $1,400. The note and mortgage bear date July 12, 1927, and because of Rosenberg's financial backing in the undertaking plaintiff had them run in his favor. On July 12, 1929, the note was indorsed over to the plaintiff. Such transfer of the indebtedness carried the security with it as an incident thereto. Section 2936, Civ. Code; Adler v. Sargent, 109 Cal. 42, 48, 41 P. 799. At the time of its execution and delivery the mortgage failed to comply with the provisions of section 2957 of the Civil Code, in that it was not then accompanied by the usual "good faith" affidavit nor was it then recorded. Subsequently, and about July 6, 1928, Mrs. Coffin, the purchaser and plaintiff's mortgagor, sold the lease and furnishings to the defendant Burns for $1,600, the latter paying $400 in cash and executing and delivering her note and chattel mortgage to Mrs. Coffin to secure the balance. The bill of sale running from Mrs. Coffin to the defendant Burns was duly recorded on July 6, 1928. It was after this that plaintiff's mortgage was made to comply with section 2957, supra, and thereupon recorded. It necessarily follows, therefore, that defendant's bill of sale, though subsequent in point of time, takes priority over and is not subject to plaintiff's chattel mortgage, unless it appears that defendant had actual knowledge of the existence of plaintiff's mortgage at the time she purchased the lease and furnishings from plaintiff's mortgagor. It is well settled that an unrecorded chattel mortgage, or one failing to comply with the terms of section 2957, supra, is "nevertheless valid between the parties * * * and persons who, before parting with value, have actual notice thereof." Sec. 2973, Civ. Code; Wolpert v. Gripton (Cal. Sup.) 2 P. (2d) 767.

[1] Upon the issue of knowledge, the trial court found that defendant "had no knowledge or information or notice, actual or constructive, of the existence of [plaintiff's] mortgage when she purchased said personal property * * * nor had she any notice, knowledge or information actual or constructive of the claim of plaintiff to said mortgage or property." If there is any evidence in the record to sustain this finding, the judgment for defendant must, of course, be affirmed.

[2] We have examined the record and conclude that the quoted finding is not only unsupported by, but is contrary to, the evidence. The defendant when on the stand denied that the seller, plaintiff's mortgagor, had told her of the existence of a chattel mortgage on the furnishings pending the negotiations for defendant's purchase thereof. She did make the significant statement, however, that "she [the seller] explained that [the existence of plaintiff's chattel mortgage] to Mr. Zimmerman." Zimmerman was the defendant's attorney and representative in the transaction leading up to and resulting in defendant's purchase of the mortgaged property. Defendant also testified that she had heard "rumors" of the existence of plaintiff's chattel mortgage "when I was talking of buying the place," that she thereupon had her attorney investigate the matter, and that she subsequently bought the furnishings "on the strength" of his report that he was unable to find such a mortgage of record.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

The defendant's attorney, when called to the stand, testified that his client (the defendant) and Mrs. Carson (the real estate broker who handled the deal) met at his office to discuss the purchase of the lease and hotel furnishings; that "there was mention made of an indebtedness existing, previous indebtedness, * * * from Mrs. Coffin [the seller] to Mrs. Treat [plaintiff], or to Mr. Rosenberg [plaintiff's financial backer], as the case might have been. * * * They talked about the chattel mortgage, but I was never able to have the chattel mortgage produced to me." He also testified that, when his client was about to consummate the deal, he telephoned the plaintiff relative to the chattel mortgage, and that plaintiff said, "Mr. Rosenberg has that mortgage, you better see him"; that he thereupon communicated with Rosenberg, who was unable to find it among his papers; that he (the witness) thereupon searched the records and found no mortgage on file; that he so advised his client (the defendant), "and she decided to go ahead with the transaction"; that the deal was then closed, and plaintiff thereupon informed that defendant could not find her mortgage of record, and would not therefore "recognize it."

The plaintiff called Mrs. Carson, the real estate broker, in rebuttal, and she testified that the defendant came to her office in response to an advertisement; that she explained the transaction to the defendant, and told her and her attorney of the existence of a chattel mortgage on the furnishings; that it was learned that the instrument was in the office of one Mathews; that defendant's attorney sent her (the witness) to Mathews' office to ascertain if he had possession of the instrument; that she visited Mathews, who, upon interrogation as to the existence of plaintiff's mortgage, held out a paper and said, "Why, this is the mortgage, but I can't show it to you, you have no right to see it"; that she reported to the defendant's attorney of her visit to Mathews' office; that she told him Mathews had possession of the mortgage; that, in drawing up the papers closing the deal by which defendant purchased the mortgaged chattels, defendant's attorney first drafted a set of papers recognizing the existence of plaintiff's mortgage, but substituted therefor a second set which made no mention of plaintiff's mortgage.

The foregoing rebuttal testimony was not denied or contradicted by the defendant or her attorney, the latter, upon being recalled to the stand, merely stating that the real estate broker may have mentioned Mathews to him, he did not recall; that he did not go to see Mathews.

In reviewing the evidence on the issue of defendant's knowledge of the existence of plaintiff's chattel mortgage, we have confined ourselves solely to the defendant's evidence and so much of plaintiff's evidence as stands uncontradicted. The trial court's finding in favor of defendant necessitates such a course. However, we are satisfied that the foregoing evidence conclusively establishes that the defendant and her attorney had actual knowledge of the existence and the amount of plaintiff's chattel mortgage prior to the consummation of the transaction by which the defendant undertook to and did purchase the mortgaged property. This being so, the judgment for the defendant must be reversed. It is immaterial that defendant's efforts to locate the written evidence of such mortgage, of which she had actual knowledge, proved unavailing. The important and determinative feature of the case is that defendant, before undertaking to purchase the hotel furnishings and before advancing any money on the purchase price, was informed or had knowledge of the existence of a lien thereon in favor of the plaintiff.

Judgment reversed.

We concur: TYLER, Justice pro tem; SEAWELL, J.; SHENK, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.

216 Cal. 220

GARRETT et al. v. SWANTON, Mayor, et al.

S. F. 13549.

Supreme Court of California.

Aug. 11, 1932.

Rehearing Denied Sept. 8, 1932.

1. Municipal corporations ⇐864(1).

Installment contracts requiring payments over period of years out of city's ordinary revenue, where each installment is not in payment of consideration furnished that year, and total installments, coupled with other expenditures, exceed yearly income, violate Constitution limiting indebtedness, unless approved by voters (Const. art. 11, § 18, amended in 1926).

2. Municipal corporations ⇐864(4).

Constitutional limitation on municipal indebtedness is not violated by obligation payable only out of special fund, if indebtedness cannot deplete municipality's resources (Const. art. 11, § 18, as amended in 1926).

3. Municipal corporations ⇐864(4).

Municipal obligation payable from special fund constitutes "indebtedness" within constitutional limitation when municipality is obligated directly or indirectly to feed spe-

cial fund from general revenues (Const. art. 11, § 18, amended in 1926).

[Ed. Note.—For other definitions of "Indebted; Indebtedness," see Words and Phrases.]

4. Municipal corporations ⊜864(4).

Municipality incurs "indebtedness" within constitutional limitation when it may suffer loss if special fund from which indebtedness is payable is insufficient (Const. art. 11, § 18, amended in 1926).

5. Municipal corporations ⊜864(4).

Contract for city pumping plant payable from special fund, created not only from income earned by property purchased, but from entire water system, from which interest and principal of water system bonds constituting general obligation of city were payable, *held* to create general "indebtedness" within constitutional limitation (Const. art. 11, § 18, amended in 1926).

6. Municipal corporations ⊜864(4).

Installment contract for pumping plant providing for forfeiture of payments made from city's general fund and also payments made from special fund created by income of water system on default in subsequent installments violated constitutional provision limiting indebtedness (Const. art. 11, § 18, amended in 1926).

Appeal from Superior Court, Santa Cruz County; H. G. Jorgensen, Judge.

Action by J. H. Garrett and others against F. W. Swanton, individually, and as Mayor and member of the council of the City of Santa Cruz, and others. From an adverse judgment, plaintiffs appeal.

Reversed.

Superseding opinion of the District Court of Appeal in 3 P.(2d) 1025.

J. L. Johnston, of Santa Cruz, and Maurice J. Rankin, of San Jose, for appellants.

John H. Leonard, of Santa Cruz, Carl E. Lindsay and Lindsay & Gearhart, all of Fresno, and Maurice R. Carey and Carey & Gorfinkel, all of San Francisco, for respondents F. W. Swanton et al.

Orrick, Palmer & Dahlquist, of San Francisco (Gibson, Dunn & Crutcher, of Los Angeles, and H. F. Prince, of Los Angeles, of counsel), amici curiæ.

PER CURIAM.

This action was instituted in the court below by plaintiffs as taxpayers and residents of the city of Santa Cruz. Plaintiffs prayed for a decree directing the delivery into court, for the purpose of cancellation, of a certain contract between the city and Fairbanks, Morse & Company, a corporation; for an injunction preventing the city from making any further payments under the contract, and preventing the defendant city officials from auditing, allowing, or approving any demand or claim based thereon; and for a decree requiring the defendants to repay to the city the sum of $30,000 already paid under the contract. Subsequently the plaintiffs filed an amendment to the complaint, which amendment merely set out with more particularity the transaction which is the basis of this suit. Defendants demurred generally and specially, which demurrers were sustained without leave to amend. Plaintiffs subsequently moved for leave to amend, but this motion was denied on the ground that the complaint as amended could not be further amended so as to state a cause of action. Judgment was thereupon rendered in favor of defendants, and from this judgment plaintiffs have prosecuted this appeal.

Appellants' main contention is that the contract in question violates article 11, section 18, of the state Constitution. In this contention they are assisted by several amici curiæ. So far as pertinent here, article 11, section 18, provides: "No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose."

It is alleged by the plaintiffs that the contract here involved creates an indebtedness or liability in excess of that allowed by the above provision, and that the incurring of such indebtedness or liability was not authorized by a vote of the electors of Santa Cruz. It is admitted by respondents that no such election was had.

The contract in question is pleaded as an exhibit to the complaint, and provides that the respondent Fairbanks, Morse & Company agrees to install a pumping plant for the city at a total cost of $152,960. The complaint alleges that at the time this contract was entered into the city already owned and operated a water system plant supplying water to the inhabitants of the city; that this water distributing system was acquired by the sale of bonds; that the amount of the bonded indebtedness of the city incurred for the purpose of acquiring and maintaining this water system now outstanding is $555,000; that said outstanding indebtedness constitutes a general obligation of the city. It appears from the complaint that in March, 1928, the city council of Santa Cruz by resolution indorsed a plan to acquire a pumping plant to be operated in connection with the existing distributing system. On April 30, 1928, pursuant to a resolution of the council,

the city clerk advertised for bids for the pumping plant, said plant to be constructed in accordance with the plans and specifications furnished by the city. This notice provided that the terms of purchase and the time and amount of payments were left to the bidders. It appears that the California Filter Company submitted the lowest bid, but such bid was not accepted for the reason that it called for cash. Respondent Fairbanks, Morse & Co. submitted the bid which was subsequently accepted by the council, and made the basis of the contract involved in this action. By the terms of this contract, as already stated, Fairbanks, Morse & Co. agreed to install the pumping plant at a total cost of $152,960, "less an allowance of nine thousand dollars ($9000) for the equipment specified" by the city in its notice of bids, "in the event that the municipality can legally transfer or sell said equipment to the company." It was provided that $30,000 in cash was to be paid upon commencement of work, and the balance to be paid in sixty equal monthly installments, commencing September 1, 1928, all the installments to be payable on the presentation of claims at maturity of each respective installment. The contract stated that "it is agreed that the obligation to pay the installments hereunder is not a general obligation of the said municipality payable from taxes or its general funds but only a special obligation payable from the Water Development Fund. * * * The municipality covenants to operate the said [water] department in an efficient and economic manner, and to maintain rates for the product or service of said department which will produce sufficient revenue for the payments called for by this contract so far as it may be permitted to do so by law. The municipality agrees to operate said plant as a municipal plant until all installments to become due under this contract have been fully discharged, and until such time shall not dispose of said plant in any manner so as to deprive the company of its title to or interest in machinery or materials without providing for the payments to the company of all installments when due or to become due under this contract."

The contract also provides that the title and ownership of the machinery and materials installed shall remain in the company, and shall retain their character as personal property, until all installments have been paid. It is then provided that, "in the event of a breach of any of the terms and provisions herein contained on the part of said municipality * * * the company shall have and by said municipality is expressly given the right, privilege and option to immediately repossess the machinery, materials and structures herein referred to, in which event the company shall keep and retain any and all installments paid hereunder as and for rental thereof." The city expressly agrees to insure and pay the taxes on the machinery and equipment during the period of the contract.

The contract above outlined was accepted by the city council on May 14, 1928. On the same day the council determined by resolution that the installation of the pumping plant was an emergency measure, for the reason that the existing plant was inadequate. Later the city desired to change the location of the pumping plant. Fairbanks, Morse & Co. agreed to the change providing that the city at its own expense would agree to bear certain expenses connected with the change. This the city agreed to do.

On May 21, 1928, Fairbanks, Morse & Co. presented its claim for $30,000 as and for the cash down payment provided for in the contract. This claim was approved and paid the same day. On May 28, 1928, plaintiffs demanded that the money be repaid, and demanded that the city immediately sue to recover the same. The defendants refused to comply with this request. The original complaint alleges that this sum of $30,000 was paid "out of the public funds of said city of Santa Cruz."

Plaintiffs also pleaded the provisions of Ordinance No. 1287 of the city passed by the council and approved by popular vote in 1923. This ordinance provides that "the rents, income, and receipts from the water system of the said city shall be used solely and exclusively for the operation, maintenance, construction, improvement, extension, enlargement and upkeep thereof and for the payment and liquidation of the principal and interest of any bonded indebtedness now existing, or which may be hereafter created for the operation, maintenance, construction, improvement, extension, enlargement or upkeep of said water system."

On information and belief plaintiffs allege that the necessary and requisite expenditures of the city for the fiscal year from July 1, 1927, to July 1, 1928, inclusive of the total obligation of this contract, exceed the income and revenues of said city of Santa Cruz for said fiscal year. This is conceded to be a fact by respondents.

Essentially the transaction above outlined presents a situation where the city agrees to purchase certain machinery on the conditional sales plan, title to remain in the seller until paid for, and agrees to pay for the same, part in cash and the balance in installments over a period of years, out of a special fund, which fund is created not only by the profits from the property purchased, but contains also the profits earned by the entire water plant of the city. Can a city, when the total amount of such a purchase exceeds its income, enter into such a contract without submitting the same to a vote of

the people? Appellants urge that such a contract violates the constitutional provision above quoted.

[1] Appellants take the position that, when the agreement with Fairbanks, Morse & Co. was entered into on May 14, 1928, an immediate liability for the full amount of the contract price—$152,960—came into existence, and that such liability was a general obligation of the city. There can be no doubt that immediately upon entering into the contract a liability arose for the full purchase price. The law is well settled in this state that installment contracts of any kind, where the installment payments are to be made over a period of years and are to be paid out of the ordinary revenue and income of a city, where each installment is not in payment of the consideration furnished that year, and the total amount of said installments, when coupled with the other expenditures, exceeds the yearly income, are violative of the constitutional provision in question unless approved by a popular vote. This is so whether the contract be denominated a mortgage, lease, or conditional sale. Chester v. Carmichael, 187 Cal. 287, 201 P. 925; In re City and County of San Francisco, 195 Cal. 426, 233 P. 965; Mahoney v. San Francisco, 201 Cal. 248, 257 P. 49. It is true that under the doctrine enunciated in McBean v. City of Fresno, 112 Cal. 159, 44 P. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191; Smilie v. Fresno County, 112 Cal. 311, 44 P. 556; Doland v. Clark, 143 Cal. 176, 76 P. 958; California Pacific Title & Trust Co. v. Boyle, 209 Cal. 398, 287 P. 968, contracts for the furnishing of property in the future have been upheld, but only where no liability or indebtedness came into existence until the consideration was actually furnished. In other words, such contracts are valid where each year's installment is within the city's income, and where each year's payment is for the consideration actually furnished that year. This exception to the general rule is well stated in McBean v. Fresno, supra, at page 167 of 112 Cal., 44 P. 358, 361: "We base our views upon the conviction that at the time of entering into the contract, no debt or liability is created for the aggregate amount of the installments to be paid under the contract, but that the sole debt or liability created is that which arises from year to year in separate amounts as the work is performed." This exception can have no application to the case at bar, for the reason that the liability of the city for the entire contract price came into existence at the time the contract was entered into, and the installments were not to be paid each year for the work to be performed in that year. Keeping in mind at all times the allegation of the complaint that the total expenditures required by this contract, if added to the other expenditures of the city for 1927–1928, will exceed the yearly income, it is apparent that the debt or liability created by this contract, constituting, as it does, an immediate liability of the city, violates the constitutional provision, unless that provision does not apply to this type of contract because of the fact that all payments are to be made from the water fund, and are not to constitute a general obligation of the city.

[2] It is the contention of respondents that since by the terms of this contract the indebtedness or liability is made payable solely out of a specified fund created entirely from the income of the water system, and is not a general obligation of the city, the constitutional provision has not been violated. This so-called "special fund" doctrine finds ample support in the decisions of other jurisdictions where constitutional debt limit provisions similar to the one here involved exist. It seems to be the majority rule in other jurisdictions that a limitation upon municipal indebtedness is not violated by an obligation which is payable out of a special fund, if the municipality is not liable to pay the same out of its general funds should the special fund prove to be insufficient, and the transaction by which the indebtedness is incurred cannot in any event deplete the resources of the municipality. 19 R. C. L. 985, § 281; 6 McQuillan, Mun. Corp. (2d Ed.) 45, § 2387. See, also, Fox v. Bicknell, 193 Ind. 537, 141 N. E. 222; Bowling Green v. Kirby, 220 Ky. 839, 295 S. W. 1004; Kelly v. Minneapolis, 63 Minn. 125, 65 N. W. 115, 30 L. R. A. 281; Bell v. City of Fayette, 325 Mo. 75, 28 S.W.(2d) 356; Kasch v. Miller, 104 Ohio St. 281, 135 N. E. 813; McClain v. Regents of University, 124 Or. 629, 265 P. 412; Barnes v. Lehi City, 74 Utah 321, 279 P. 878; State v. Clausen, 134 Wash. 196, 235 P. 364; Franklin Trust Co. v. Loveland, Colo. (C. C. A.) 3 F.(2d) 114. In Feil v. Cœur d'Alene, 23 Idaho, 32, 129 P. 643, 43 L. R. A. (N. S.) 1095, and Miller v. City of Buhl, 48 Idaho 668, 284 P. 843, 72 A. L. R. 682, the Supreme Court of Idaho refused to follow this "special fund" doctrine.

The recent decisions of this court would seem to leave no room for doubt that the "special fund" doctrine has been adopted in this state. In Shelton v. City of Los Angeles, 206 Cal. 544, 275 P. 421, a taxpayer sought to enjoin the city of Los Angeles and the board of water and power commissioners from proceeding with the issuance of certain short-term notes on the ground that the issuance of the notes would violate the constitutional provision here involved. This court held that the constitutional provision was not violated because the notes were not a general obligation of the city, directly or indirectly, but were payable solely and entirely from a special fund. The position taken in the Shelton case has been recently affirmed in the case of In re California Toll Bridge

Authority, 212 Cal. 298, 298 P. 485. In that case not only was the Shelton Case directly affirmed, but at page 302 of 212 Cal., 298 P. 485, 486, the court stated: "The overwhelming weight of judicial opinion in this country is to the effect that bonds, or other forms of obligation issued by states, cities, counties, political subdivisions, or public agencies by legislative sanction and authority, if such particular bonds or obligations are secured by and payable only from the revenues to be realized from a particular utility or property, acquired with the proceeds of the bonds or obligations, do not constitute debts of the particular state, political subdivision, or public agency issuing them, within the definition of 'debts' as used in the constitutional provisions of the states having limitations as to the incurring of indebtedness."

[3, 4] It therefore follows that, if the contract here involved comes within the limits of the "special fund" doctrine, it does not violate the debt limit provision of the state Constitution. In order to determine this question, it is necessary to determine the exact limits and extent of that doctrine. On this phase of the question the decisions of the courts of this state offer no assistance, but in other states this phase of the problem has been frequently considered. An examination of the cases from other jurisdictions establishes the fact that there are at least two well-settled limitations or exceptions to the "special fund" doctrine. Thus it is well established that an indebtedness or liability is incurred when by the terms of the transaction a municipality is obligated directly or indirectly to feed the special fund from general or other revenues in addition to those arising solely from the specific improvement contemplated. It also seems to be well settled, as a second limitation to the doctrine, that a municipality incurs an indebtedness or liability when by the terms of the transaction the municipality may suffer a loss if the special fund is insufficient to pay the obligation incurred.

[5] Appellants and amici curiæ urge that the contract here involved comes within either or both of these exceptions or limitations. With this contention we are inclined to agree. It is to be noted that the complaint alleges that before this contract was entered into the City of Santa Cruz owned its waterworks system, acquired with money raised from the sale of its own bonds. For a history of the method by which this waterworks system was acquired see City of Santa Cruz v. Wykes (C. C. A.) 202 F. 357; Waite v. Santa Cruz, 184 U. S. 302, 22 S. Ct. 327, 46 L. Ed. 552. The complaint alleges that part of the bonds by which the waterworks system was acquired are still outstanding, and that such bonds constitute a general obligation of the city. All moneys collected from the operation of the waterworks system are placed in the water development fund. By the terms of Ordinance No. 1287, above quoted, such fund is to be used solely and exclusively for the "operation, maintenance, construction, improvement, extension, enlargement and upkeep" of the water system, and for the payment of "any bonded indebtedness now existing or which may be hereafter created for the operation, maintenance, construction," etc., of said water system. It is the fund created from the revenue of the entire water system from which the payments on the contract are to be made. In other words, it is not only the income earned by the property purchased that constitutes the special fund from which the payments are to be made, but the income from the entire water system constitutes such special fund. It is obvious that, although the contract provides the payments to Fairbanks, Morse & Co. shall solely be made from this fund, and shall not constitute a general obligation of the city, indirectly such contract does create a general indebtedness or liability of the city. It seems too clear to require further elaboration that, if the water fund be depleted by the payments made to Fairbanks, Morse & Co. for the pumping plant, the fund created for the payment of interest and principal on the bonds will be depleted, and that, since such bonds are a general obligation of the city, the taxpayers must at all times be ready to feed the special fund if the income is not sufficient to pay both the interest and principal on the bonds and the payments to Fairbanks, Morse & Company. It follows, of course, that, when this contract was executed, the taxpayers became indirectly liable to pay the amount thereof. We do not believe that the "special fund" doctrine was ever intended to be applied to a situation where the municipality, directly or indirectly, is or may be compelled to feed the special fund from other revenues in addition to those arising from the special improvement contemplated. Such a subterfuge, if sanctioned would go far to effectually wipe out the purpose and intent of the constitutional provision.

A case very similar to the instant case, likewise involving a Fairbanks, Morse & Co. contract, has been recently decided by the Circuit Court of Appeals, Eighth Circuit—City of Campbell, Mo., v. Arkansas-Missouri Power Co., 55 F.(2d) 560. In that case the action was brought to enjoin the city and Fairbanks, Morse & Co. from carrying out the provisions of a contract for the purchase of certain machinery to be used by the city as a part of its municipal light plant. It appears that at the time the contract was entered into the city, by means of a bond issue approved by the people, already had constructed a distributing system and a power house. The contract with Fairbanks, Morse & Co. was for the purchase of certain ma-

chinery for the power plant. The total purchase price of $62,366.40 was to be paid in seventy-two monthly installments, each installment being evidenced by an order providing that said payment was to be made solely out of the light and power fund, and such obligation was not to be a general obligation of the city, "but is a special obligation payable only out of the net revenues of the Light & Power Plant." By the terms of the contract net revenue was defined as the balance of the gross receipts of the power plant after the payment of the legitimate and necessary expenses of the operation of the plant, plus interest on the bond issue, were deducted. It is to be noted that the legal and factual situation presented by the above contract is almost identical with those presented in the instant case. In fact, the contract above outlined presents a situation much stronger in favor of upholding the contract than does the case at bar, for the reason that the specific fund from which the payments were to be made was defined as the fund remaining in the light and power fund after interest on the bonds was deducted, a provision not found in the contract here under consideration. The court held that the contract violated the debt limitation clause in the Missouri Constitution. In so holding the court stated at page 563 of 55 F.(2d): "There is, however, further reason for holding that this contract resulted in creating a debt. The machinery sold to the city, as has been pointed out, does not constitute the entire plant which generates and distributes the electric current and produces the revenue for such service. It required in addition to this machinery the equipment and the power house owned by the city. The purchase price, under the provisions of this contract, is not to come alone from the earnings of the property sold. Under such circumstances, the obligation to pay the income of the property other than that purchased is not different from an obligation to pay with any other funds. Bell v. City of Fayette, 325 Mo. 75, 28 S.W.(2d) 356, 360; Schnell v. City of Rock Island, 232 Ill. 89, 83 N. E. 462, 14 L. R. A. (N. S.) 874; Feil v. City of Cœur d'Alene, 23 Idaho, 32, 129 P. 643, 43 L. R. A. (N. S.) 1095; City of Ottumwa, Iowa, v. City Water Supply Co. (C. C. A.) 119 F. 315, 59 L. R. A. 604; Hesse v. City of Watertown (S. D.) 232 N. W. 53; State v. McMillan, 12 N. D. 280, 96 N. W. 310; Wilder v. Murphy, 56 N. D. 436, 218 N. W. 156.

"The contract in question requires the use of the earnings of the entire property. In Bell v. City of Fayette, supra, the court said: 'It will be noted that the distinction is whether any other property of the city is liable for the payments or whether the purchase price of such improvement is to be paid for wholly out of the earnings of the improvement.'

"Notwithstanding the skillful attempt to evade the constitutional inhibition against the creation of indebtedness, we think it clear that the subterfuge resorted to does not have that effect, and that the lower court properly held that the contract was void."

The reasoning of the Supreme Court of Illinois in the case of Schnell v. City of Rock Island, 232 Ill. 89, 83 N. E. 462, 14 L. R. A. (N. S.) 874, is also applicable here. In that case at page 464 of 83 N. E. the court stated: "In this case the entire proceeds of the existing waterworks system were pledged to secure payment of the certificates, and they created an indebtedness against the city. The case is not like that of Village of East Moline v. Pope, 224 Ill. 386, 79 N. E. 587, where the scheme was to erect and establish a new system of waterworks. It was there said, in accordance with the principles of City of Joliet v. Alexander, 194 Ill. 457, 62 N. E. 861, that if nothing but the income from the waterworks had been pledged, or could be reached, the bonds would not create a debt, and in that case relief was granted because of the provision for a special tax.' A city may acquire a system of waterworks by pledging the income until it shall pay for the system, and no indebtedness is created. The same rule might apply to some definite extension of waterworks where the income of the extension could be separated and applied to payment, but an obligation to pay with the income of property already owned by a city is not different from an obligation to pay with any other funds, so far as the question whether the transaction amounts to a debt is concerned."

The logic of these cases, and of the cases cited by the Federal Circuit Court, seems unescapable. The contract here involved is not payable solely from the income of the improvement contemplated, but is payable from the revenues of the entire water system. Part of those revenues can, and in fact must, be applied to the payment of the interest and principal on the bonds which is a general obligation of the city.

The respondents attempt to distinguish the cases above cited on the ground that in the above cases it does not appear that there was a city ordinance similar to Ordinance No. 1287 of the city of Santa Cruz requiring that all the revenue of the water plant must go into the water development fund which can only be used for the maintenance, upkeep, construction, and repair of the water plant. The argument proves too much. By the very terms of the ordinance relied upon, as above quoted, the revenue from the water plant is likewise to be used to pay the interest and principal on the bonds, which are general obligations of the city. If this fund is depleted, the obligation to feed the fund will fall upon the taxpayer. Respondents state: "The money in the special fund cannot be placed in the general fund, nor used for charges to be

met from tax-raised funds." Such a contention is directly in the face of the terms of the ordinance relied on by respondents, because that ordinance specifically states that the money in the water fund shall be used to pay a general obligation of the city; namely, the interest and principal on the bonds.

[6] For still another reason we are of the opinion that the contract here involved must be held violative of the constitutional provision. It will be remembered that the contract provides for an immediate cash payment of $30,000, which was paid according to the allegations of the complaint "out of the public funds of said city of Santa Cruz." This positive allegation may have been weakened by the amendment to the complaint, although we do not think that this is so, but certainly there was nothing in the contract which required the city to make this payment from the water fund. The city also agreed to pay the taxes and insurance on the property, and to pay certain expenses caused by the change in the location of the pumping plant, all apparently out of the general funds. It is true that, when these payments were made, and probably when the future payments are made for each item, such payments themselves will not constitute a violation of the constitutional provision. This is so because it is admitted that the $30,000 payment was made from funds on hand during the year 1927–1928, and such payment, when added to the other expenditures of the city for 1927–28, did not exceed the revenue for that year. The payments for taxes and insurance can probably be made out of the revenue of the year in which they are made. But by the provisions of the contract all these payments, as well as the installment payments made from the special fund, will be forfeited to Fairbanks, Morse & Co. if the payments called for by the conditional sales contract are not made when due. In other words, the effect of a default under the contract would be to take from the taxpayers money paid by them from their general funds. It seems clear that, after a large cash payment has been made out of the general funds, if the special fund is not sufficient to pay the installments, and a failure will result in the losing of the cash payment as well as the installments, as a practical matter the installments will have to be paid from the general fund in order to protect the investment already made. It was in reference to such a practical argument that this court stated in the case of In re City and County of San Francisco, supra, at page 438 of 195 Cal., 233 P. 965, 969: "It also quite clearly appears that the so-called option on the part of the municipality to purchase the said property becomes in effect an increasing compulsion upon it to consummate such purchase, since not to do so would result in the irrevocable loss to the municipality, not only of the primary and succeeding annual payments, which it is bound to make under this agreement, but also of the entire usufruct of the property during the period of its occupation, and also of the property itself." So in the case at bar failure to make the installment payments would result in the loss of not only the installment payments, but also in the loss of the $30,000 and other sums not made payable from the special fund. The practical compulsion to protect the investment by making the payments from the general fund if the special fund prove insufficient constitutes, in our opinion, a violation of the constitutional provision in fact. It is no answer to say that the $30,000 was paid and the other payments for taxes, insurance, etc., will be made from the special fund. The contract does not so provide.

We are not unmindful of the arguments of expediency and necessity advanced by respondents, but we are of the opinion that such arguments are not sufficient to uphold this contract. The constitutional provision involved is based on sound public policy. Arguments of convenience, of policy, or of present necessity, should not be allowed by loose construction to weaken the force or limit the extent of the debt limit provisions.

Inasmuch as we are of the opinion that the contract involved violates the constitutional provision, we do not find it necessary to discuss the many other points raised and discussed by the litigants.

For the reasons heretofore stated, the judgment appealed from is reversed.

216 Cal. 212

A. PALADINI v. DURCHMAN.

Sac. 4558.

Supreme Court of California.

Aug. 9, 1932.

Rehearing Denied Sept. 8, 1932.

1. Shipping ⇐30½.

Evidence established that "bill of sale" of boat was mere chattel mortgage (Civ. Code, § 2924).

The fact that plaintiff was given momentary possession of the boat on completion of the terms of the agreement, and that it was thereafter registered in plaintiff's name as owner, did not alter the character of transaction as between the parties as being a chattel mortgage, since it was given as security for repayment of money expended by plaintiff in purchasing and installing engine in boat

and otherwise equipping it, and contract therefore could not operate as transfer of title to the property.

2. Shipping ⇐30½.

That instrument may not comply with legal requirements for execution of chattel mortgage is immaterial as between parties thereto (Civ. Code, § 2973).

3. Shipping ⇐32.

Oral understanding that chattel mortgagee might take possession of boat if mortgagor breached agreement *held* not "authorization" required by statute to entitle mortgagee to take possession on mortgagor's breach (Civ. Code, § 2927).

Such oral agreement did not furnish authorization required by statute because such understanding was necessarily incidental to, and inseparably connected with, that portion of agreement which attempted to cut off debtor's equity of redemption, and was therefore void in toto.

In Bank.

Appeal from Superior Court, Humboldt County; T. H. Selvage, Judge.

Action by A. Paladini, a corporation, against William Durchman. Judgment for plaintiff, and defendant appeals.

Reversed, with directions.

J. Logan Beamer, of Eureka, for appellant.

E. S. Mitchell, of Eureka, and Daniel W. Hone, of San Francisco, for respondent.

WASTE, C. J.

Defendant appeals from the judgment entered in an action brought by plaintiff to recover the possession or the value of a certain boat. The complaint contains the usual allegation of plaintiff's ownership and right to immediate possession and defendant's wrongful withholding thereof. Defendant in his answer denied all of the allegations of the complaint.

In 1926 the defendant was the owner of the hull of the fishing boat involved herein. It was defendant's desire to procure an engine and other equipment to outfit the boat for fishing purposes. With this in view he entered into negotiations with the plaintiff, with the result that it installed in the boat an engine and such other equipment as from time to time was required to efficiently operate the same for fishing purposes. In consideration therefor defendant executed and delivered to plaintiff a "bill of sale" purporting to transfer to it all of his right, title, and interest in and to the boat. The boat was thereupon registered in plaintiff's name. Contemporaneous with the execution of the written instrument, and as part of the same transaction, it was orally agreed between the parties that defendant might purchase the boat, engine, and equipment from plaintiff for $3,100. In furtherance thereof it was also orally agreed that defendant should deliver all fish caught by him to plaintiff, two-thirds of the value of which was to be returned to defendant, and the remaining one-third credited against the amount owing by him to plaintiff for current expenses (gasoline, bait, etc., furnished by plaintiff), and the balance, if any, to be applied as payment on the boat account. Plaintiff reserved the right to repossess itself of the boat in the event of defendant's failure to comply with the terms of his oral agreement to deliver to it all fish caught by him.

Alleging that defendant had repeatedly breached his agreement by failing to deliver his entire catch of fish to it, plaintiff brought this action to recover possession of the boat or its value. The court below found for plaintiff, and entered judgment accordingly. There is ample evidence in the record to sustain the finding that defendant had breached his agreement to deliver all fish caught by him to plaintiff. However, the evidence is insufficient to support the finding that plaintiff is the owner of the boat and therefore entitled to the exclusive immediate possession thereof.

[1] We are satisfied that the purported "bill of sale" legally constitutes nothing more than a chattel mortgage given as security for the repayment of the money expended by plaintiff in purchasing and installing an engine and otherwise equipping and supplying defendant's boat for fishing expeditions. The testimony of plaintiff's manager amply supports our conclusion in this particular. He testified in part:

"Mr. Beamer: Q. At the time that you drew up this bill of sale for Mr. Durchman, it was your intention at the time that that should be security for this engine? A. That that bill of sale was to be security for the payment of the engine? * * *

"Q. The bill of sale from Mr. Durchman to you was intended to be security for the payment of the engine? A. For the whole bill; there was more than the engine at that time. There was $3100 at that time that the bill of sale was made out.

"Q. Then the bill of sale at the time it was made out was intended as security for the payment of that money? A. It was.

"Q. In other words it would take the place of the usual mortgage? A. No, we didn't figure it would take the place of a mortgage.

"Q. You figured that the only interest that the Paladini Fish Company had in that boat was what Mr. Durchman owed you? A. Yes. We fiured that the money that we had in the boat we had that security for it.

"Q. And if Mr. Durchman went down the next day you would give him the bill of sale back? A. Yes."

[2] Clearly such a contract, even though plaintiff refused to take an agreement which was a mortgage in form, could not operate as a transfer of title to the property. Civ. Code, § 2924; Fraser v. Sheldon, 164 Cal. 165, 172, 173, 128 P. 33; Bonestell v. Western Auto-Motive Finance Corp., 69 Cal. App. 719, 723, 232 P. 734; Forrest v. Burt, 67 Cal. App. 564, 569, 227 P. 949; Blodgett v. Rheinschild, 56 Cal. App. 728, 736, 206 P. 674. Fraser v. Sheldon, supra, is substantially on all fours with the present case. The fact that plaintiff was given momentary possession of the boat upon completion of the terms of the agreement, and that it was thereafter registered in plaintiff's name as owner, does not alter the character of the transaction as between the parties. The evidence discloses that the bill of sale or transfer was primarily intended to serve as security for plaintiff's disbursements on defendant's behalf. This being so, we must regard it as a chattel mortgage. The fact that an instrument may not comply with the legal requirements for the execution of a chattel mortgage is immaterial as between the parties thereto. Section 2973, Civ. Code; Wolpert v. Gripton (Cal. Sup.) 2 P.(2d) 767.

[3] The legal title to the boat, therefore, remained in the defendant, and the plaintiff has merely a lien for the amount owing to it. It necessarily follows that plaintiff is not entitled to possession unless authorized by the express terms of the mortgage. Section 2927, Civ. Code. The oral understanding of the parties that the plaintiff might take possession of the boat in the event of defendant's breach of agreement to deliver his entire catch of fish to plaintiff cannot furnish such authorization, for such provision or understanding was necessarily incidental to, and inseparably connected with, that portion of the agreement "which attempts to cut off the debtor's equity of redemption, and must therefore be held void in toto." Bonestell v. Western Auto-Motive Finance Corp., supra, 69 Cal. App. 723–726, 232 P. 734, 736; Blodgett v. Rheinschild, supra.

It follows from what has been said that the judgment must be reversed. We therefore find it unnecessary to discuss many other points urged in the briefs of the parties.

The judgment is reversed, with directions to the trial court to take any further evidence and permit such further or amended pleadings as may be necessary to enable it to render judgment in accordance with the conclusions reached herein.

We concur: CURTIS, J.; LANGDON, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; TYLER, Justice pro tem.

216 Cal. 156

VOWINCKEL v. N. CLARK & SONS.

S. F. 14331.

Supreme Court of California.

Aug. 3, 1932.

Rehearing Denied Sept. 2, 1932.

1. Nuisance ⇐33.

Evidence sustained finding that defendant's operation of factory for manufacturing sewer pipes, tile, pottery, and stoneware caused great and irreparable damages to adjoining owner.

2. Appeal and error ⇐931(1).

Appellate court must presume that trial court gave due consideration to all contentions brought to its attention.

3. Nuisance ⇐35.

Court will not enjoin conduct of defendant's entire business not nuisance per se, if less measure of restriction will afford plaintiff relief to which entitled.

4. Nuisance ⇐25(2).

Injunction against nuisance will not be denied solely on ground that injury suffered by defendant will be greater, if injunction be granted, than injury to plaintiff if injunction be refused.

5. Nuisance ⇐33.

Evidence *held* to justify injunction abating operation of four out of eighteen kilns operated for manufacturing sewer pipes, tile, pottery, and stoneware.

Defendant contended that all infringements on plaintiff's rights could be eliminated by erection of a fireproof sound-absorbing wall inclosing the four kilns ordered to be abated as well as the other kilns, and an offer to construct such a wall, with sliding doors to permit loading, was made on defendant's motion for a new trial, and testimony of engineers and samples of materials proposed to be used were produced on the hearing of the motion. Trial court's refusal of such motion and offer did not constitute prejudicial error, in view of the showing that, though fire hazard and flares might be thereby reduced, nuisance arising from great vibration and noise could not be eliminated because of location and character of property with respect to plaintiff's dwelling.

6. Nuisance ⇐33.

Evidence supported finding that factory as operated constituted fire hazard to adjoining owner's dwelling and other buildings.

7. Nuisance ⇐25(1).

That defendant legally operated factory with municipality's consent, in district zoned for industry, and was first in field, were no defenses to adjoining owner's action to enjoin nuisance (Civ. Code, § 3479).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

8. Nuisance ⇐25(1).

That other sources of possible discomfort to plaintiff existed in neighborhood was no defense to action to enjoin nuisance.

Facts disclosed that, in addition to defendant's factory for manufacturing sewer pipes, tile, pottery, and stoneware on premises adjoining plaintiff, plaintiff also had for his neighbors an airport on the north and a busy railroad right of way on the south.

9. Nuisance ⇐7.

Adoption of most approved appliances and methods of production will not justify continuance of nuisance.

10. Limitation of actions ⇐55(6).

Operation of factory in manner constituting nuisance, being of continuing character, statute of limitations was inapplicable to action for injunctive relief.

Record showed that at no time did the plaintiff consent to defendant's acts, but that, on the contrary, his course of conduct was a continuous objection to defendant's operations.

In Bank.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action by F. W. Vowinckel against N. Clark & Sons, a corporation. From an adverse judgment, defendant appeals.

Affirmed.

Superseding opinion in 5 P.(2d) 609.

John L. McNab and S. C. Wright, both of San Francisco, for appellant.

A. P. Black and A. E. Shaw, both of San Francisco, for respondent.

PER CURIAM.

This is an appeal from a judgment for the plaintiff in an action to enjoin the defendant's operation of its factory as a nuisance and for damages.

For more than forty years prior to the trial of this action the defendant has conducted a business of manufacturing sewer pipe, tile, pottery, and stoneware on its property consisting of about 11 acres fronting on the north side of Pacific avenue in the city of Alameda. It is conceded that the property of the defendant at all times herein was zoned as industrial and was within what was considered a partly industrial and partly residential section of the city of Alameda. About seventeen and a half years after the commencement of the defendant's operations, the plaintiff purchased the improved residence property consisting of about 6 acres adjoining the defendant's property on the west. On the plaintiff's land there were a family dwelling and some other buildings to which plaintiff added by a virtual reconstruction thereof involving an investment of from $50,000 to $60,000. The plaintiff is a practicing physician and at all times since its purchase, with the exceptions hereinafter noted, with his assistants and household, has occupied said property as a residence.

In November, 1906, when portions of the factory had been reconstructed after the earthquake of April, 1906, the plaintiff brought an action to enjoin the operation of the factory. The result of that action was an injunctive order that the defendant cease operating its kilns and furnaces unless it raise its main chimney to a height of at least 150 feet. The defendant since said time has maintained said chimney at the height so required.

In 1915 the plaintiff joined the German Red Cross Service as a physician and surgeon and returned to his home in 1922. In 1917 the main building of the defendant's factory was destroyed by fire. After that time it was rebuilt and has increased and expanded from eight kilns and furnaces, inclosed within the brick building which burned in 1917, to eighteen kilns and furnaces constructed in the open except for a corrugated iron roof built over them. A battery of nine of these kilns is placed along and about 20 feet from the fence dividing the plaintiff's and the defendant's properties, and with the opening of the furnaces facing outward. The four most southerly of this battery of kilns are placed practically opposite to and southerly from the plaintiff's dwelling. Since 1917, two other fires have occurred on the defendant's premises, at least one of which caused damage to the fence and trees between the properties, and burned the grass in the rear of the plaintiff's lot. The factory is operated day and night and on Sundays and holidays.

The complaint alleged injuries to and continued discomfort and interference with the peaceable enjoyment of the plaintiff's property by reason of the discharge of large quantities of noxious soot, smoke, and malodorous and injurious gaseous substances; vibrations and noise caused by the operations of the kilns and furnaces and of freight cars on the railroad switch in front of the westerly battery of kilns; light disturbances or flares at night caused by the successive combustions in the oil-burning furnaces along the dividing fence; and danger by reason of the fire hazard alleged to exist. The plaintiff sought an injunction to restrain the conduct of the defendant's business in such wise as to interfere with the peaceable enjoyment of his property, and damages in the sum of $20,000. During the course of the trial and pursuant to a stipulation of the parties the trial court viewed the premises, and the plant of

the defendant while it was in operation, in the absence of the parties and their counsel.

The court found untrue the allegations of the complaint relating to the emission of filthy and noxious smoke, soot and gas, the maintenance of the railway switch, and the injuries resulting to the plaintiff thereby. The court found, however, that the manner of operation of the kilns and furnaces and the combustion of the fuel therein causes great vibration and noise disturbing to the peace and quiet of the plaintiff and his household, and together with the flares resulting therefrom, prevent the plaintiff from the comfortable use and enjoyment of his property and are offensive to the senses of persons living upon the property of the plaintiff; and that one of the plaintiff's buildings, formerly occupied by help, has become uninhabitable by reason of such vibration and noise and the flares of light from the furnaces. The findings also recite that the operation of said kilns and furnaces is the source of an extraordinary fire hazard found to exist. It was also found that damage to the plaintiff was incapable of ascertainment and that full relief would be accorded to the plaintiff by the issuance of an injunction to the extent hereinafter stated; that any former action between the parties did not constitute an estoppel against the plaintiff inasmuch as the nuisance was continuing in its nature; that the plaintiff was not guilty of laches in bringing the action, nor was the cause of action barred by the statute of limitations.

The judgment decreed that the defendant be enjoined from operating the four southerly kilns and furnaces on the westerly side of its property, and from operating the remaining kilns and furnaces on the westerly side of its property and northerly of said four southerly furnaces unless and until it shall erect between said northerly furnaces and the property of the plaintiff a substantial fireproof wall or fence at least 15 feet in height.

Except as to the one particular hereinafter mentioned, the defendant does not contend that the factory as operated does not constitute a nuisance to the plaintiff, but its contention that the findings are unsupported by the evidence is based upon the presence in the record of the following undisputed facts: That the defendant had operated its pottery and tile factory seventeen and one-half years before the plaintiff had purchased and established his home on the adjoining property; that the factory was then in full operation, which the plaintiff knew, and that the plaintiff must also have known or be presumed to have known that the business of the defendant would increase and that its operations would necessarily expand and its facilities enlarge; that the site selected for the factory is and always has been an industrial section on the outskirts of Alameda on marshy and filled ground; that it has operated by permission of the municipal authorities for nearly a half century; that on recently filled land immediately north of the plaintiff's and the defendant's properties has been established the San Francisco Airdrome, where airships are continuously causing noise during the day and night; that 20 acres of land adjoining the defendant's property have been acquired by the Belt Railroad of Alameda upon which to pursue its railroad activities; that immediately adjoining the plaintiff's property on the west is a commercial vegetable garden; and that a short distance to the west are 1,000 acres of tide land recently deeded by the city of Alameda to the United States to be used as an army base, and adjoining these tide lands on the west is the Alameda Airport; that one of the main lines of the Southern Pacific Company for the carriage of both passengers and freight, operating trains every half hour during the day and frequently during the night up to 12 o'clock, passes in front of the plaintiff's property on Pacific avenue; and that the plaintiff keeps on his own property fifteen to twenty police dogs, and at times has kept thereon sheep, rabbits, geese, and other animals and fowl.

The defendant urges that it operates its business in the most careful and prudent manner; that its kilns and furnaces are of the most modern type of construction; that the defendant's properties represent an investment of $400,000 to $500,000 as compared to the $50,000 or $60,000 invested by the plaintiff; that the defendant employs constantly about 230 to 240 men with an annual pay roll of about $270,000; that the four kilns ordered abated represent an investment of about $30,000; and that a cessation of operations as to those kilns will result in laying off thirty or forty employees.

[1, 2] The defendant contends that the court gave no consideration to the great damage that will be sustained by the defendant if its kilns are abated as compared with the slight injury that may be sustained by the plaintiff by their operation. Leaving for later discussion the question whether that contention may properly be made in this case, and bearing in mind that the court did not wholly abate the defendant's conduct of its factory, it is significant that the trial court did not find that the injury to the plaintiff was trivial or slight, but on the contrary found that it was great and irreparable. We do not discover the state of the record to be such as to warrant a holding that that finding is not supported by the evidence. All of the matters argued by the defendant as grounds for its contention were brought to the at-

tention of the trial court, and it must be presumed that the court gave them due consideration in arriving at its conclusion.

We know of no precedent, and the defendant cites none, for holding that the character of injury involved here is not the result of an invasion of a distinct private right and such as to make applicable the doctrines stated in Hulbert v. California, etc., Cement Co., 161 Cal. 239, 118 P. 928, 38 L. R. A. (N. S.) 436; Judson v. L. A. Suburban Gas Co., 157 Cal. 168, 106 P. 581, 26 L. R. A. (N. S.) 183, 21 Ann. Cas. 1247; Fendley v. City of Anaheim, 110 Cal. App. 731, 294 P. 769; Williams v. Blue Bird Laundry Co., 85 Cal. App. 388, 259 P. 484, and McIntosh v. Brimmer, 68 Cal. App. 770, 230 P. 203. We are mindful of the fact that the opinion of Melvin J., in the case of Hulbert v. California, etc., Cement Co., supra, was not concurred in by a majority of the court, and that the case involved a petition for a writ of supersedeas to stay the force of the prohibitive injunction pending the appeal on the merits. Nevertheless, the views therein expressed on the so-called doctrine of comparative injuries or "balance of hardship" were adopted by this court in the later case of People v. Selby Smelting & Lead Co., 163 Cal. 84, 94, 124 P. 692, 1135, Ann. Cas. 1913E, 1267, which involved the merits of the judgment.

[3] In the present case the court appears to have given due consideration to the situation of the defendant. This is apparent from the fact that it refused to abate entirely the defendant's operations and granted the relief sought to the extent necessary to preserve the rights of both parties. In other words the court in the exercise of its equity powers, has compared consequences and has considered the injuries resulting to each party, on the one hand if the injunction be wholly denied, and on the other if it be granted. The court, from the evidence presented, gave heed to the rule that in a proper case it will not enjoin the conduct of the defendant's entire business, where such business is not a nuisance per se, if a less measure of restriction will afford to the plaintiff the relief to which he may be entitled. McMenomy v. Baud, 87 Cal. 134, 26 P. 795; Tuebner v. Cal. St. R. R. Co., 66 Cal. 171, 4 P. 1162; Williams v. Blue Bird Laundry, 85 Cal. App. 388, 259 P. 484; McIntosh v. Brimmer, 68 Cal. App. 770, 230 P. 203.

[4] The defendant nevertheless, seeks to invoke the foregoing rule as a basis for the reversal of that part of the injunction which abates four of its kilns. Unless under the rule and the record presented we are led to the conclusion that the plaintiff could be afforded all the relief to which he was entitled by a modification of the injunction in this respect, we must say that the contention is answered by the doctrine of the cases of American Smelting & Refining Co. v. Godfrey (C. C. A.) 158 F. 225, 14 Ann. Cas. 8, and Sullivan v. Jones & Laughlin Steel Co., 208 Pa. 540, 57 A. 1065, 66 L. R. A. 712, adopted and followed in our decisions. Hulbert v. California Cement Co., supra; People v. Selby Smelting & Lead Co., 163 Cal. 84, 94, 124 P. 692, 1135, Ann. Cas. 1913E, 1267; Judson v. L. A. Suburban Gas Co., 157 Cal. 168, 106 P. 581, 26 L. R. A. (N. S.) 183, 21 Ann. Cas. 1247; Peterson v. City of Santa Rosa, 119 Cal. 387, 51 P. 557. Extensive quotations from those cases appear in Hulbert v. California, etc., Cement Co., supra, at pages 247–249 and 252, 253 of 161 Cal., 118 P. 928. The doctrine as disclosed by those cases may be stated to be that, where a right of the plaintiff has been invaded by the maintenance of a nuisance, and the plaintiff has suffered injury therefrom, an injunction which results in the abatement of the defendant's operations will not be denied solely on the ground that the injury suffered by the defendant will be greater, if the injunction be granted, than the injury suffered by the plaintiff if the injunction be refused.

[5, 6] The defendant contends that all of the infringements upon the plaintiff's rights can be eliminated by the erection of a fireproof sound-absorbing wall inclosing also the four kilns ordered abated. An offer to construct such a wall, with sliding doors to permit loading, was made upon the defendant's motion for a new trial; and testimony of engineers and samples of materials proposed to be used were produced on the hearing of the motion. The trial court, however, declined the offer and denied the motion for a new trial. This ruling is claimed to be prejudicial error and we are urged to reverse or modify the judgment on the ground that the proposed wall will give to the plaintiff all the relief to which he is entitled. But we are not persuaded that the court abused its discretion in denying the motion. The court itself viewed the premises, and although it may have been shown that the wall might tend to reduce the fire hazard and flares, nevertheless the denial of the motion is persuasive that the court remained unconvinced that either the vibrations or noise would be diminished or eliminated. The character of the property abated, and its location with respect to the plaintiff's dwelling, together with the finding that its operation causes great vibration and noise disturbing to the plaintiff and his household, is conclusive against the showing attempted to be made by the defendant. The record shows that the trial court was justified in abating a portion of the defendant's factory on the ground that to control only the manner of its conduct would be inadequate relief to the plaintiff from the nuisance there-

by maintained. The contention is also made that the evidence is insufficient to support the finding that the factory of the defendant as presently operated constitutes a fire hazard. This contention cannot be seriously entertained in view of the fact that in the period beginning in 1917 three serious fires have occurred on the defendant's premises.

[7] The fact that the operations are conducted with the consent of the municipality, or that the defendant was doing a legal act, or that its operations are conducted in a district zoned for industry, or that the defendant was first in the field, may not avail the defendant. This conclusion, based on the equitable maxim sic utere tuo ut alienum non laedas, in Tuebner v. California St. R. R. Co., 66 Cal. 171, 173, 4 P. 1162, 1164, is stated thus: "A person may not use his own property, even in and about a business in itself lawful, if it be used in such a manner as to seriously interfere with another in the enjoyment of his right in the use of his property." Civ. Code, § 3479; Judson v. L. A. Suburban Gas Co., 157 Cal. 168, 106 P. 581, 26 L. R. A. (N. S.) 183, 21 Ann. Cas. 1247; Fendley v. City of Anaheim, 110 Cal. App. 731, 294 P. 769; Williams v. Blue Bird Laundry Co., 85 Cal. App. 388, 259 P. 484.

[8, 9] That the plaintiff has also for his neighbors an airport on the north and a busy railroad right of way on the south may not control. "The fact that other sources of possible discomfort to plaintiff existed in the neighborhood of his property is no defense to an action of this kind. * * * Nor will the adoption of the most approved appliances and methods of production justify the continuance of that which, in spite of them, remains a nuisance." Judson v. L. A. Suburban Gas Co., supra, pages 171, 173 of 157 Cal., 106 P. 581, 582; Snow v. Marian Realty Co., 212 Cal. 622, 299 P. 720; Fendley v. City of Anaheim, supra, page 737 of 110 Cal. App., 294 P. 769.

[10] No doubt may be entertained of the continuing character of the nuisance maintained by the defendant's operations, so as to make inapplicable the statute of limitations. The defendant's contention in this regard may be disposed of without discussion by reference to the decisions in the cases of Kafka v. Bozio, 191 Cal. 746, 218 P. 753, 29 A. L. R. 833; Strong v. Sullivan, 180 Cal. 831, 181 P. 59, 4 A. L. R. 343; Collins v. Sargent, 89 Cal. App. 107, 115, 116, 264 P. 776; Williams v. Blue Bird Laundry Co., 85 Cal. App. 388, 395, 259 P. 484. The record shows that at no time did the plaintiff consent to the defendant's acts, but that on the other hand his course of conduct was a continuous objection to the defendant's operations.

A petition for a writ of supersedeas to stay the effect of the injunction pending appeal was filed herein and was ordered submitted with the appeal on the merits. In view of the disposition of said appeal, a discussion of the questions involved on the petition for the writ of supersedeas becomes unnecessary.

The judgment is affirmed.

216 Cal. 209

REINIGER v. HASSELL.

L. A. 11060.

Supreme Court of California.

Aug. 9, 1932.

1. Mines and minerals ⇐74.

In action for rescission of contract to purchase interest in oil and gas lease, implied finding that plaintiff acted promptly after discovering fraud *held* supported by evidence.

Evidence disclosed that contract to purchase interest in oil and gas lease was made on July 14, 1923; that plaintiff gave notice of rescission on October 10, 1923, and demanded the return of the money paid; that within a few days after plaintiff had entered into the contract she demanded a return of her money; that defendant told her that he did not have the money at the time, but would procure it for her, thereby mutually rescinding agreement; and that plaintiff waited until October 1st for defendant to fulfill his promise, and, he not having done so, she thereafter gave formal notice of rescission.

2. Contracts ⇐270(2).

Where party to contract promptly protests on discovering fraud, and negotiates settlement, complaint for rescission filed within reasonable time after failure of settlement is not barred by laches.

3. Contracts ⇐270(2).

Whether party defrauded has promptly rescinded contract, depends upon particular facts and circumstances.

4. Appeal and error ⇐1010(1).

Conclusion of trial court that party defrauded promptly rescinded contract, if reasonably supported by evidence, will not be disturbed.

5. Appeal and error ⇐931(3).

Where omitted finding upon determinative issue must be inferred from findings actually made, appellate court will consider finding made.

6. Appeal and error ⇐1071(6).

Failure to make finding on determinative issue does not warrant reversal, where

evidence supports implied finding, and express finding, if made, would have been adverse to appellants.

In Bank.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by Grace M. Reiniger against John A. Hassell. Judgment for the plaintiff, and the defendant appeals.

Affirmed.

Geo. D. Blair, of Los Angeles, for appellant.

Clyde C. Shoemaker, of Los Angeles, for respondent.

TYLER, Justice pro tem.

Action for rescission of a contract. The facts show that on the 14th day of July, 1923, plaintiff and defendant entered into an agreement whereby defendant agreed to sell and plaintiff agreed to buy an interest in a certain oil and gas lease. The complaint charged that defendant made false and fraudulent representations concerning the acreage of the land covered by the lease, and its location with reference to certain producing wells. The trial court found, upon sufficient evidence, that all of the representations made by defendant were false and untrue and were so made for the purpose of inducing plaintiff to enter into the agreement. The court further found that on October 10, 1923, plaintiff gave notice of rescission and demanded the return of the money she had paid. Judgment was accordingly rendered against defendant for the sum of $4,640, principal and interest, and from this judgment defendant appeals.

[1-4] The first point urged for a reversal is that the evidence is insufficient to show or justify the court in deciding in effect that plaintiff rescinded promptly upon the discovery of the alleged fraud, for the reason that the evidence shows without conflict that plaintiff discovered such alleged fraud at least seventy-two days prior to the time of serving her notice of rescission. There is no merit in this contention. It appeared in evidence that within a few days after plaintiff had entered into the contract she became suspicious of defendant's good faith and demanded a return of her money. Defendant informed her that he did not have it at that time, but would procure it for her. The agreement having been mutually rescinded, plaintiff waited until October 1st for defendant to fulfill his promise. He not having done so, she then gave defendant formal notice of rescission. Under such circumstances we cannot say that the evidence is insufficient to justify the implied finding that plaintiff acted promptly. Where a party protests promptly on discovering that he has been defrauded in making a contract, and enters into negotiations for a peaceable settlement, which fail, a complaint filed within a reasonable time after such failure is not barred by laches. Cooper v. Huntington, 178 Cal. 160, 172 P. 591; Bechtold v. Coney, 42 Cal. App. 563, 183 P. 841; Menefee v. Oxnam, 42 Cal. App. 81, 183 P. 379; 2 Black on Rescission and Cancellation, § 544. There is no hard and fixed rule as to the lapse of time or circumstances which will justify the application of the doctrine of laches. Kleinclaus v. Dutard, 147 Cal. 245, 81 P. 516. The question of whether or not a party defrauded has rescinded promptly depends upon all of the facts and circumstances of the particular case, and this question is one primarily for the trial court to determine. If its conclusion finds reasonable support in the evidence, reviewing courts will not interfere therewith. Suhr v. Lauterbach, 164 Cal. 591, 130 P. 2; Powell v. Oak Ridge Orchards Co., 84 Cal. App. 714, 258 P. 636; Smith v. Riverside Groves, etc., Co., 19 Cal. App. 165, 167, 124 P. 870. Here there is no showing of any abuse of the discretionary power reposed in the trial court.

[5] Appellant urges the further contention that the judgment is contrary to law, for the reason that the trial court failed to make a finding upon the issue raised as to whether or not plaintiff acted promptly in exercising her right to a rescission. A finding that plaintiff rescinded promptly upon becoming aware of defendant's fraud is necessarily implied from the findings and decision of the lower court. Where a finding omitted must be inferred from a consideration of the findings actually made, the appellate court will recognize the necessary inference and consider the finding in question as having in effect been made, and this is so with respect to laches. Scott v. Symons, 191 Cal. 441, 216 P. 604; Stevinson v. San Joaquin, etc., Co., 162 Cal. 141, 121 P. 398; Suhr v. Lauterbach, supra. In the Symons Case, it is held that the trial court, having given judgment in favor of plaintiff, in effect found against unnecessary delays in instituting the action.

[6] The evidence is ample to support the implied finding that plaintiff rescinded promptly. If there was an express finding on the subject, it would have to have been, under the evidence, adverse to the appellant. Under these circumstances its omission will not constitute error sufficient to authorize a reversal. Reed v. Johnson, 127 Cal. 538, 541, 59 P. 986.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

A. PALADINI, INC., v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. *

Civ. 8511.

District Court of Appeal, First District, Division 2, California.

Aug. 17, 1932.

Rehearing Denied Sept. 16, 1932. Hearing Granted by Supreme Court Oct. 13, 1932.

1. Evidence ⇐43(4).

Court could not take judicial notice of proceedings in federal court where nothing except copy of monition appeared in record.

2. Shipping ⇐209(1⅜, 1¾).

It must appear that petitioners in proceeding for limitation of liability surrendered vessel or deposited value in court, or that limitation of liability was established in federal court before injunction restraining other proceedings could become effective (28 USCA § 379; 46 USCA § 183 et seq.).

3. Judgment ⇐829(3).

If limitation proceeding in federal court did purport to restrain injured employee's action against petitioners, stockholders of corporation owning boat, proceeding had no effect upon action against corporation (28 USCA § 379; 46 USCA § 183 et seq.).

4. Dismissal and nonsuit ⇐45.

Delay of more than five years after answer filed to bring cause to trial compels dismissal, where plaintiff was not restrained by injunction from proceeding against defendant (Code Civ. Proc. § 583).

5. Dismissal and nonsuit ⇐45.

Provisions of statute respecting dismissal of action not brought to trial within five years after filing of answer are mandatory (Code Civ. Proc. § 583).

Original proceeding in mandate by A. Paladini, Incorporated, against the Superior Court of the State of California in and for the City and County of San Francisco and another.

Peremptory writ issued.

Redman, Alexander & Bacon, of San Francisco, for petitioner.

Ford & Johnson and Fletcher A. Cutler, all of San Francisco, for respondents.

NOURSE, P. J.

This is an original proceeding in mandate to require the respondent to dismiss an action because of the failure of the plaintiff in that action to bring the cause to trial within five years after the defendants' answer was filed.

On March 4, 1924, one Andrew Flink commenced an action against the petitioner herein and one Achille Paladini (now deceased) for injuries incurred while working upon a tugboat owned and operated by this petitioner. On October 8, 1926, the defendant corporation filed its answer. No further proceedings were had until February 4, 1932, when this defendant moved for a dismissal of the cause on the ground heretofore stated.

On March 8, 1926, Flink commenced a separate action in the superior court against all the stockholders of the Paladini Corporation to recover for the same injuries. On March 4, 1927, those stockholders filed in the United States District Court a petition for limitation of their liability, if any, arising out of the voyage on which plaintiff's injuries were sustained. On April 1, 1927, the District Court issued a monition citing all claimants against the vessel to appear on or before the first Tuesday of July, 1927, to make proof of their claims and to show cause why their claims should not be limited and apportioned as provided by title 46, § 183 et seq., of the United States Code (46 USCA § 183 et seq.).

[1] On this proceeding respondents have incorporated a copy of this monition. No other papers and no record of the proceedings in the federal court are before us. We cannot, therefore, take judicial notice of those proceedings [City of Los Angeles v. Abbott (Cal. Sup.) 12 P.(2d) 19], but are limited in our examination to the contents of the order of April 1, 1927. This paper, which under the federal practice is termed a monition, is nothing more than what in our state practice we term an order to show cause. It cites the claimants to appear and make proof of their claims and to show cause why these claims should not be limited to the value of the vessel, etc. It was issued on the petition of named individuals who were stockholders of the Paladini Company and did not cover any claim against the corporation as such. It does not contain any injunctive clause and, hence, does not in terms purport to restrain the prosecution of the action against the corporation.

[2, 3] Bearing in mind that, under the rule of City of Los Angeles v. Abbott, supra, we cannot examine the record in the proceeding before the federal court, we are forced to these conclusions from the record which is before us; that it does not appear either that the petitioners in that proceeding surrendered the vessel or deposited the value in court, or that the limitation of their liability was established in that court; that either one of these contingencies must arise before the "statutory injunction" restraining other proceedings can become effective (Metropolitan Redwood Lumber Co. v. Doe, 223 U. S. 365, 372, 32 S. Ct. 275, 56 L. Ed. 473, Ann. Cas. 1913D, 1221); that the presence of either one of these contingencies is necessary to escape the provisions of section 379, tit. 28, U. S. Code, 28 USCA § 379 (R. S. § 720), which prohibits an

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 21 P.2d 941.

injunction from a federal court staying proceedings in a state court (Metropolitan Redwood Lumber Co. v. Doe, supra); that if the limitation proceedings did purport to restrain the action in the state court against the petitioners named therein, it had no effect upon the action against the corporation.

[4, 5] Thus, upon the record before us, it appears that the plaintiff was not restrained either by an express or by a statutory injunction from proceeding against the corporation and hence his delay for more than five years after answer filed to bring his cause to trial compels a dismissal of the cause under the express provisions of section 583, Code of Civil Procedure. That the provisions of this section are mandatory must be conceded. Larkin v. Superior Court, 171 Cal. 719, 721, 722, 154 P. 841, Ann. Cas. 1917D, 670; Cruse v. Superior Court, 102 Cal. App. 290, 294, 283 P. 73.

Let a peremptory writ issue as prayed.

We concur: STURTEVANT, J.; SPENCE, J.

ENGLISH et al. v. OLYMPIC AUDITORIUM, Inc., et al. *

Civ. 8141.

District Court of Appeal, First District, Division 2, California.

Aug. 18, 1932.

Rehearing Denied Sept. 17, 1932. Hearing Granted by Supreme Court Oct. 17, 1932.

1. Mechanics' liens ⇐288(2).

Whether notice of nonresponsibility has been posted within ten days after owner has notice of commencement of construction work is fact question for court (Code Civ. Proc. § 1192).

2. Mechanics' liens ⇐281(2).

Finding that digging of test hole and hauling of lumber on premises constituted "commencement of work" within statute sufficient to sustain landowner's subsequent posting of notice of nonresponsibility *held* authorized (Code Civ. Proc. § 1192).

[Ed. Note.—For other definitions of "Commencement of Work," see Words and Phrases.]

3. Appeal and error ⇐1010(1).

Appellate court could not interfere with trial court's finding sustained by evidence.

4. Mechanics' liens ⇐161(1).

Constitution gives direct lien on property for value of labor or material expended thereon (Const. art. 20, § 15).

5. Mechanics' liens ⇐191.

Where landowner duly posts notice of nonresponsibility, lien claimants are not thereby deprived of liens on building erected by lessee, but lien claims exist separately from land (Const. art. 20, § 15; Code Civ. Proc. §§ 1183, 1192).

6. Mechanics' liens ⇐233.

Unlawful detainer action wherein landowners had lease declared forfeited did not destroy mechanics' liens on building only (Const. art. 20, § 15; Code Civ. Proc. §§ 1183, 1192).

This was particularly true since the lease itself provided that lessee could erect a building and that any improvements erected could not be removed by lessee, and thus lessors by their own voluntary act made the building a part of their land, and therefore took the building burdened with the mechanics' liens which did not depend on leasehold interest of lessee.

7. Mechanics' liens ⇐230.

Federal court receiver's application to be relieved from forfeiture of lease, and denial thereof, *held* not binding on mechanics' lienors of building (Code Civ. Proc. §§ 1179, 1183; Const. art. 20, § 15).

That federal court receiver applied under Code Civ. Proc. § 1179, to be relieved from effect of forfeiture of the lease, and denial of such application by court, was not binding on mechanics' lienors, even though application was made in creditor's action authorized by federal court, and was made on behalf of receiver and all creditors of lessee, liens sought to be foreclosed not being dependent on unlawful detainer action brought by lessor wherein forfeiture of lease was obtained, but being liens on building itself, not dependent on existence of lease.

8. Mechanics' liens ⇐233.

Lien claimants who furnished labor and material for construction of building erected by lessee had equities in their favor, as respects landowner's contention that forfeiture of lease freed property from liens.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby and Guy E. Bush, Judges.

Actions by James G. English and others against the Olympic Auditorium, Inc., the Los Angeles Athletic Club, a corporation, and others, which actions were consolidated. From the judgment plaintiffs and defendant last named and certain other defendants appeal.

Reversed and remanded, with directions.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 20 P.2d 946

Horton, Anderson, Horton & Armstrong, Rufus L. Horton, and Joseph K. Horton, all of Los Angeles, for appellant Hammond Lumber Co.

Dryer, Castle & Hartke and Dryer, Castle, McConlogue & Richards, all of Los Angeles, for appellant English.

Lawler & Degnan and Hunsaker, Britt & Cosgrove, all of Los Angeles, for respondents Title Insurance & Trust Co. and Los Angeles Athletic Club.

BURROUGHS, Justice pro tem.

Four actions were brought to foreclose mechanics' liens. They were consolidated and became the above-entitled action.

The appeals are by the plaintiffs from so much of the judgment entered August 16, 1928, as fails to give them liens upon the interest of the defendant Los Angeles Athletic Club, a corporation, hereinafter referred to as the Athletic Club; and the interest of the defendant Title Insurance & Trust Company, hereinafter referred to as the Trust Company, in and to the land upon which the building in controversy is situated. The appeals are also from that portion of the said judgment which fails to give the plaintiffs any judgment against the Athletic Club or the Trust Company. The plaintiffs also appeal from the order of the court made on September 27, 1928, amending the conclusions of law and the judgment entered on August 16, 1928, and on October 6, 1928, entering different conclusions, and judgment, whereby the plaintiffs are deprived of liens given by the judgment of August 16, 1928, upon the building erected on the land above referred to, and they also appeal from that portion of the last-named judgment which fails to grant plaintiffs any relief against either the Athletic Club or Trust Company, and also that portion which vacates and sets aside the judgment of August 16, 1928.

The uncontradicted facts of the case found by the court are as follows: On November 1, 1924, the Athletic Club and Trust Company were the owners and reputed owners of a certain tract of land situated in the city of Los Angeles. On that day they leased said property to the defendant J. M. Danziger for the term of twenty-five years at the annual rental of $25,000. Thereafter Danziger and wife assigned said lease to the defendant Olympic Auditorium, Inc., a Delaware corporation, hereinafter referred to as the Auditorium Company, and the latter also assumed all of the obligations of said lease. Said lease, assignment, and covenant of assumption were in writing, and were duly recorded in the office of the county recorder. By the terms of the lease, the lessee was authorized to construct an auditorium building on the leased premises at the sole cost and expense of the lessee. It was further provided in said lease that mechanics and other persons performing work on said building, or furnishing material therefor, were thereby given notice that any liens filed by them upon said premises should not in any manner affect the rights of the lessors in said building, and that the lessee should have no right to remove any improvements constructed upon the leased premises. On January 9, 1925, the Athletic Club and Trust Company, as owners, posted upon said premises a notice of nonresponsibility in the form required by section 1192 of the Code of Civil Procedure, and on said day recorded a copy thereof in the office of the county recorder of Los Angeles county, as required by said section; that said notice remained posted and the recorded copy thereof remained of record during the entire period of construction of the auditorium building. At the time the notice was posted as aforesaid, there had been delivered upon the premises six hundred board feet of lumber which was used to build a temporary platform in connection with ceremonies of ground breaking held on January 10, 1925. Also there was dug, before the said notice was posted, a test hole not over six feet by ten feet by six feet deep, for the purpose of testing the character and weight-bearing qualities of the soil, which information was necessary in preparing the plans and specifications for the building. The test hole was thereafter used as a part of the excavation for the building. On the same day, and shortly after the posting of said notice, the Auditorium Company also caused a large steam shovel to be moved onto the premises, near the test hole. The shovel was operated the next day, January 10, 1925, as a part of the ground breaking ceremonies, and actually dug in on January 12, 1925. Thereafter, from day to day, work progressed on said building until its completion on or about September 10, 1925. Within due time after the completion of the building, these plaintiffs, not having been paid, filed their liens, and in due time commenced these actions to foreclose them. Thereafter the Auditorium Company defaulted in the payment of rent, and on August 17, 1926, the Athletic Club and Trust Company commenced an action in unlawful detainer against the Auditorium Company, to recover possession of said premises. On August 24, 1926, one James R. Masten was appointed a receiver by the District Court of the United States for said Auditorium Company, and he made application to the Superior Court for relief from the judgment of forfeiture of said lease, as provided by section 1179 of the Code of Civil Procedure. The court made an order granting the relief prayed for, but, plaintiffs failing to comply with the terms of the order, the judgment of forfeiture has now become final. Thereafter the Athletic Club and Trust Company entered into possession of the Olympic Auditorium building and premises, and have ever since remained in possession.

The plaintiffs did not apply to the court in the last-named action for relief from the judgment therein, nor were any of them parties to said action. At all times during the pendency of the unlawful detainer action, the actions of these plaintiffs on the mechanics' liens were all pending in the Superior Court.

Upon these findings, the trial court adjudged that the relief to which the plaintiffs were entitled was the sale of the Olympic Auditorium building, unless within a specified time respondents paid the amount of their lien claims to plaintiffs. The court also concluded that, as to plaintiffs, the lease had never been forfeited. After the entry of the judgment aforesaid, the Athletic Club and Trust Company made a motion to vacate the judgment and to amend the conclusions of law to the effect that plaintiffs were entitled to a lien upon the building and to enter its judgment denying said lien. Upon a hearing of the motion, the court granted the same, and on October 6, 1928, judgment was entered accordingly.

[1-3] Appellants contend that the court erred in adjudging that the land upon which the building was erected was not subject to the plaintiffs' lien, because the Athletic Club and Trust Company, the owners of the land, had protected their title thereto against the liens by giving proper notice of nonresponsibility to lien claimants, as provided in section 1192 of the Code of Civil Procedure. Appellants claim that the notice was posted before the commencement of work on the building, and was therefore ineffective for any purpose. Section 1192, supra, among other things, provides that the land upon which a building is erected by persons other than the owner or persons claiming an estate therein is subject to mechanics' and other designated liens, unless the owner or person having or claiming an estate therein shall, within ten days after he shall have obtained knowledge that construction of a building is in progress on his land, among other requirements, give notice that he will not be responsible for the same, by posting a notice in writing to that effect in some conspicuous place on the land. The facts upon which the court based its findings of proper posting by the owners are above set forth and are undisputed, and are sufficient to sustain the judgment that the construction was actually begun before the notice was posted. It was a matter for the trial court to determine. In Simons Brick Co. v. Hetzel, 72 Cal. App. 1, 236 P. 357, 358, the holder of an unrecorded mortgage testified that, when he went upon the premises for the purpose of ascertaining if any construction was being done, or if there was any evidence of a building being erected, there were no tools or materials of any description on the premises nor any evidence of a building being constructed. But it developed from other evidence that a trench about sixty feet long and four feet deep had been excavated along the front of the lot, and it was held by the court that this alone was sufficient to put the holder of the mortgage on notice of a building being under construction on the premises, and the mortgage, although recorded before any other work was done, was held to be subsequent to lien claimants under the Mechanics' Lien Law (Code Civ. Proc. § 1183 et seq.). The court said on page 5 of the opinion in 72 Cal. App., 236 P. 357, 358: "As to just what is meant by the term 'commencement of work' and as to the amount and character of work necessary to be done upon a building in order to say that work has been begun thereon, we think the true rule is stated in Phillips on Mechanics' Liens (3d Ed.) p. 387, where it is said: 'What this law means is some work and labor on the ground, the effects of which are apparent—easily seen by everybody; such as beginning to dig the foundation, or work of like description, which every one can readily see and recognize as the commencement of a building.'" We think this rule should be applied in the case at bar. The object of such a notice is to bring home to those who are expending labor or materials upon a building the fact that the owner of the land will not be responsible for such labor or materials. The notice must be posted on the ground within ten days after the owner has notice of the commencement of construction. Whether this has been done or not is, under Simons Brick Co. v. Hetzel, supra, a question of fact for the court to determine from the evidence before it. Here the court has found in effect that the digging of the test hole of considerable size, afterwards used as a part of the excavation and the hauling of lumber on the premises, was a commencement of the work, sufficient to sustain the posting of the notice in accordance with the requirements of section 1192 of the Code of Civil Procedure, and it was within the province of the trial court to so decide, and we are not allowed to interfere with such finding. Hickman v. Freiermuth, 21 Cal. App. 629, 132 P. 772.

The judgment of August 16, 1928, gave plaintiffs a lien upon the building itself down to the surface of the ground, and directed that, unless the owners paid the several amounts found due by the judgment within ninety days from the date thereof, the building would be sold to satisfy the lien claims. This portion of the judgment was set aside by the motion above referred to and the conclusions of law so altered as to deny a lien upon the building. And, on October 6, 1928, the judgment entered deprived plaintiffs of their liens upon the building. It is contended that this was error. As we read the record, the above action of the court was based upon the fact that, by the judgment in the unlawful detainer action, evicting the Auditorium Company from the premises and nullifying the lease, the plaintiffs were deprived of their

lien upon the building. It is further contended by respondents that, the plaintiff not being entitled to a lien upon the land, it necessarily follows that the building, being a part of the real estate, was also relieved of the liens.

[4, 5] The Constitution of the state of California (article 20, § 15) is the basis of the Mechanics' Lien Law, and is as follows: "Mechanics, materialmen, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material, for the value of such labor done and material furnished; and the legislature shall provide, by law, for the speedy and efficient enforcement of such liens." The language of the foregoing provision of our Constitution is clear and positive, and gives a direct lien on the property upon which the classes named therein have bestowed labor or furnished material to the extent of the value thereof. In carrying out the above constitutional mandate, the Legislature has provided by section 1183 of the Code of Civil Procedure that mechanics and materialmen shall have a lien upon the property on which they have bestowed labor and material, thus following the constitutional provision. The Legislature has distinguished between the ownership of the improvements made on the land and the land itself, in so far as the mechanics' and materialmen's liens are concerned. This is manifest by the enactment of section 1192 of the Code of Civil Procedure wherein it is provided that the landowner may protect his interest in the land from the lien by giving the notice of nonresponsibility as provided for in that section.

Mazzera v. Ramsey, 72 Cal. App. 601, at page 609, 238 P. 101, 103, quotes with approval from People v. Moxley, 17 Cal. App. 466, 468, 120 P. 43, as follows: "The lien of a mechanic or materialman is a constitutional right and attaches to the structure as the material is furnished or labor performed. The statutory procedure enacted for the enforcement of such right has reference only to the remedy." See, also, Siegel v. Hechler, 181 Cal. 187, 183 P. 664.

In Western Electric Co., Inc., v. Colley, 79 Cal. App. 770, 778, 251 P. 331, 335, it is said: "Lien claimants are given a lien 'upon the property upon which they have bestowed labor or furnished materials,' as well as upon the land upon which any building, improvement, well, or structure is constructed, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, if at the commencement of the work or the furnishing of materials the land belonged to the person causing the improvement to be undertaken; if he owned less than a fee, only his interest is subject to the lien, except as the owner of the fee may have failed to give notice of nonliability, as provided in section 1192 of the Code of Civil Procedure. Under these statutory provisions, the lien on the building, or other structure, is the primary thing, and the lien in the land is merely an incident to it. No lien can be acquired on the land, if none is acquired on the building, but a lien may exist on the building without attaching to the land. Hence it is not essential to the existence of a mechanic's lien on a building that the person causing its erection should have owned or had any interest in the real property on which it is located. This distinction between land and superstructure, the lien attaching primarily to the latter, and to the former only as it was embraced in a common ownership with the building, has existed in California from the very earliest times."

Humboldt Lumber Mill Company v. Crisp, 146 Cal. 686, 688, 81 P. 30, 31, 106 Am. St. Rep. 75, 2 Ann. Cas. 811, is a case where it was sought to enforce mechanics' liens against the land. The structure being built thereon was burned before completion or any lien had been filed. Under this state of facts the court held there was no right of lien; and, in commenting upon the distinction between the lien on the land and the lien on the building, says: "A further reason why the lien should not apply to the land in this case is found in a consideration and comparison of sections 1183 and 1185 of the Code of Civil Procedure. The first of these sections gives a lien 'upon the property upon which they have bestowed labor or furnished materials.' The second section cited says that certain land 'is also subject to the lien.' In these provisions we see an intention of the Legislature to make the lien on the building the principal thing, and the lien upon the land on which it is situated an incident of the completion of the building, and that when the building is destroyed before completion there can be no lien against the land on which it was being erected."

Linck v. Meikeljohn, 2 Cal. App. 506, 508, 84 P. 309, is in point. The building against which a materialman's lien was enforced was erected by a trespasser who had no interest in the title to the land upon which it was erected. The owner of the land raised one of the questions here presented that the building had become and was a part of the realty and therefore not subject to the lien. In answer to this claim, the court says: "It is true that where a building is constructed in a permanent manner upon land it becomes a part thereof, but if it is constructed with a lien thereon it becomes a part of such land subject to such lien. It would be grossly inequitable to say that one who may elect to treat a structure as a trespass and remove it, may elect to retain it, with knowledge that it is burdened with a lien, and yet hold it free from such burden."

Harmon Lumber Co. v. Brown, 165 Cal.

193, 200, 131 P. 368, 370, says: "But the primary thing is the lien upon the building. The lien upon the land is incident thereto." 17 California Jurisprudence, § 15, p. 28, is authority for the rule that the lien upon the building upon which labor or material has been furnished is the primary thing and the lien on the land an incident to it, and that this rule has existed in California from the earliest times.

[6] Having reached the conclusion that the lien upon the building exists separately from the land, the unlawful detainer action by which the respondents herein had the lease declared forfeited as to the Auditorium Company, and thus obtained possession of the property, becomes immaterial. However, the lease itself provides that the lessee may erect a building, and, further, that any improvements erected could not be removed by the lessee. Thus respondents have by their own voluntary act made the building a part of their land, and therefore have taken the same, burdened with the liens of plaintiffs, and which liens do not depend upon the leasehold interest of the Auditorium Company.

Should the lien laws be so interpreted as to destroy the liens because the leasehold interest has ceased to exist, such interpretation would render such laws unconstitutional. Section 15, art. 20, Cal. Const.

[7] It is claimed by the respondents that the action of the receiver appointed by the federal court, in applying under the provisions of section 1179 of the Code of Civil Procedure to be relieved from the effect of the forfeiture of the lease and the denial of the application by the court, is binding upon appellants in this action because such application was made in a creditor's action authorized by the federal court, and was made "on behalf of himself and all other creditors of said Olympic Auditorium, Inc." However, the liens here sought to be foreclosed are not in any manner dependent upon the unlawful detainer action, but are liens upon the building itself, and, as heretofore said, do not depend upon the existence of the lease. Section 15, art. 20, Const. Cal.; section 1183, Code Civ. Proc.

[8] It is also contended by the appellants that the equities of the case are in their favor, and, as this is an action in equity, they should have been awarded a judgment of foreclosure of their liens. To this respondents answer that equity follows the law.

There can be no doubt that the equities are with the plaintiffs. They have put into the building, in labor and material, many thousands of dollars for which they have not been paid, and the building has cost the respondents nothing whatever. To turn it over to the defendants freed from the liens of plaintiffs would be grossly inequitable. While equity follows the law, we do not believe that it is necessary to give a strained construction to the law so that this costly structure may be given to the defendants without any return to the men who created it.

As said in Stimson Mill Co. v. Nolan, 5 Cal. App. 754, 760, 91 P. 262, 265, in speaking of mechanic's liens: "The right to declare such lien is based upon the theory that the materialman and laborer produce the thing upon which the lien is declared." In Jones v. Great Southern Fireproof Hotel Co. (C. C. A.) 86 F. 370, 385, it is said by the court, in relation to statutes creating similar rights of lien: "But the validity of such statutes need not be rested upon mere authority. They find sanction in the dictates of natural justice, and most often administer an equity which has recognition under every system of law. That principle is that every one who, by his labor or materials, has contributed to the preservation or enhancement of the property of another, thereby acquires a right to compensation." Similar expressions are found in many cases and are applicable to the facts of this case.

The conclusions of law drawn from the findings that the appellants were entitled to a lien upon the building down to the surface of the ground were correct, and the judgment of August 16, 1928, was the proper judgment. The conclusions of law that the plaintiffs were not entitled to a lien on said building and the judgment of October 6, 1928, based on such conclusions are erroneous.

It is therefore ordered that as to these appellants the order of the trial court of September 27, 1928, and the judgment entered October 6, 1928, be, and each one of them is hereby, reversed. It is further ordered that this cause be, and it is hereby, remanded, with directions to the trial court to enter its conclusions of law granting appellants a lien upon the Auditorium building down to the surface of the ground, and to enter its judgment in accordance with the findings of fact and, the conclusions of law thus amended, granting the lien as aforesaid.

We concur: NOURSE, P. J.; STURTEVANT, J.

125 Cal.App. 28

PEOPLE v. SUTTER et al.

Cr. 1665.

District Court of Appeal, First District, Division 2, California.

July 21, 1932.

1. Criminal law ⇐730(4).

District attorney's reference in interrogating jurors to how previous jury stood *held* not prejudicial, in view of court's action.

Facts were that district attorney, during interrogation of jurors, asked jurors if they would be influenced by fact that upon former trial of defendants jury had voted 8 to 4 for conviction, but, upon objection made, court warned jurors that they had no evidence as to how previous jury stood, that they should disregard all remarks of counsel in that matter, and that, if they were unable to do so, or if they had any other information on the subject, they should so inform him and be discharged.

2. Criminal law ⇐1160.

Whether complaining witness should have been denied credence as witness because he had violated prohibition law was matter for trial court and jury.

3. Criminal law ⇐808½.

Instruction, following statute, that witness willfully testifying falsely as to one fact should be distrusted in other parts of his testimony *held* not prejudicial (Code Civ. Proc. § 2061, subd. 3).

4. Criminal law ⇐958(3).

New trial for newly discovered evidence *held* properly denied, where affidavits disclosed that evidence might easily have been discovered before trial.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Mike Sutter and another were convicted of robbery, and they appeal.

Affirmed.

A. J. Hennessy, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and Lionel B. Browne, Deputy Atty. Gen., for the People.

NOURSE, P. J.

The defendants were tried with a jury upon an information charging robbery. A verdict for the people resulted, and the defendants have appealed from the judgment and from the order denying their motion for a new trial.

At about 10 o'clock on the evening of November 11, 1931, the defendants, in company with Raymond Hill, entered a bootlegging "joint" in the city and county of San Francisco, and, after engaging in the showing of card tricks with one Romagnolo, who was in charge of the place, Sutter and Trott each drew a pistol and forced Romagnolo to deliver the contents of the cash register—about $40—and an equal amount of money was taken from the person of Romagnolo. The three then locked Romagnolo and his helper in a rear room and left the premises. Within the hour they were captured by the police while they stood at a street corner a few blocks from the scene of the holdup. At the time of his arrest Trott held in his hand the gun used by him in the holdup and Romagnolo's purse was found in his pocket. Each of the three had some of the money on his person, and the other gun, two masks, and the remainder of the money taken was found in a search of defendants' room. These articles were shown to defendants at the police station, and both admitted their part in the robbery.

[1] On this appeal, three points are raised which we will consider in order. It is urged that the district attorney's interrogation of the jurors was prejudicial misconduct when he asked if they would be influenced by the fact that upon a former trial of these defendants the jury had voted eight to four for conviction. Objections having been made to this line of inquiry, the trial court read from the decision in People v. Carmichael, 198 Cal. 534, 547, 246 P. 62, and, with extreme care, warned the jurors that they had no evidence as to how the previous jury stood; that they should disregard all remarks of counsel in that matter; that, if they were unable to do so, or if they had any other information on the subject, they should so inform him and be discharged. Under these circumstances we cannot say that the rights of the defendants were prejudiced by this occurrence.

[2] The second point is that the evidence does not support the verdict. The argument is that, as the complaining witness was a "bootlegger" and had been convicted and served a term for violation of the federal Prohibition Act, he should be denied credence as a witness. This was, of course, a matter for the trial court and jury to determine. It is also argued that we should hold that the evidence of the previous good reputation of the defendants supported the presumption of their innocence and thus overcame the direct evidence of their guilt. Such evidence merely created some conflict and, on this appeal, we are concerned simply with the question whether there is substantial competent evidence to support the verdict. A mere reference to the statement of facts compels an affirmative answer.

[3] Criticism is made of the portion of the instruction in the terms of subdivision 3, sec-

tion 2061, Code of Civil Procedure, advising that a witness who willfully testifies falsely as to one fact is to be distrusted in other parts of his testimony. It is not suggested how this instruction could have been prejudicial to the defendants, and, as a large part of the brief is devoted to the testimony of the complaining witness and to the argument that we should not believe any of his testimony because of inconsistencies in immaterial portions of it, we conclude that this instruction was not prejudicial to either defendant.

[4] We find no error in the ruling denying a new trial. The affidavits presented endeavored to show that new evidence had been discovered subsequent to the second trial, but they also disclosed that such evidence might easily have been discovered in time for that trial.

Judgment and order as to both defendants are affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

125 Cal.App. 310

In re McGIRL'S ESTATE.

Civ. 8159.

District Court of Appeal, Second District, Division 1, California.

Aug. 9, 1932.

1. Action ⇐6.

Proceeding for payment of monthly sums to petitioner under will *held* within scope of administration proceedings and not action for declaratory relief (Code Civ. Proc. § 1060 et seq.).

2. Wills ⇐673.

Codicil bequeathing stated sum to testator's niece in trust for payment of interest to another in stated monthly installments established maintenance trust.

3. Wills ⇐684(7).

Income from amount bequeathed to testator's niece in trust for payment of interest to another in stated monthly installments *held* payable from time of testator's death.

4. Executors and administrators ⇐314(3).

Beneficiary of testamentary trust had right to move probate court for distribution of fund to trustee.

5. Executors and administrators ⇐296.

Probate court could grant distribution of trust fund to testamentary trustee whenever circumstances of estate warranted it, without awaiting final distribution of general estate.

6. Executors and administrators ⇐314(12).

Order directing executor to distribute trust fund to testamentary trustee must be reversed, in absence of evidence that executor had sufficient funds in his possession to do so.

7. Executors and administrators ⇐315(1).

Order to pay stated monthly sums to beneficiary of trust under will bequeathing stated amount to testator's niece in trust for payment of interest to another in such installments, without limitation to actual net income received as interest, *held* erroneous.

YORK, J., dissenting.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

In the matter of the estate of Thomas McGirl, deceased. From an order to distribute a maintenance fund, created by a codicil to decedent's will, to Nellie H. Barbe in trust for Mrs. Leora Branch, with direction to pay the latter a stated sum monthly, P. M. Barbe, the executor, appeals.

Reversed, with instructions.

Thad Smith, of Long Beach, for appellant.

Todd, Pawson, Watkins & Anderson, of Long Beach, for respondent.

CONREY, P. J.

Upon the 29th day of September, 1930, Thomas McGirl, a resident of the county of Los Angeles, died, leaving an estate, the larger part of which was located in Montana and a small part at Long Beach in Los Angeles county, Cal. The will of decedent, together with two codicils, was duly admitted to probate, and on November 30, 1930, letters testamentary were issued to the executor, P. M. Barbe, who proceeded with the administration of the estate.

In the first codicil to the will the testator made provision for the benefit of one Leora Branch as follows: "As Mrs. Leora Branch has been a good help in taking care of me, I hereby give devise and bequeath to my niece, Nellie H. Barbe, in trust, the sum of Five Thousand Dollars ($5,000.00), the interest upon said sum to be paid to the said Leora Branch in equal monthly installments of Twenty-five Dollars ($25.00) per month during the natural life of said Mrs. Leora Branch, provided the said Mrs. Leora Branch remains with me to the time of my death, and at her death, then said principal sum of Five Thousand Dollars ($5,000.00) to become the property of my said niece, Nellie H. Barbe, to be hers absolutely and forever.

"In the event Mrs. Leora Branch does not remain with me until my death, then in that event, I hereby give, devise and bequeath the said sum of Five Thousand Dollars ($5,000.00) to my niece, Nellie H. Barbe, to be hers absolutely and forever."

On March 3, 1931, Mrs. Branch filed in the matter of said estate a petition based upon said provisions of the codicil, and asking for the payment to petitioner of the sum of $25 per month. An order to show cause was issued, notice given, and answer filed by the executor, and the issues presented were tried by the court. Thereafter the court made an order wherein it was recited that, by virtue of the terms of said codicil, the decedent intended to and did create a maintenance trust for the petitioner, Leora Branch, payable as of and from the date of the death of Thomas McGirl; and Mrs. Branch did remain with the decedent as intended by the provisions of said codicil, and was actually being supported by him at the time of his death. Thereupon it was ordered that the executor make distribution to Nellie H. Barbe, in trust during the lifetime of Leora Branch, with directions to said trustee to pay the sum of $25 a month from and after the death of Thomas McGirl to Leora Branch. Provision was made for the filing of bonds, apparently to conform with the provisions of sections 1658 to 1662 of the Code of Civil Procedure. The executor has appealed from the judgment.

[1] In the briefs there has been some suggestion that the proceedings in the court below might be considered as an action for declaratory relief brought under the provisions of section 1060 et seq. of the Code of Civil Procedure. We are of the opinion that the parties and the court below correctly proceeded upon the theory that the proceeding was one belonging within the scope of proceedings in course of administration, and was not an action for declaratory relief.

[2-5] It is contended by appellant that the court erred in finding that Mrs. Branch remained with decedent until the time of his death as intended by the codicil; and in finding that the provisions of the codicil established a maintenance trust; and in decreeing that the allowance was payable at and from the death of the testator; and in ordering the executor to make distribution to Nellie H. Barbe in trust; and in directing the trustee to pay to Mrs. Branch the sum of $25 a month from and after the death of McGirl. There are other points listed, but those above specified will be sufficient for this decision.

We are satisfied that the codicil was properly construed as one establishing a maintenance trust, and also that the evidence was sufficient to warrant the court in determining that the petitioner did remain with the decedent to the time of his death under circumstances which sufficiently complied with that provision of the codicil. It was appropriate that the income provided to be paid out of the trust fund should be payable beginning with the time of the death of the testator. In re Mackay's Estate, 107 Cal. 303, 40 P. 558, 559. The cited case is also authority for the rule that, as beneficiary of the trust, the petitioner had the right in the probate court to move the court to make distribution of the fund to the trustee. "This distribution the court could grant, at any time the circumstances of the estate would warrant it, without awaiting final distribution of the general estate."

[6, 7] But, while we think that, so far as the questions above noted are concerned, a correct decision was made, it will for other reasons be necessary to reverse the order and remand the case for further proceedings in accordance with this opinion. The first reason is that there is not in the record any evidence to support a finding or implied finding that the executor had in possession funds with which to comply with the order and pay over the trust fund to the trustee. To meet this point it has been suggested that the court might take judicial knowledge of the steps which had been taken in the process of administration, and that it must be presumed here that the court, in the form of such judicial knowledge, had before it the necessary evidence. But no attempt has been made to show to this court that in fact there was any such evidence contained in the record of the proceedings in course of the administration of the estate. We assume, therefore, that, if we were to agree with the suggestion thus made, and if accordingly we should send for the files showing the said probate proceedings, we would not find that there was in the record any evidence that the necessary funds were in the hands of the executor. Such intimations as we can find in the record indicate the probability that there were not such funds; although it may be that on completion of the ancillary proceedings of the estate in Montana a large sum of money will come into the hands of this executor. The second reason why the order as made cannot be sustained lies in the fact that it is a flat order for the payment of the sum of $25 a month instead of being, as it should be, an order for the payment of money at that rate, but not exceeding the actual net income received, or which under proper management should be received, as interest on said trust fund. It may well be that the interest on said $5,000, either with or without any deduction of taxes or other necessary expenditures, would be less than $25 per month.

The order is reversed, with instructions to the lower court to proceed in accordance with this decision.

I concur: HOUSER, J.

I dissent: YORK, J.

125 Cal.App. 137

FAULKNER v. BROOKS et al.

Civ. 7313.

District Court of Appeal, Second District, Division 1, California.

July 28, 1932.

1. Landlord and tenant ⇐291(8).

Complaint in unlawful detainer action *held* to state cause of action (Code Civ. Proc. § 1166).

Complaint alleged that the plaintiff was well entitled to possession of the property involved.

2. Attorney and client ⇐103.

Where, shortly after judgment was entered under stipulation executed by defendant's attorney, defendant had notice thereof and accepted benefits thereunder, defendant could not thereafter complain of judgment on ground attorney's stipulation was unauthorized.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by J. E. Faulkner against Earl Brooks, W. A. Spaulding, and others. From an adverse judgment, and from an order denying a motion to vacate the judgment, the last-named defendant appeals.

Affirmed.

Edmund S. Green, of Los Angeles, for appellant.

Elijah M. Smuckler, of Los Angeles, for respondent.

HOUSER, J.

Although not entirely disclosed by the official record herein, but to some extent dependent upon undisputed statements set forth in the briefs of the respective parties hereto, it satisfactorily appears that the pertinent facts which relate to this appeal are as follows: At a time when, in accordance with the provisions of a lease, defendant Spaulding was in possession of a part of certain real property, plaintiff became the purchaser of the whole of the property at a sale which was authorized by the provisions of a trust deed. Thereupon, under the provisions of section 1161a of the Code of Civil Procedure, plaintiff served on the defendants "a three day notice to quit" possession of the property, etc.; and, on the failure and refusal of the defendants to yield to plaintiff the possession of the property, plaintiff commenced an action against defendants in "unlawful detainer" for possession of the premises. Four days after the answer to the complaint of all the defendants in the action had been filed, "a stipulation consenting to the entry of a judgment against all of the defendants was filed, and seven days later a judgment pursuant to said stipulation was entered against all of the defendants." By such stipulation, which was dated January 10, 1930, and which was signed by the attorneys who then represented the respective parties to the action, it was agreed that plaintiff was the owner of and entitled to possession of the property in question; "that possession of said premises is to be delivered up to the plaintiff on or before the 9th day of March, 1930; that if the premises are not so delivered up, the plaintiff shall have a writ of possession issued on the 10th day of March, 1930, or as soon thereafter as the plaintiff may elect; that each of the parties hereto are to pay their own costs incurred herein; that the plaintiff is not entitled to the damages prayed for in his complaint" (treble damages). On March 7, 1930, or (according to the terms of said stipulation) two days before the rightful possession of defendants of said property would have expired, defendant Spaulding presented to the trial court his notice of motion to vacate the judgment which, in accordance with the stipulation of the parties to the action, theretofore had been entered therein. In substance, the grounds of the motion were that, "without the knowledge or consent of petitioner (Spaulding), * * * and contrary to his wishes and contrary to the interest of said petitioner," his then attorney in the action signed the stipulation by virtue of which the judgment was entered against said defendant. In response to said motion, the attorney for plaintiff filed his affidavit wherein he deposed: "That the interest of W. A. Spaulding (appellant) is the same as that of the other defendants herein; that immediately after the stipulation was executed said W. A. Spaulding was in the office of this affiant, and also called on him at his place of residence. * * * That said W. A. Spaulding, after said judgment was docketed and entered, appeared at your affiant's office, in the company of Arthur C. Webb, his now attorney. * * *"

The trial court denied the motion; whereupon defendant Spaulding appealed, not only from said order by which said motion was denied, but as well from the judgment.

[1] It is first urged by appellant that, because the complaint in the action failed to "set forth the facts upon which plaintiff seeks to recover," and also failed to "set forth the circumstances of force or violence which may have accompanied the alleged * * * unlawful detainer" (section 1166, Code Civ. Proc.), the complaint failed to state a cause of action.

In connection therewith, an examination of the complaint discloses the fact that it contained an allegation that "the plaintiff was well entitled to the possession" of the prop-

erty involved in the action. In the case of City Investment Co. v. Pringle, 69 Cal. App. 416, 422, 231 P. 355, 357, wherein a similar allegation was made by the plaintiff and a similar point was raised on appeal from the judgment, in reaching a conclusion that the position assumed by the appellant in that regard was not well taken, in part the court said: "Technically, this is a conclusion of law and not an allegation of fact, and even though we were to concede that the special demurrer directed to this defect in the complaint should have been sustained, it would not warrant a reversal of the judgment in this case."

Placing reliance in such authority, it follows that the point suggested by appellant cannot be sustained.

[2] It is next contended by appellant that, without express authority from him so to do, his attorney had no power to stipulate that a judgment might be entered against said defendant. However, the conduct of defendant subsequent to the entry of the judgment renders it unnecessary that this court should consider the specific question thus submitted by appellant. From the record herein the date at which said defendant acquired knowledge or notice of the fact that the judgment had been entered against him is not disclosed. But (as appears from the affidavit of the attorney for plaintiff) the fact that the then attorney who represented said defendant was fully aware of all the facts which related to the entry of the judgment, "that immediately after the stipulation was executed said W. A. Spaulding (defendant) was in the office of this affiant (attorney for plaintiff), and also called on him at his place of residence, * * * that said W. A. Spaulding, after said judgment was docketed and entered, appeared at your affiant's office, in the company of Arthur C. Webb, his now attorney," coupled with the most significant fact that defendant remained in possession of the property up to a time which, according to the terms of the stipulation, was but two days before his right to such possession of that part of the property held by him expired, and that on the hearing of the motion defendant failed to produce the affidavit of the attorney who had formerly represented him in the matter—it was but a fair inference which the trial court was authorized to make, and which from its order may be assumed was made, to wit, that in fact defendant either had expressly authorized his attorney to make the stipulation of which defendant later complained, or that subsequent to the entry of the judgment defendant acquired notice or knowledge of the fact and thereafter ratified it. But, even without any ratification of the said assumed authorized act of his attorney, if, acting within its discretion, the trial court found as a fact that which may be legally assumed it did find, to wit, that either immediately or shortly after the judgment had been entered said defendant had notice or knowledge thereof, and thereafter accepted the benefits which accrued to him under the stipulation, among which were the right of possession of the property for a period of approximately two months, that he be not compelled to pay plaintiff's costs in the action, nor treble damages to which plaintiff might become entitled, it is clear that defendant would not then have, nor now has, just cause for complaint.

The final contention by appellant to the effect that, in rendering the judgment, and subsequently in denying the motion to vacate the same, the trial court abused its discretion, is entirely lacking in merit.

The judgment and the order from which the respective appeals herein are taken are, and each of them is, affirmed.

We concur: CONREY, P. J.; YORK, J.

125 Cal.App. 44

CONKLIN v. LING et al.

Civ. 7455.

District Court of Appeal, Second District, Division 1, California.

July 22, 1932.

Rehearing Denied Aug. 15, 1932. Hearing Denied by Supreme Court Sept. 19, 1932.

Libel and slander ⇐9(8).

Publication stating that, due to misunderstanding with author, it would be impossible to start new story in paper as advertised, *held* neither libelous on its face nor capable of being given libelous quality by means of amendment to complaint.

HOUSER, J., dissenting in part.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Action by Mary Greer Conklin against Harvey R. Ling and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Mary Greer Conklin, in pro. per.

Ralph W. Swagler, of Burbank, for respondents.

CONREY, P. J.

The facts are stated in the dissenting opinion of Mr. Justice HOUSER. We are all in agreement that the court did not err in sustaining the demurrer to the plaintiff's com-

plaint. We of the majority, however, think that the alleged publication of which plaintiff complained was neither libelous on its face nor capable of being given a libelous quality by means of any amendment to the complaint. We therefore are of the opinion that the court very properly dismissed the action without first giving plaintiff permission to file an amended complaint.

There being no argument presented in support of the appeal from order denying motion to strike cost bill, that appeal is deemed to be without merit.

The judgment is affirmed. The order is affirmed.

I concur: YORK, J.

HOUSER, J. (dissenting).

From the complaint filed in the lower court in pertinent substance it appears that plaintiff, as an author, and the defendants, as publishers of a newspaper, theretofore had agreed one with the other that the defendants would publish as a serial in their newspaper a certain story which had been written by plaintiff and as to which, with the knowledge of the defendants, plaintiff was desirous of copyrighting both in the United States and in Great Britain; that (as alleged), "in order to secure a copyright in the United States an affidavit must accompany the application for copyright stating that the 'matter is printed from type set within the borders of the United States'; that in order to copyright the same material in Great Britain there must, under British law, be simultaneous filing for copyright in Washington, D. C., and in the British Museum in London, the British law allowing only fourteen days for transportation by mail as a divergence in dates of filing; that unless British copyright is secured simultaneously with the copyright in the United States the same matter could never later be copyrighted in Great Britain."

The complaint contains further allegations to the effect that, notwithstanding full knowledge possessed by the defendants of the foregoing facts, and without having theretofore caused the entire matter of the story written by plaintiff to be set in type as contemplated by the said copyright regulations, the defendants caused a "large display advertisement—announcement" to be inserted in a publication of their newspaper that the story "would begin in a few days"; that immediately thereafter plaintiff unsuccessfully endeavored to perfect arrangements with the defendants so that, in order to have the said story copyrighted, a compliance would be had with the required legal conditions precedent with reference to having the said story in type prior to the publication of any part or installment thereof; and, upon failure and refusal of the defendants to co-operate with plaintiff to that end, "directed the newspaper not to publish any more announcements until they could arrange to set the type of the entire story and run off sheets which could be forwarded to the British Museum in London"; that thereupon, without and in the absence of any "misunderstanding" on the part of either of the parties regarding the situation, the defendants "maliciously published of and concerning the complainant the following false, defamatory, and unfair professional libel: 'Due to a misunderstanding with the author, it will be impossible to start the new story "Enduring Love" advertised to start today, Monday, Feb. 18th.'"

Following an allegation contained in the complaint to the effect that the statements contained in said publication were false, etc., the allegation is made: "That the said professionally defamatory, false and unfair publication by innuendo said, and by innuendo meant to state, and was so taken by newspaper readers to mean, that the author, Mary Greer Conklin, the complainant, was irresponsible and did not keep her writing engagements; that the said professionally defamatory, false and unfair publication by innuendo said, and by innuendo meant to state, that the author, Mary Greer Conklin, the complainant herein, was not to be depended upon."

Although by several different subsequent allegations contained in the complaint plaintiff endeavored to set up facts from which malice of the defendants toward plaintiff might be found to have existed both before and after the alleged libel was published—neither in form nor in substance were any pertinent extrinsic facts, nor any inducement nor innuendo alleged other than such as those or that respectively to which attention hereinbefore has been directed.

The lower court sustained the defendants' demurrer to plaintiff's complaint "without leave to amend" the same, and thereupon rendered judgment against plaintiff and in favor of the defendants. It is from such judgment, as well as from an order made by said court by which plaintiff's motion to strike defendants' cost bill was denied, that the instant appeals are taken.

Although the point is neither suggested by the respondents nor discussed in the prevailing opinion, in order that no merited criticism may be directed toward the appeal by reason thereof, it may be stated that, in view of the fact that the demurrer to the complaint was sustained "without leave to amend"—to enable plaintiff on appeal from the judgment not only to protest the sufficiency of the complaint, but as well to attack the validity of the order and the ensuing judgment by which her right to amend the complaint was denied, she was not required as a condition precedent to the assertion of such right to first make a

motion for leave to amend the complaint and thereafter have such motion denied by the trial court. Schaake v. Eagle Automatic C. Co., 135 Cal. 472, 480, 63 P. 1025, 67 P. 759; Metzger v. Vestal, 76 Cal. App. 409, 416, 244 P. 942.

It is clear that, leave to amend the complaint having once been denied by the trial court, it should be presumed that thereafter, had plaintiff presented her formal motion to amend her complaint, in substance an order identical with that formerly made by the trial court again would have been made. The law does not demand the performance of an idle act.

On consideration of the alleged libelous language it becomes manifest that, if actionable, it must be so because by its covert meaning, as was intended by its publisher, and as was rightfully understood by the readers of the newspaper in which the words were published, some aspersion was cast upon the character of plaintiff which was harmful to her in the pursuit of her occupation.

It is obvious that in its ordinary significance, and as commonly understood, no libelous meaning could attach to the language of which plaintiff complains; but it is contended by appellant that, as explained by the "extrinsic facts," or the inducement, and the colloquium, the published words "due to a misunderstanding with the author" constituted a libel of plaintiff which had a tendency to injure her in her occupation. Section 45, Civ. Code. It therefore becomes apparent that, somewhat reduced in its expression, the question here presented is whether, by the allegations contained in the complaint, plaintiff set forth such facts that from them it should follow as a matter of law that a cause of action either was or might have been stated.

Preliminarily, it should be noted that "words which on their face appear to be entirely harmless, may, under certain circumstances, convey a covert meaning, wholly different from the ordinary and natural interpretation usually put upon them" (16 Cal. Jur. 39, and authorities there cited); and that, if by proper pleading and competent evidence such hidden meaning be respectively averred and established, the plaintiff may become entitled to recover such a judgment for damages against the defendant as the evidence may show resulted to the plaintiff by reason of the publication of the alleged libel.

As apt illustrations of the application of such rule, see Maynard v. Fireman's Fund Insurance Co., first reported in 34 Cal., at page 48, 91 Am. Dec. 672, and later in 47 Cal., at page 207, where the alleged libel consisted in the published statement that "this company, for good and sufficient reasons, has resolved to dismiss D. D. Maynard from its service." Likewise, in the case of Ingraham v. Lyon, 105 Cal. 254, 38 P. 892, in which it appears "that defendants were members of a Merchants' Protective and Collection Association, doing business in Oakland; that they caused to be entered upon the 'black list' of the association the following: 'When entered, February 13, 1892; name of delinquent debtor, George Ingraham; occupation, porter; residence, 718 Henry street; when account closed, month, January, day, 2nd, year, 1892, amount, $14.25, by whom reported, J. L. Lyon & Son.'" See, also, Grand v. Dreyfus, 122 Cal. 58, 54 P. 389, 390, in which case the plaintiff complained of the words, "If he (plaintiff) continues to sell (steal) my hogs, I [defendant] will send him where he was another time. * * *"

As applied to an action for damages for a libel of the character of that here under consideration, it is a well-recognized rule of pleading that, in order to show the connection between what ordinarily would be understood as innocent and harmless words, and the sinister or injurious meaning, or the innuendo, which it is claimed was by the publisher thereof intended to be, and which in fact was, understood by the readers of such published words, the extrinsic circumstances, or what ordinarily is termed the inducement, must be set forth in the complaint. 16 Cal. Jur., 86 et seq., and authorities there cited. But, notwithstanding the existence of the rule that the utterance or the publication of apparently harmless words, when properly and sufficiently supported in the complaint by allegations of extrinsic facts, may be actionable, nevertheless it is equally well-settled law that the innuendo, or the declaration by the plaintiff in the action by which he ascribes the meaning which was intended by the defendant and the manner in which the libel or the slander was understood by the readers or the hearers thereof, can be no broader than is justified or warranted by the facts upon which such attributed meaning rests. 16 Cal. Jur. 88; Bates v. Campbell (Cal. Sup.) 2 P. (2d) 383; Pollock v. Evening Herald Pub. Co., 28 Cal. App. 786, 154 P. 30, and authorities in such cases respectively cited. In other words, the innuendo, like an allegation of fraud, is nothing more nor less than a pleading of an ultimate fact (or possibly a conclusion of law), which in order to be legally effective must be supported by extrinsic facts which have been pleaded in the complaint.

Adverting to the extrinsic facts or the inducement set forth in the complaint herein, and coupling it with the alleged innuendo therein contained, it appears that the gist of the charge is that, as between plaintiff and the defendants, although complete harmony existed in the minds of such respective parties relative to the requirements of copyright regulations, and incident thereto the necessity that the entire manuscript theretofore prepared by plaintiff should be actually in "type" prior to the publication of any part of it—the

defendants falsely published the statement that, because of a "misunderstanding" with the author, the story theretofore written by plaintiff could not be published; and by such statement intended to declare, and by the readers thereof was understood to mean, that plaintiff was "irresponsible and did not keep her writing engagements; * * * was not to be depended upon."

It will be noted that, other than that in effect the defendants asserted that a "misunderstanding" existed between them and plaintiff regarding the publication of the story of which plaintiff was the author, the complaint contained no averment of extrinsic facts or inducement by or from which it might be reasoned and thereby legally concluded that by the use of the word "misunderstanding" the defendants had intended to assert, and the readers of their newspaper had understood the defendants as asserting, that plaintiff was "irresponsible," or that she could not "be depended upon." Exactly as is stated in the case of Mellen v. Times-Mirror Co., 167 Cal. 587, 591, 140 P. 277, 278, Ann. Cas. 1915C, 766, in the inducement proper, "no facts are alleged upon which it can reasonably be claimed that this charge imputed to plaintiff anything dishonorable or disreputable, or anything that could expose him to hatred, contempt, ridicule, or obloquy, or cause him to be shunned or avoided by any one, or that could cause him any injury, * * *" or (as applied to the instant case), which could have a tendency to injure her in her occupation. Section 45, Civ. Code. Particularly does the inducement not contain any sufficient statement of facts by or from which it might or does even inferentially appear that by the use of the alleged libelous words any hidden or covert meaning of a sinister or harmful significance was either intended or expected to be conveyed, or was so understood by the readers of the published article.

In the case of Mahana v. Echo Publishing Co., 181 Cal. 233, 237, 183 P. 800, 802, in commenting upon a situation similar to that here under consideration, the Supreme Court said: "Unless the article was of such a nature that in view of extrinsic facts alleged and proved it conveyed to the readers of the newspaper charges of dishonesty and financial irresponsibility of plaintiffs, of course the innuendo will not give it that sinister significance. Mellen v. Times-Mirror Co., 167 Cal. 587, 140 P. 277, Ann. Cas. 1915C, 766." To the same effect, see Chavez v. Times-Mirror Co., 185 Cal. 20, 25, 195 P. 666.

As stated in the prevailing opinion herein, the members of this court are in accord one with the other in the conclusion that, in view of the adjudicated cases by the Supreme Court and the Court of Appeal of this state, the demurrer to the complaint was properly sustained. But my inability to completely agree with my associates arises from the order of the trial court by which plaintiff was denied the right to amend her complaint.

It must be apparent that, if from the allegations contained in the complaint it appears that the defect in attempting to state a cause of action is as to form only, or that either the stated or the obviously omitted facts, or both of them combined, were such that, had they been correctly and scientifically pleaded, a cause of action might have been stated, it should follow that the denial to the plaintiff of the right to amend her complaint was prejudicial to her substantial rights in the premises. 21 Cal. Jur. 121, and authorities there cited. In other words, unless it affirmatively appear that the complaint is incapable of amendment so as to state a cause of action, ordinarily leave should be granted to plaintiff to amend his complaint.

The theory upon which the trial court is empowered to deny to a plaintiff the right to amend his complaint rests upon the incontrovertible assumption that by no possible combination of the facts surrounding the transaction, or condition of which the plaintiff complains, may he state a cause of action. Manifestly the proper function and duty of the court is to administer equal and indiscriminative justice as between parties before it—not to deny justice to either or any of them. If on consideration of the complaint in an action, irrespective of either the allegations which it contains, or those which in reason might thereafter be inserted therein, under and in pursuance of the law of the land, the trial court be authorized irremediably to sustain a demurrer thereto "without leave to amend," the perpetuation of an apparent arbitrary and autocratic power consistent only with the disposition, rights, and liberties of man as exercised by an absolute monarchy would be threatened, if not be actually existent. Fortunately in this jurisdiction the invariable rule has been adopted that "it is error to sustain a general demurrer without leave to amend, unless it appears that the complaint is incapable of amendment in a radical particular." 21 Cal. Jur. 121, and authorities there cited. Nor in an action for damages which arises from an alleged libel should the rule differ in that particular from the rule which is applicable in any other action.

From a consideration of the nature of the action and the allegations of the complaint constituting the extrinsic circumstances or the inducement, to my mind it does not affirmatively appear that in no possible condition or circumstances might additional or substituted allegations not be made which, together with those now appearing in the complaint, might constitute a sufficient statement of a cause of action. It may be a fact that because of inadvertence, or of the lack of experience of plaintiff in matters of the character of that here under consideration, she has

failed to appreciate the existence of certain relevant and material facts which, if properly pleaded, would at least aid in the proper and scientific preparation of her complaint. As an indication that in the inducement proper plaintiff did not exhaust her opportunities to lay a foundation either for the alleged innuendo which she claims was intended, or for some other innuendo which might be supported by the extrinsic facts, the later allegations of her complaint by which the malice of defendants was pleaded may be cited. Such allegations were as follows:

"That showing the malice of said professionally defamatory, false and unfair statements in said publication the complainant avers that the defendants Harvey R. Ling, one of the high officers of the Review Ptg. Co., and Mrs. Lillian Harris Greer, another of the high officers of the Review Ptg. Co., and Miss May Read, another high officer of the Burbank Review Pub. Co., have stated repeatedly that the complainant, Mary Greer Conklin, is crazy; that she is 'an educated fool' and a 'writing fool'; that nobody could get along with her; that the said Harvey R. Ling laughed sardonically when he discussed the tactics he quietly pursued with regard to publishing the story 'Enduring Love' and how with glee he noticed that those tactics worried the complainant; that he stated months later apropos of publishing a want advertisement the complainant had prepared for another member of the family that he would not publish said advertisement because the complainant had written it—not if anybody paid him a million dollars for so doing; that by other and divers ways he has shown malice not only toward the complainant but toward other immediate members of her (the Greer) family as well. * * *

"That showing further the malice of said false, professionally defamatory and unfair publication complainant avers that the said Harvey R. Ling and the Review Ptg. Co. through others of its high officers intended to state (coupling their own repeated verbal statements that the complainant was 'crazy' with the professionally defamatory, false and unfair publication) and by innuendo did state that the author and complainant was crazy and therefore resorted to ruses ('misunderstandings') in her professional writing engagements; that the readers who had heard these verbal accusations that the author (because of certain sociological work she had done in Burbank) was 'crazy' so took the publication to mean by innuendo that the author and complainant had thus given another example of her 'craziness.'"

In the case of Grand v. Dreyfus, 122 Cal. 58, 63, 54 P. 389, 391, it is said: "It is not material where the matters of inducement appear in the complaint—whether before or after the statement of the language published —although logically they should precede the words spoken."

In the same case, on page 63 of 122 Cal., 54 P. 389, 391, relative to the allegation of extrinsic facts, the following language appears: "* * * We cannot regard this [a specified allegation] as in any sense explaining the situation of and circumstances surrounding the parties, or as explaining what the defendant meant by saying, 'If he continues to sell my hogs.' It is alleged that the hearers understood defendant to mean 'steal my hogs'; but does the complaint disclose enough extrinsic facts from which alone to warrant us in holding that the hearers had a right to put such construction on the language used, or that as matter of law his language had such meaning? We think not. It certainly cannot be the law that a defendant must answer to the charge of slander whenever, without reason, some bystander attributes to his language a meaning wholly different from the natural import of the language used. There should be sufficient inducement alleged somewhere in the complaint from which, when proven to be true, it would be fair and reasonable to say, as matter of law, that defendant intended, in using the language, to charge that the plaintiff was guilty of the crime, or the act giving rise to the alleged slander."

However, neither in the case of Maynard v. Fireman's Fund Insurance Co., 34 Cal. 48; Id., 47 Cal. 207, nor in Ingraham v. Lyon, 105 Cal. 254, 38 P. 892, is it in anywise suggested that in framing a complaint and in alleging extrinsic facts or inducement the plaintiff must go to anything like the length suggested in the case to which reference has just been had.

But, even relying exclusively upon the principle announced in the case of Grand v. Dreyfus, 122 Cal. 58, 54 P. 389, it would seem clear that, if by proper foundational allegations of extrinsic facts and circumstances in the complaint it should appear that, by the publication by the defendants of a statement that "due to a misunderstanding with the author," etc., the defendants falsely, and without any exemption of privilege, meant to charge, and that the readers of the newspaper published by the defendants "had a right to put such construction on the language used," and in fact understood the defendants to mean, that plaintiff was "crazy"; that she was "an educated fool; * * * a writing fool; * * * resorted to ruses ('misunderstandings') in her professional writing engagements"; and had "thus given another example of her craziness"—in substance, if not in form, the complaint contained required basic elements for the statement of a cause of action. Maynard v. Fireman's Fund Ins. Co., 47 Cal. 207; Ingraham v. Lyon, 105 Cal. 254, 38 P. 892. Of course, it may be that, as apparently is required by the respective rulings

to which attention has been directed, plaintiff would not have been successful in any attempt which she might have made to establish a proper and sufficient connection between the word "misunderstanding" and either of the several or the combined epithets or characterizations which, as alleged, the defendants expressed regarding plaintiff, her mentality, or her business habits, and consequently could not have laid a sufficient foundation for her conclusion as to what she alleged was intended by the defendants by their said publication, or as to how the language so employed by the defendants was rightfully understood by the readers of the newspaper; but to my mind, considering the existing conditions, at least an opportunity should have been afforded plaintiff to so amend her complaint as to comply, if possible, with the legal requirements of the situation.

125 Cal.App. 100

O'BRIEN v. EDENS.

Civ. 7390.

District Court of Appeal, Second District, Division 1, California.

July 26, 1932.

1. Trial ⇐228(1).

That unnecessarily large number of instructions was given on damages was not alone ground for reversal.

2. Trial ⇐295(11).

That some instructions did not limit consideration respecting future conditions to damages reasonably certain to be suffered *held* not to require reversal where all instructions on damages considered together correctly declared rule (Civ. Code, § 3283).

3. Trial ⇐228(1).

Trial court need not state all law applicable in single instruction.

4. Damages ⇐130(1).

$10,000 for broken leg, contusions, sprain of left leg, and numerous cuts and bruises, involving several months' confinement in hospital, *held* not excessive.

5. Trial ⇐241.

In action for injuries by being run down by backing automobile, reading to jury alleged inapplicable statute *held* not error where jury could not have been misled.

6. Negligence ⇐89(1).

Joint enterprise doctrine is inapplicable to actions by one joint adventurer against another for injuries due to latter's negligence.

7. Automobiles ⇐181(1).

Joint enterprise doctrine *held* not applicable to exonerate motorist from liability for running down his business partner, sent to flag traffic, while backing automobile.

Even if plaintiff and defendant, who were partners in restaurant business, were engaged in joint enterprise in operating automobile when it broke down near garage, defendant who ran down plaintiff, who had been sent by defendant to flag traffic in back of automobile so as to permit defendant to back automobile to garage, was not exonerated from liability for negligence by doctrine of joint enterprise, since plaintiff's flagging of traffic had nothing to do with operation of automobile which was left entirely in hands of defendant.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Joseph O'Brien against R. W. Edens. Judgment for plaintiff, and defendant appeals.

Affirmed.

George H. Moore, of Los Angeles, for appellant.

Russell H. Pray, of Long Beach, for respondent.

CONREY, P. J.

Action to recover damages for personal injuries received by reason of alleged negligence of the defendant. Judgment was entered in accordance with a verdict for the plaintiff in the sum of $10,000. Defendant appeals from the judgment.

While appellant and respondent were returning from Los Angeles to Long Beach in a Cadillac automobile driven and operated by appellant, mechanical trouble developed in the car. Edens drove the car to the side of the road and asked O'Brien to go to a service station, which was about two hundred yards away, and get a mechanic to repair the car. After examining the automobile, the mechanic stated that he could do nothing there and desired to know if the car could be driven back to the service station. According to the testimony of appellant, he said to the respondent: "The traffic is very thick here on the street at this time of night, and I am afraid to turn around, I am afraid I will kill my engine, but if you will flag the traffic behind me I can safely back up to this garage." (Supp., fol. 552.) Respondent accordingly walked around the car to the rear thereof, and had gone a distance of some five or ten feet when the car, driven by appellant, struck and ran over respondent. Respondent suffered a comminuted fracture of the right leg, contusions above the

left eye, a sprain of the left leg, and numerous cuts and bruises.

[1] Appellant cites, as his first ground for reversal, that "the court erred in repeating some eight times the same proposition concerning the right of the plaintiff to recover damages; and the measure is incorrectly stated." From an examination of the instructions referred to and the instructions taken as a whole we find no merit in appellant's contention. These criticized instructions related to the measure of damages to be awarded in the event of a verdict in favor of the plaintiff. It may be conceded that the instructions on this subject might have been reduced in number without loss of clarity, but the instructions upon other phases of the case must have made it entirely clear to the jury that the court was not expressing any opinion to the effect that the plaintiff was entitled to a verdict in his favor. The fact that an unnecessarily large number of instructions was given on the subject is not of itself a ground for reversal of the judgment. Bergen v. Tulare County Power Co., 173 Cal. 709, 721, 161 P. 269.

[2, 3] With regard to the same instructions above mentioned, appellant contends that the instructions were erroneous in that, with respect to future conditions, they did not limit the jury to considering "only such damages as are reasonably certain to be suffered in the future." The rule governing this matter is stated in section 3283 of the Civil Code. "Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future." There are several instructions on this subject, and in some of them the court did not use the customary language found in the quoted section of the Civil Code. For instance, the court in one of the instructions advised the jury that they should take into consideration "such prospective suffering and loss of health, if any, as the jury may believe, from all the evidence before them in this case, he has sustained, or will sustain by reason of such injuries." But in another instruction the court said: "If you find for the plaintiff, and it appears from the evidence with reasonable certainty that plaintiff's physical condition will be impaired in the future by reason of said accident, or that plaintiff will suffer inconvenience or loss therefrom, it is your duty to award such sum as will, in your opinion, compensate him therefor." Reading the instructions in connection with each other, they correctly declare the rule of certainty which must be the basis of damages for detriment resulting in the future. A trial court is not required to state all of the law applicable to the case, in a single instruction. Peak v. Key System Transit Co., 88 Cal. App. 354, 365, 263 P. 578.

[4] In his first assignment of error appellant also states that the verdict is excessive in amount. The injuries received by the plaintiff included a broken leg, and other injuries hereinabove mentioned, and he suffered great pain during several months of confinement in the hospital. The award was not so large, in comparison with the damages, as to justify this court in declaring that the verdict was controlled by passion or prejudice.

[5] Appellant urges in his second point for reversal that "the court erred in quoting in substance certain sections of the Motor Vehicle Act not applicable to plaintiff and defendant." The reading of said quoted sections of the California Vehicle Act, in connection with the other instructions given, could not have misled the jury upon either the facts or law of this case. (See Suppl. to App. Brief, fols. 674, 683, 691, 693, being instructions identified as p. 8, p. 18, p. 24, and p. 27.)

[6, 7] In addition to defendant's denial of his own negligence, and his plea charging contributory negligence of the plaintiff, the defendant attempted to make the further defense that plaintiff and defendant were engaged in a joint business and in a joint undertaking in making the trip between Los Angeles and Long Beach during which this accident occurred, and that plaintiff and defendant, with a mechanic, were engaged in a joint endeavor to get the car to the garage for repairs so that plaintiff in particular could get back to the restaurant in which plaintiff and defendant were jointly interested, in order that plaintiff might attend to the evening's business in that restaurant. Evidence having been introduced in support of this defense, defendant requested the court to give to the jury certain instructions declaring and applying to the facts of this case the rule of law, in substance to the effect that if the jury found that both plaintiff and defendant were jointly engaged and acting together in accomplishing the movement of the automobile and were engaged in a joint and common enterprise, then that the negligence, if any, of the defendant must be imputed to the plaintiff, "and if you find that there was such a joint undertaking your verdict must be for the defendant." It is now contended by appellant that the court erred in refusing to give to the jury the instructions proposed by him dealing with this particular defense. Two decisions are cited by appellant as authority on this question. In Callahan v. Harm, 98 Cal. App. 568, 577, 277 P. 529, the rule of imputed negligence in connection with the joint prosecution of a common purpose was stated and approved, but was held not applicable to that case, inasmuch as the plaintiff's authority with respect to control of the agencies employed did not include any right to direct the movements of the person who was operating the machine. In Bry-

ant v. Pacific Electric Ry. Co., 174 Cal. 737, 742, 164 P. 385, 387, the court declared its approval of the rule or principle of imputed negligence in accordance with an Illinois decision, as follows: "There can be no such thing as imputable negligence, except in those cases where such a relation exists as that of master and servant or of principal and agent. In order that the negligence of one person may be properly imputed to another, they must stand in such relation of privity that the maxim qui facit per alium facit per se directly applies."

The principal instruction on this matter, which appellant contends that the court erred in refusing to give to the jury, reads as follows: "If you believe from the evidence in this case, that plaintiff and defendant were at the time of and prior to the accident involved herein engaged in a business or undertaking in which both of them were interested, and if you believe both of them had a controlling voice and authority in the undertaking and business, and if you believe that after trouble with the automobile developed, they were both jointly engaged in an effort to have the automobile repaired or moved to a place where it could be repaired and both of them were acting together in accomplishing this movement of the automobile, then I instruct you that for that purpose they were engaged in a joint and common enterprise and undertaking, and if you find that they were so engaged then the negligence, if any, of the defendant, is imputed to the plaintiff and likewise the negligence, if any, of the plaintiff, is imputed to the defendant, and if you find that there was such a joint undertaking, then your verdict must be for the defendant."

We find that this would be an erroneous instruction. In no case to which the attention of this court has been directed in which has been considered the question of liability for a negligent act resulting in injury, committed by one individual as against another or others, all of whom are engaged in a common or joint enterprise, has it been held that because of such relationship of the several parties one toward the other or others, an immunity from liability exists for the commission of such tortious act. To the contrary, although the authorities by no means are numerous such as are available indicate that "the doctrine of joint enterprise * * * has no application to actions brought by one joint adventurer against another to recover for injuries due to the latter's negligence" (45 Cor. Jur. 1021, and authorities there cited); and with the rule thus announced this court is in accord.

But even considering the existence of a principle of law in harmony with that for which appellant contends, as disclosed by the record herein, the facts which surrounded the happening of the accident in question were such as to preclude the proper application of any such rule. It may be conceded that there was evidence showing that plaintiff and defendant were partners in the restaurant business, and were both interested in an early completion of their journey so that plaintiff could resume his work in the restaurant; that by reason of this joint interest they were co-operating in an endeavor to move the automobile to the service station; that the plaintiff had gone to the rear of the automobile in order to be in a position "where he could flag the traffic"; that is to say, warn people to keep out of the way of defendant's automobile. But such business of flagging the traffic had nothing to do with the operation of the automobile, which was left entirely in the hands of the defendant.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

125 Cal.App. 219

ANDREWS v. TINKLER.

Civ. 7432.

District Court of Appeal, Second District, Division 1, California.

Aug. 1, 1932.

1. Automobiles ⇐245(14).

Whether defendant's automobile reached intersection at approximately same time as plaintiff's automobile so as to be entitled to right of way under statutory rule *held*, under evidence, for jury (St. 1923, p. 560, § 131, as amended by St. 1925, p. 412, § 15).

2. Appeal and error ⇐1011(1).

Appellate court cannot inquire into weight of evidence, where findings can reasonably be based on conflicting evidence.

3. Negligence ⇐136(9).

Contributory negligence is law question only when evidence supports no other legitimate inference than that plaintiff was contributorily negligent.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Byron P. Andrews against J. C. Tinkler. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hiram T. Kellogg, of Los Angeles, for appellant.

Carl B. Sturzenacker, of Los Angeles, for respondent.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

TAPPAAN, Justice pro tem.

This is an appeal from a judgment rendered in plaintiff's favor. The cause of action as alleged in plaintiff's complaint is one for damages arising from a certain collision had between automobiles driven by the respective parties to this action. The complaint alleges negligence on the part of defendant in the operation of his automobile as the cause of the damage. The answer of defendant is, in effect, a general denial of the allegations of the complaint, and also pleads by way of defense, contributory negligence upon the part of the plaintiff and that the damage was the result of unavoidable accident. The only questions presented here have to do with the allegations of negligence.

The facts as disclosed by the record, in brief, are as follows: Plaintiff was driving his car in a southerly direction upon a paved road or street while defendant with two passengers in his car was driving east upon another road that intersected the road upon which plaintiff was operating his car at a right angle. The view of the respective drivers of the cars in question was unobstructed, and they were able to see each other as they approached the intersection of the roadways for five hundred feet or more. One witness placed the distance as one thousand feet. Both drivers testified that they saw the other car approaching the intersection. The testimony on this point is that defendant saw plaintiff when he was three hundred feet from the intersection, while plaintiff testified that he saw defendant's car when it was five or six hundred feet from the same point. There is some conflict as to the speed at which the cars approached the intersection. Defendant testified his car was traveling at forty miles per hour, and that he reduced his speed to fifteen or twenty miles per hour at the time of the collision, and that plaintiff's speed was twenty-five or thirty miles per hour, while plaintiff's testimony is to the effect that defendant's speed was fifty miles per hour and that his (plaintiff's) speed at the time of the accident was twelve to fifteen miles per hour. The collision of the two cars took place at a point at or near the south line of the roadway upon which defendant was driving and near the center line of the street upon which plaintiff was operating his car; that is to say, that plaintiff had crossed or nearly crossed, from the north, when defendant coming from the west collided with him. Defendant and his witnesses testified that the cars entered the intersection at about the same time, while plaintiff testified that some thirty or forty feet before he entered the intersection defendant's car was three hundred feet from the intersection and that he watched it as he entered the intersection and as he crossed it. "I had plenty of time, in my opinion, to cross safely. Q. You were satisfied then you were there first, and so you kept going, is that right? A. Yes." Plaintiff's car was overturned by the impact of the collision and came to rest against the pumps of a filling station some twenty-five feet southeast of the intersection. Defendant's car appears to have traveled but a short distance after the accident.

[1, 2] Appellant's first specification of error is that there is no evidence that he was operating his car in a careless, negligent, and unlawful manner at the time of the collision with plaintiff's car. In support of this contention, appellant cites section 131 of the California Vehicle Act (Stats. 1925, p. 412, § 15), which at the time of the accident read in part as follows: "(a) When two vehicles approach an intersection of public highways at approximately the same time, the vehicle approaching from the right shall have the right of way, provided such vehicle is traveling at a lawful speed." Appellant states his position to be that he approached the intersection at approximately the same time that plaintiff did, and that he was traveling at a lawful speed. To make use of appellant's own language: "Hence we contend * * * that the plaintiff has failed to show by a fair preponderance of the evidence that the defendant did not fulfill the duty required of him to avoid the collision when he saw that the plaintiff did not intend to yield the right of way." The question presented to the trial court for determination was clearly one of fact, and there was evidence of a substantial nature to support the finding made by the court that appellant was negligent. The evidence viewed in a light most favorable to appellant, at best, presents but a conflict in the evidence. "The record shows conflicting evidence, but it discloses some evidence upon which the findings can reasonably be predicated, and under such circumstances this court may not inquire into the weight of the evidence." Kuck v. McConnell, 39 Cal. App. 266, 267, 178 P. 533, 534.

[3] Appellant next contends that respondent was guilty of contributory negligence as a matter of law. The trial court made a finding negativing this contention, and appellant's position is that this finding of fact is not sustained by the evidence. In the case of White v. Davis, 103 Cal. App. 531, 540, 284 P. 1086, 1090, the court says: "Contributory negligence 'is a question of law only when the evidence is of such a character that it will support no other legitimate inference than that in the one case the plaintiff was guilty of contributory negligence. * * * When the evidence is such that the court is impelled to say that it is not in conflict on the facts, and that from those facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his own injury, then, and only then, does the law step

in and forbid plaintiff a recovery. * * * Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury.'" From an examination of the record presented here, it appears that there was evidence of substantial and satisfactory nature to support the finding as made by the trial court, and, as has been said heretofore, the evidence presents, at best, but a conflict. "Reasonable minds might draw different conclusions upon the question of negligence," and, the question being one of fact, and having been decided by the trial court, may not be questioned upon appeal.

The judgment appealed from is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

125 Cal.App. 223

In re DAWSON'S ESTATE.

Civ. 8236.

District Court of Appeal, Second District, Division 2, California.

Aug. 2, 1932.

Appeal and error ⇐766.

Where appellant's brief did not contain separate presentation of points, appropriate headings, or list of authorities, violating governing rule, appeal was dismissed (Rules of Supreme Court and District Courts of Appeal, rule 8).

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Proceedings in the matter of the Estate of James E. Dawson, deceased, wherein Hiram Warren, administrator with the will annexed, and another, filed claims for funeral expenses and attorney's fees, opposed by the California Lutheran Hospital and another. From an order allowing the claims in less than the amount claimed, the claimants appeal.

Appeal dismissed.

George S. Hupp, of Los Angeles, for appellants.

Gibson, Dunn & Crutcher, of Los Angeles, for respondents.

CRAIG, J.

The administrator with the will annexed in the matter of the estate of James E. Dawson, deceased, appealed from an order allowing funeral expenses and attorney's fees in amounts less than those claimed by them.

The appellants' briefs contain no separate presentation of points, appropriate headings, or list of authorities, and are not so prepared as to comply with rule VIII of the Rules of the Supreme Court and District Courts of Appeal. For that reason the appeal is not considered.

The appeal is dismissed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

125 Cal.App. 383

WILSON v. CALIFORNIA CAB CO. et al.

Civ. 7253.

District Court of Appeal, Second District, Division 1, California.

Aug. 18, 1932.

1. Automobiles ⇐245(6).

In action for death of pedestrian, negligence of driver of cab which struck pedestrian at street intersection *held* question for jury.

2. Automobiles ⇐245(72).

In action for death of pedestrian struck by cab, decedent's contributory negligence in attempting to cross street at intersection *held* question for jury.

3. Trial ⇐304.

In death action arising out of automobile accident, jurors' conduct in conversing while examining map, if improper, *held* not to warrant mistrial.

Alleged misconduct of jury, in discussing case before it was finally submitted to them, consisted of a conversation between certain jurors while examining a map during recess of court after both parties had rested. The map exhibited the scene of the accident and had been admitted in evidence and its correctness stipulated to.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Belle M. Wilson against the California Cab Company, a co-operative business association, and others. Judgment for the plaintiff, and the defendants appeal.

Affirmed.

B. P. Gibbs and Libby & Sherwin, all of Los Angeles (M. Tellefson, of Los Angeles, of counsel), for appellants.

Freston & Files and John P. McGinley, all of Los Angeles (Ralph E. Lewis, of Los Angeles, of counsel), for respondent.

YORK, J.

Appeal from a judgment awarding damages to plaintiff for the death of her husband caused by the alleged negligence of defendants.

The decedent was walking from north to south in a safety zone across Hollywood boulevard at the intersection of Wilcox avenue in the city of Los Angeles, when he was struck by a taxicab owned by defendant Vincent and coming from the east, while operated by defendant Mider. Decedent thereby received injuries which later resulted in his death.

From a judgment for the sum of $9,500 based upon verdict of the jury, the defendants appeal on the grounds that: (1) The evidence does not justify the verdict, in that (a) the evidence shows no negligence on the part of the defendant proximately causing the accident; (b) that the evidence clearly shows that the accident was due to the negligence of the decedent proximately contributing thereto. (2) That the court erred in its instructions to the jury. (3) That the court erred in denying a motion for a mistrial because of misconduct of the jury. And (4) that the court erred in denying defendants' motion for a new trial.

It is clear from the evidence that the decedent was attempting to cross Hollywood boulevard from the north to the south side thereof within the safety zone extending across that street parallel with the westerly boundary line of Wilcox avenue; that he had proceeded to a point south of the center line of Hollywood boulevard within the said safety zone; that as he stepped off the curb he had looked to his left (the east), and when he reached the center of the street he had then looked to his right (the west); that the taxicab which struck him was proceeding west on Hollywood boulevard, and when it reached the intersection referred to, it veered to the south, cutting into the south half of the street, where the decedent then was walking.

There is attached to and made a part of the record presented to this court, Exhibit No. 1, this being a copy of a map of the intersection of the two streets where the accident occurred, which was used at the trial and marked by the various witnesses as they gave their testimony and at the beginning of the trial had been stipulated to as being correct. This map shows the street car tracks on Hollywood boulevard, and shows the course of the taxicab as it proceeded through the intersection, as testified to by the two witnesses Moehring and Newton, who were occupants of another car approaching the intersection from the west and which was within ten feet of the taxicab at the time of the accident. By these two witnesses the course of the cab is shown to have been west in the usual line of traffic on Hollywood boulevard until it reached the intersection of Hollywood with Wilcox avenue, when it veered to the south or left-hand side of the street, crossed the car tracks on the north half of Hollywood boulevard and continued southerly over the center line of the street to and upon the car tracks upon the southerly half of the street, and then turned to the northwest, apparently to avoid hitting the car of the witnesses Moehring and Newton, and in so doing collided with the decedent. This evidence clearly shows that the decedent had passed the center of the street, and was crossing the car tracks on the south half of the street, and that the taxicab was proceeding westerly on the wrong side of the street.

[1, 2] With this in mind, we are not prepared to say as a matter of law that the evidence shows no negligence on the part of the defendants which proximately caused the accident, nor that there was any negligence on the part of the decedent which contributed to the accident. On the contrary, we believe the jury was completely justified in returning its verdict.

The trial court committed no error in the instructions given and committed no error in refusing to give the instructions requested by appellants.

[3] Appellants contend that the court erred in denying defendants' motion for mistrial and also defendants' motion for a new trial on the ground of misconduct of the jury in that they discussed the case before it was finally submitted to them. During a five-minute recess, after all the evidence was in and both parties had rested, a number of jurors were noticed grouped around the map (to which reference has heretofore been made in this opinion), and to which they were pointing or measuring with a ruler, at the same time conversing among themselves. No one heard what was said by the jurors, and the map had been admitted in evidence and its correctness had been stipulated to. Assuming that this was a technical violation of the court's instruction to the jury not to discuss the case until it was finally submitted to them, it is not shown that it could have been prejudicial to the appellants.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

125 Cal.App. 74

PACIFIC CAPITAL, Inc., v. ALLIED AMERICAN UNDERWRITERS et al.

Civ. 7387.

District Court of Appeal, Second District, Division 1, California.

July 25, 1932.

1. Appeal and error ⇐1071(6).

Omission of findings on issue whether insured's alleged fraudulent representations regarding property ownership voided fire policy *held* no ground for reversing judgment against insurer, where findings, if made, must have been for insured.

2. Insurance ⇐163(½).

Damage to finished cast iron merchandise *held* not excluded from protection of fire policy by provision excluding "pig iron and cast iron."

Appeal from Superior Court, Los Angeles County; Edward W. Engs, Judge.

Action by the Pacific Capital, Inc., against the Allied American Underwriters and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Lasher B. Gallagher, of Los Angeles, for appellants.

Lawrence L. Larrabee, of Los Angeles, for respondent.

CONREY, P. J.

The defendants issued to plaintiff's assignor, Kingman Manufacturing Company, a fire insurance policy on property described therein "while contained in, on or about the premises owned, leased or occupied by the assured, situate; #2000 East 52nd Street, Vernon, California." Under the heading of "exceptions" in said policy were exceptions in which it was provided that the insurance did not cover pig iron, cast iron, and some other specified articles. While this policy was in force, the building and contents were destroyed by fire, and this action followed a refusal of defendants to pay and satisfy the claim of loss. Judgment having been entered in favor of plaintiff, the defendants appeal therefrom.

The argument in support of the appeal raises only two points. These are that the court erred in failing to find on two special defenses pleaded by the defendant; and that the plaintiff is not entitled to recover in any event, because false swearing on the part of the insured voided the entire policy. The "second special defense" rests upon the terms of the policy (Rep. Trans. p. 70), which provide "that this entire policy shall be void * * * in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss." Defendants alleged that subsequent to the fire the Kingman Manufacturing Company through its president presented to the duly authorized representative of defendants a proof of loss stating that said manufacturing company was the sole owner of all property destroyed by the fire, and for which indemnity was claimed, except the land upon which said property was situated; that said statement was false and fraudulent, etc., and was made with intent to mislead and defraud the defendants, and that the building for which indemnity was claimed was not owned by said Kingman Manufacturing Company either at the time of the execution of the policy, or at the date of the fire; and that there was no agreement between said parties, excepting from said policy the provisions thereof requiring that, if the interest of the assured in property covered by said policy be other than unconditional and sole ownership, the entire policy should be void, etc., that by reason of said false and fraudulent statement, etc., the policy of insurance is null and void, etc.

[1] It was admitted by the plaintiff that at the time of the fire the insured was not the sole owner of all the personal property which was destroyed. In the "proof of loss" it was stated that the interest of the assured in the land on which the insured building stood was a leasehold interest. Following this in the document was the question: Interest of insured in all property other than the land? To which the answer was, "Sole Owner." It is upon this statement in the duly verified proof of loss that appellants base their contention that the policy became null and void because of false swearing. The filing of said proof of loss was preceded by an adjustment wherein an adjuster acting for the defendants determined the amount of the loss, and in accordance therewith "an adjuster's agreement" was executed between the adjuster and the claimant. From said documents it appears that the amount of loss and damage claimed in the proof of loss was copied from the adjuster's agreement, and that the indemnity provided for in the adjuster's agreement, and claimed in the proof of loss, extended only to property of which the insured was the sole owner. We are of the opinion that, if the court had made findings upon the second special defense, such findings necessarily must have been in favor of the plaintiff. Therefore the omission of such findings is not a proper ground for reversal of the judgment.

[2] The third special defense relates to that part of the indemnity claim, which included loss and destruction of certain miscellaneous

articles of cast iron or of cast-iron construction. It should be remembered that in the policy there was an exception from its terms of certain articles of property, among which were "pig iron, cast iron," and some other named substances. The loss accounted for in the adjuster's agreement and carried on into the judgment in this action excluded any item of crude cast iron, but did include damage to finished merchandise of cast-iron construction. We are of the opinion that such fabricated articles of cast-iron construction were not excluded from the protection of the policy, and that there was no merit in said third affirmative defense. We are further of the opinion that the claim of appellant based upon the alleged false statement in the proof of loss presented by plaintiff's assignor to the defendants is without merit.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

124 Cal.App. 766

MOTOR ACCEPTANCE CO., Inc., v. FINN, Sheriff.

Civ. 8020.

District Court of Appeal, First District, Division 2, California.

July 19, 1932.

1. Chattel mortgages ⇐2, 82.

Chattel mortgage, if valid under Colorado laws where executed, would not be invalid because not executed and recorded in accordance with local laws (C. L. Colo. § 5083).

2. Chattel mortgages ⇐33.

Transaction indicating intention to make automobile security for obligation to assignee of note and mortgage *held* to create equitable mortgage, enforceable as such notwithstanding written chattel mortgage was invalid.

3. Attachment ⇐177.

Generally, attaching creditor obtains lien only upon debtor's interest in property at time of attachment.

4. Chattel mortgages ⇐2.

Statute making chattel mortgages void as against creditors unless executed in compliance therewith *held* inapplicable in determining rights of assignee of chattel mortgage executed in another state and attaching creditor (Civ. Code, § 2957).

5. Chattel mortgages ⇐82.

Statute relating to recording of chattel mortgages *held* inapplicable in determining respective rights of assignee of chattel mortgage executed in another state and attaching creditor (Civ. Code, § 2959).

6. Chattel mortgages ⇐138(1).

Lien under equitable mortgage of automobile *held* superior to lien of attaching creditor arising thereafter.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the Motor Acceptance Company, Incorporated, against Thomas F. Finn, as Sheriff of the City and County of San Francisco. Judgment for the defendant, and the plaintiff appeals.

Reversed.

Charles Reagh, of San Francisco, for appellant.

Arthur L. Shannon, of San Francisco, for respondent.

SPENCE, J.

This action for conversion was brought against the defendant sheriff for the alleged wrongful sale upon execution of an automobile. From a judgment in favor of defendant, plaintiff appeals.

The cause was tried upon an agreed statement of facts. It appears that an attachment was levied by the defendant sheriff upon said automobile in an action brought by the Western Bond & Mortgage Company against John McGriff. In that action plaintiff herein duly presented to defendant herein its third party claim based upon an assignment of a chattel mortgage upon said automobile. The attaching creditor thereupon presented to the defendant its verified statement and bond under section 2969 of the Civil Code claiming that said chattel mortgage was void. Defendant subsequently proceeded with the sale upon execution.

The sole question presented upon this appeal involves a determination of the relative rights of the Western Bond & Mortgage Company as attaching creditor and the plaintiff herein as the assignee of the chattel mortgage. We shall therefore proceed to a consideration of the admitted facts concerning said chattel mortgage.

On June 2, 1926, at Canon City in the state of Colorado, said John McGriff executed a promissory note for $876 and the chattel mortgage covering the automobile in question to the "Rainbow Route Garage." Said John McGriff signed his own name as mortgagor and the name "Rainbow Route Garage, By John McGriff" as the mortgagee. The parties have stipulated that the mortgagor and mortgagee "was at all times one and the same person." On said June 2, 1926, the note and chattel

mortgage were assigned by said John McGriff to plaintiff herein in consideration of the payment by plaintiff to said John McGriff of the sum of $876. The mortgage was duly filed in the office of the county clerk and recorder of Fremont county, Colo., but the assignment was not filed or recorded. Neither the chattel mortgage nor the assignment was ever recorded in California. Shortly after the execution of these instruments said John McGriff, without the knowledge or consent of plaintiff, drove the automobile to California. On or about July 2, 1926, plaintiff learned that the automobile had been taken out of the state of Colorado, but was unable to locate it until after the attachment had been levied thereon in said month of July, 1926. The trial court entered its judgment in favor of defendant upon the agreed statement of facts as briefly outlined above and its judgment rests upon the theory that the rights of the attaching creditor were superior to those of plaintiff as assignee of said chattel mortgage.

[1-6] In our opinion the judgment must be reversed. The chattel mortgage was not invalid because of the failure to execute and record the same in accordance with the laws of California and if the mortgage was valid under the laws of Colorado it should be recognized here. Mercantile Acceptance Company v. Frank, 203 Cal. 483, 265 P. 190, 57 A. L. R. 696. The mortgage was filed as required by section 5083 of the Compiled Laws of Colorado (1921) and there is no requirement in that state that the assignment be filed or recorded. Respondent argues, however, in support of the judgment that the chattel mortgage as originally executed was invalid for want of parties, the same person being both mortgagor and mortgagee thereunder. 41 Cor. Jur. 375. This may be freely conceded, but we do not believe that it is determinative of the issues here involved. After the note and chattel mortgage were executed, McGriff, in consideration of the payment to him by appellant of the sum of $876, assigned them to appellant and guaranteed the payment of the note by a written agreement of guaranty indorsed thereon. This transaction evidenced by the written instruments definitely indicated an intention by the parties to make the automobile security for the obligation of McGriff to appellant and in our opinion created an equitable mortgage enforceable as between McGriff and appellant despite the defect in parties in the original mortgage. Washington Lumber & Millwork Company v. McGuire (Cal. Sup.) 1 P.(2d) 437; Nau v. Santa Ana Sugar Company, 79 Cal. App. 685, 250 P. 705; Title Insurance & Trust Company v. California Development Co., 171 Cal. 173, 152 P. 542; Peers v. McLaughlin, 88 Cal. 294, 26 P. 119, 22 Am. St. Rep. 306; Tufts v. Beach, 8 Colo. App. 33, 44 P. 771. Ordinarily an attaching creditor obtains a lien only upon the interest which the debtor has in the property at the time of the attachment (3 Cal. Jur. 483), and the facts of the present case do not bring it within any exception to the general rule. The provisions of section 2957 of the Civil Code making chattel mortgages void as against creditors unless executed in compliance therewith as well as the provisions of section 2959 of the Civil Code are not applicable here. Mercantile Acceptance Company v. Frank, supra. We conclude that appellant had a valid lien superior to the lien of the attaching creditor.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

McARTHUR v. JOHNSON. *

Civ. 906.

District Court of Appeal, Fourth District, California.

Aug. 1, 1932.

Rehearing Denied Aug. 26, 1932. Hearing Granted by Supreme Court Sept. 24, 1932.

Evidence ⇐441(11).

In action on unconditional demand note, parol evidence of contemporaneous agreement to pay note only out of defendant's share of commissions earned jointly by parties in sale of realty *held* inadmissible; no invalidity, illegality, fraud, accident, or mistake being alleged (Code Civ. Proc. § 1856; Civ. Code, § 1625).

Such parol evidence was inadmissible, since it was in direct contradiction of express terms of note, because it tended to establish that note was not payable on demand, but only out of particular fund.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by C. W. McArthur against F. O. Johnson, wherein defendant filed a counterclaim and cross-complaint. From a judgment in favor of defendant, and from the denial, by operation of law, of plaintiff's motion for a new trial, plaintiff appeals.

Judgment reversed. Appeal from the denial of a new trial by operation of law dismissed.

S. P. Williams and C. L. Brown, both of El Centro, for appellant.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 15 P.2d 151.

Harry W. Horton, of El Centro, for respondent.

HARDEN, Justice pro tem.

Plaintiff sued upon a promissory note made by defendant and payable on demand to the order of plaintiff in the sum of $2,000. The note was free from uncertainty or ambiguity. The defense interposed was that said note had been made for the accommodation of plaintiff and without consideration to defendant. No issues of invalidity, illegality, fraud, accident, or mistake were tendered. Defendant also filed a pleading denominated "a counterclaim and cross-complaint," alleging several causes of action against plaintiff for money. Parol evidence was received which tended to establish that it was agreed by the parties thereto, at the time of the making and delivery thereof, that said note was to be paid only out of defendant's share of commissions earned jointly by defendant and plaintiff in the sale of real estate. No express findings were made upon the defense that defendant was an accommodation maker. Judgment was entered crediting defendant with the payment of $400 thereon and adjudging that said note was payable only out of defendant's share of said commissions. Defendant was also given judgment upon his counterclaim and cross-complaint for $1,118.49 and interest.

Plaintiff appeals from the judgment and from the denial by operation of law of his motion for a new trial. The only point raised on the appeal is that said parol evidence was incompetent.

The note was an unconditional promise to pay money on demand. The parol evidence received was in direct contradiction of the express terms of said note. It tended to establish that said note was not payable on demand, but, on the contrary, was payable only out of a particular fund. Said evidence was not admissible. Section 1856, Code Civ. Proc., and section 1625, Civ. Code. Said sections lay down rules of substantive law. Harding v. Robinson, 175 Cal. 534, 540, 166 P. 808. Under conditions similar to those existing here, the principles of law involved have been applied to prevent the reception of parol evidence to contradict the terms of written instruments in a great variety of cases. In support of our holding we shall cite only a few decisions dealing with commercial paper. Brown v. Spofford, 95 U. S. 474, 24 L. Ed. 508; San Jose Sav. Bank v. Stone, 59 Cal. 183; Cashman v. Harrison, 90 Cal. 297, 27 P. 283; Leonard v. Miner, 120 Cal. 403, 52 P. 655; Wright v. Shoenhair, 100 Cal. App. 163, 280 P. 174. Our case falls squarely within the rules announced and applied in said cases.

The findings of the court are not such as to warrant our ordering any judgment thereon; and we think this court should not make any findings upon the evidence. The error in the reception of said parol evidence requires a reversal of the judgment and a new trial.

The judgment is reversed. The appeal from the denial of a new trial by operation of law is dismissed.

We concur: BARNARD, P. J.; MARKS, J.

125 Cal.App. 96

KALLEG v. FASSIO et al. (two cases).

Civ. 8324.

District Court of Appeal, First District, Division 2, California.

July 26, 1932.

1. Negligence ⇐93(2).

Contributory negligence of husband driving automobile must be imputed to wife riding in automobile.

2. Appeal and error ⇐1170(10).

Where jury returned verdicts for plaintiffs for $1 each, but should have found against both plaintiffs, on ground of contributory negligence, there was no error resulting in miscarriage of justice in jury's not returning substantial verdicts (Const. art. 6, § 4½).

3. Damages ⇐53.

Parent cannot recover damages because of grief after injury and distress by contemplation of disfigurements on faces of children.

4. Damages ⇐53.

Husband could not recover damages for grief because of wife's injuries, or for scars or disfigurements on her face.

Appeals from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by George F. Kalleg and by Dorothy A. Kalleg against Vincenzo Fassio and others. From the judgments, plaintiffs appeal.

Affirmed.

Ford & Johnson and Fletcher A. Cutler, all of San Francisco, for appellants.

Hadsell, Sweet & Ingalls, of San Francisco, for respondents.

NOURSE, P. J.

Four actions for damages for injuries arising out of an automobile collision were tried jointly. George Kalleg, the driver of one of the cars, sued for personal injuries to him-

self; his wife, Dorothy, sued for personal injuries to herself; two minor children of these parties each sued through their guardian for personal injuries. The jury returned four verdicts. In the actions of the husband and the wife the verdict found "in favor of plaintiff" and awarded "the damages in the sum of one dollar, $1.00." In the actions of the two minors verdicts for $1,500 were returned in each case. These judgments have been paid, but both husband and wife have appealed upon the same record from the verdicts entered in their cases.

The facts are simple. Kalleg was driving easterly on Market street in the city and county of San Francisco, and, when he reached the intersection of Market, Franklin, and Page streets, he attempted to make a left-hand turn across the west-bound traffic on Market street. At that point four lines of street car tracks are maintained. As Kalleg crossed the east-bound tracks and approached the first west-bound track, he looked to his right, but did not see any vehicle approaching. From that point he crossed over the second track and across the west-bound lane of vehicle traffic without looking to his right—the point from which danger might have been anticipated. The defendant was proceeding westerly about four feet north of the most northerly car track where the cars collided. Neither plaintiff saw defendant's car approaching at any point of their progress.

On the issue of damages, the husband claimed that he had suffered a bruised shoulder and some nervous shock, the wife had a slight scar above the right eyebrow, which was fully healed, and also claimed that she had been bruised about the hip. Both children were cut about the face by broken glass.

[1, 2] The verdicts in the parents' cases are easily explained. Their claims of personal injuries were manifestly feigned and greatly exaggerated. A verdict for either in an amount in excess of their costs of suit would have been a gross miscarriage of justice which the trial court would have necessarily set aside. The evidence of the husband's contributory negligence, which, of course, must be imputed to the wife, was such that the jury should have found against both on that issue. Hence, again, if substantial verdicts had been rendered in their favor, the trial court would have been compelled to set them aside on this issue as well. Thus, when we examine the entire record, including the evidence within the purview of article 6, § 4½, of the Constitution, we cannot say "that the error complained of has resulted in a miscarriage of justice."

Because of this view, it would serve no purpose to discuss Wolford v. Lyon Gravel Gold Mining Co., 63 Cal. 483, where a verdict for plaintiff assessing his damages at $1 was held to be "grossly absurd." That case was decided before the days of open plumbing. A case more nearly in point here is Mosekian v. Ginsberg (Cal. App.) 10 P.(2d) 525, where the Fourth District held that an appeal from a verdict for the plaintiff which assessed his damages at $0 (nothing) was in legal effect an appeal from the order denying plaintiff's motion for a new trial, and that, on such appeal, the question for the appellate court to determine was whether the trial court had abused its discretion in that respect. This is in accord with our view.

[3, 4] Another point requires some consideration. The trial court instructed the jury that Kalleg was not entitled to recover because of "grief, sorrow, or resentment * * * on account of any injury sustained by his wife or children * * * or because of * * * any scars, blemishes or disfigurement on the faces of the wife or children." The appellants criticize the instruction, saying that it unduly limited the jury in the consideration of the element of "nervous shock," and they cite Easton v. United Trade School Contracting Co., 173 Cal. 199, 159 P. 597, L. R. A. 1917A, 394, and Lindley v. Knowlton, 179 Cal. 298, 176 P. 440. The criticism is not sound. The element of physical pain, including the "nervous shock" theory, was fully covered by other instructions. This instruction was limited to the element of grief and sorrow because of the subsequent disfigurement or suffering of other members of the family. It is the accepted rule that a parent cannot recover damages upon those grounds because the minor child has his own right of action for the same damage. 17 Cor. Jur. p. 835. Upon the same principle the husband should be denied recovery for such damages arising out of injuries to the wife.

Neither of the cases cited by appellants is in point. They involved the question of fright and fear of the parent for the safety of a minor child *at the time of the accident*. The instruction complained of was confined to the element of grief and sorrow *after* the collision and to subsequent distress by contemplation of scars or disfigurements on the faces of the other members of the family.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

125 Cal.App. 207

DUNCAN v. TORMEY et al.

Civ. 8364.

District Court of Appeal, First District, Division 1, California.

Aug. 1, 1932.

1. Costs ⇐3.

Right to recover costs is purely statutory.

2. Constitutional law ⇐186.

Legislature may give statute retroactive operation except so far as it would conflict with some vested right secured by constitutional guaranty.

3. Statutes ⇐189.

Mere literal construction of statute ought not to prevail if it is opposed to legislative intention apparent from act itself.

4. Statutes ⇐263.

In absence of clearly expressed intention to contrary, statute will be construed to operate prospectively.

5. Statutes ⇐267(2).

Statute will not be construed to affect pending proceedings, unless such intention is clearly declared or necessarily implied from its language.

6. Costs ⇐18.

Plaintiff recovering judgment in Superior Court was entitled to costs, where Superior Court had exclusive jurisdiction when action was commenced, though during pendency of action municipal court was established in city and county (Code Civ. Proc. § 1022, as amended by St. 1929, p. 846, § 1).

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by A. Don Duncan against Latane C. Tormey and another. From an order taxing and disallowing costs claimed by plaintiff, plaintiff appeals.

Reversed.

Percy A. Smith and A. Don Duncan, both of San Francisco, for appellant.

Ford & Johnson and Fletcher A. Cutler, all of San Francisco, for respondent.

PER CURIAM.

An appeal by the plaintiff from an order taxing and disallowing costs claimed by plaintiff. The reason of the order was that a judgment entered in plaintiff's favor was one which could have been rendered by the municipal court in the city and county of San Francisco.

The action was brought in the Superior Court of the city and county of San Francisco to enforce a lien created by contract upon a judgment entered in respondent's favor against defendant Petersen. The complaint, which was filed on February 14, 1930, alleged an express promise to pay as a contingent attorney's fee 33⅓ per cent. of the judgment recovered; the amount of plaintiff's claim being $1,832. On May 14, 1931, a supplemental complaint was filed, alleging that the judgment had been assigned by respondent to one Millerick, who took subject to plaintiff's lien, and on May 29, 1931, there was filed an amendment to the original complaint by adding a count for the reasonable value of plaintiff's services, alleged to be the above sum, and praying that the same be declared a lien on the judgment. The action was tried by a jury, which returned a verdict for the plaintiff. A judgment was entered thereon by the court declaring the amount claimed to be a lien on the judgment mentioned.

Section 1022 of the Code of Civil Procedure contains the proviso "that the plaintiff shall not recover costs when the judgment is one which could have been rendered by a municipal or inferior court within the county, or city and county, in which the action is properly commenced." Stats. 1929, p. 846, § 1. The parties concede that the Superior Court had jurisdiction of the action, that no municipal court was established in said city and county before July 1, 1930, and that the justice's court was limited in its jurisdiction to $1,000. The parties differ as to whether under the pleadings as finally presented the action was one at law or in equity, and whether in the latter case a municipal court would have had jurisdiction.

But, however this may be, there was, as stated, no court in said city and county except the Superior Court which had jurisdiction of the action when the same was commenced; and, if respondent's contention is correct, then all actions pending in the Superior Court of a county when a municipal court is established therein, and of which the latter court would have had jurisdiction had it been in existence when the actions were filed, will be affected, and in none of such actions can a successful plaintiff recover his costs in the Superior Court.

[1-6] The right to recover costs is purely statutory (Williams v. Atchison, Topeka & Santa Fe Ry. Co., 156 Cal. 140, 103 P. 885, 134 Am. St. Rep. 117, 19 Ann. Cas. 1260); and, while the Legislature may give to a statute a retroactive operation except in so far as it would conflict with some vested right secured by constitutional guaranty (State Commission in Lunacy v. Welch, 20 Cal. App. 624, 129 P. 974; Herrold v. Reen, 58 Cal. 443), a mere literal construction ought not to prevail if it is opposed to the legislative intention apparent from the act itself; and, in the ab-

sence of a clearly expressed intention to the contrary, every statute will be construed to operate prospectively (In re Frees' Estate, 187 Cal. 150, 201 P. 112; Roberts, Thomas & Co. v. Allen (Cal. Sup.) 7 P.(2d) 309); nor will it be construed so as to affect pending proceedings unless such intention is expressly declared or necessarily implied from its language (Gates v. Salmon, 28 Cal. 320; Vanderbilt v. All Persons, 163 Cal. 507, 126 P. 158; East Bay Municipal Utility Dist. v. Garrison, 191 Cal. 680, 218 P. 43; Montecito County Water Dist. v. Doulton, 193 Cal. 398, 224 P. 747; People v. Allied Architects' Ass'n, 201 Cal. 428, 257 P. 511; Blade v. Sup. Ct., 102 Cal. App. 375, 283 P. 81). Here there is no such declaration, nor is the intention necessarily implied from the language of the proviso. The construction contended for by the respondent would work an injustice to parties to pending litigation, a result which it cannot be presumed the Legislature intended; and, in view of the authorities, it is our conclusion that the proviso should not be given a retroactive operation.

The order is reversed.

125 Cal.App. 31

ATLAS MIXED MORTAR CO. v. STEIN et al.

Civ. 4569.

District Court of Appeal, Third District, California.

July 21, 1932.

1. **Vendor and purchaser** ⇐14.

Purchase-money note and trust deed, executed to complete purchasers' escrow agreement with vendor, *held* not without sufficient consideration.

2. **Contracts** ⇐88.

Presumption of consideration arises from written instrument (Civ. Code, § 1614).

3. **Contracts** ⇐88.

Burden of proof is on party seeking to invalidate written instrument for want of consideration (Civ. Code, § 1615).

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by the Atlas Mixed Mortar Company, a corporation, against J. P. Stein, the Progressive Finance Corporation and others. From a judgment for defendant finance corporation, plaintiff appeals.

Affirmed.

G. C. De Garmo and Winthrop M. Crane, both of Los Angeles, for appellant.

Willebrandt & Horowitz, Paul J. Fritz, Goldman & Lieberman, and Derthick, Cusack & Ganahl, all of Los Angeles, for respondents.

JAMISON, Justice pro tem.

This action was brought by plaintiff to foreclose a mechanic's lien for material furnished to defendant J. P. Stein. Respondent Progressive Finance Corporation answered, claiming that it was the owner of a deed of trust upon the premises covered by the said mechanic's lien and that said deed of trust was prior to said lien. Judgment was rendered in favor of appellant against defendants Stein, Peet, and Cheroff for the various sums alleged to be owing to it as set forth in the complaint, but adjudged respondent's deed of trust to be superior in point of time to appellant's said lien. Appellant does not deny that the deed of trust is a prior lien, but contends that it was executed without consideration and is, therefore, null and void.

Respondent was the owner of the property in controversy and desiring to sell it listed it with one Kalb, a real estate broker. Kalb worked in conjunction with another real estate broker named Gordon and associated with Gordon and occupying the same office was defendant Stein. Stein was engaged in the building business. Stein agreed to purchase the property for the sum of $34,000, $2,000 of which was to be paid to Gordon and Kalb for the commission in making said sale. On July 9th the said Steins and the Progressive Finance Corporation executed escrow instructions by the terms of which the said Steins were to pay $11,250 in cash and deliver a note for $22,750 secured by deed of trust not to exceed $60,000. The Progressive Finance Corporation placed in the hands of the Title Guaranty & Trust Company, the escrow holder, a deed for said property to be delivered upon compliance with said terms. On July 27, 1928, the said Steins executed their note, secured by a deed of trust to said Gordon, and on the 6th day of August, 1928, the said Gordon assigned the said note and deed of trust to the Progressive Finance Corporation as collateral security for the payment of said sum of $22,750. On the 7th of September, 1928, the said Gordon wrote the said escrow holder, inclosing the $60,000 note and deed of trust, which he stated had been assigned to the Progressive Finance Corporation as collateral security authorizing it to use the same under instructions from the said Steins, and on September 12th, Stein wrote the escrow holder authorizing the said note and deed of trust to be used in accordance with said escrow. On September 8, 1928, the Progressive Finance Corporation requested said escrow holder to place the date of said

deed of trust as of September 6, 1928. It appears that the said escrow was closed and the deed to the property was delivered to the Steins and the $60,000 note and deed of trust were delivered to the Progressive Finance Corporation.

J. P. Stein testified the terms under which he purchased the property were that he was to pay $11,250 in cash and to give a note for $22,750 secured by a deed of trust, the amount of the deed of trust to be determined later.

Some time after the date of the escrow, Stein suggested that the deed of trust should be for $60,000. The object in placing the deed of trust at this sum was primarily to secure the balance of the purchase price of said property, to wit, $22,750, and to endeavor to discount said note and mortgage, pay off the $22,750, and use the remainder in his business, and having full confidence in Gordon, he executed the same to him as a matter of expediency.

[1] Appellant contends that the Progressive Finance Corporation accepted a $22,750 note without security in payment of the remainder of the purchase price of said property, but there is no evidence supporting this contention. Appellant cites authorities to the effect that a valid deed of trust must rest upon a sufficient consideration, and others, where the courts have held that there was no consideration; but none of the cases are applicable to the facts as presented by this case. It is true that no consideration passed from Gordon to the Steins for the note and mortgage, but they were executed by the Steins for the purpose of completing and fulfilling the terms of the escrow agreement upon their part, and when Gordon assigned them to the Progressive Finance Corporation the escrow agreement upon the part of the Steins was completed and they thereupon became entitled to receive and did receive the deed conveying to them the title to said property.

[2, 3] Upon a plea of want of consideration a presumption of consideration arises from the writing itself. Moore v. Gould, 151 Cal. 723, 91 P. 616; Civ. Code, § 1614, and 17 Cal. Jur. 953. The burden of proof is upon the party seeking to invalidate the instrument for want of consideration. Civ. Code, § 1615.

We find no merit in the contention of appellant that the note and deed of trust, in the hands of the Progressive Finance Corporation, was without a sufficient consideration.

Appellant having presented no other grounds for reversal, the judgment is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

CLARK v. SMITH. *

Civ. 8315.

District Court of Appeal, First District, Division 2, California.

Aug. 18, 1932.

Rehearing Denied Sept. 17, 1932. Hearing Granted by Supreme Court Oct. 17, 1932.

1. Appeal and error ⇐994(3).
Credibility of witness was for trial court.

2. Bills and notes ⇐518(1).
Evidence supported court's finding that plaintiff paid to deceased maker adequate consideration for note sued on.

3. Witnesses ⇐252.
Where counsel for defendant executrix used bank statement in examining plaintiff, court properly permitted plaintiff to have bank statement before her to identify checks given to deceased for purpose of investment.

4. Appeal and error ⇐223.
Where judgment against executrix was not in form prescribed by statute, appellate court would modify judgment in accordance with respondent's request although point was not raised by appellant-executrix (Code Civ. Proc. § 1504).

Appeal from Superior Court, Santa Cruz County; H. C. Lucas, Judge.

Action by Nellie P. Clark against Zetta W. Smith, as executrix of the last will and testament of Ralph H. Smith, deceased. From a judgment for plaintiff, defendant appeals.

Judgment modified and, as modified, affirmed.

Sidney Rhein and Herbert Choynski, both of San Francisco, for appellant.

Philip B. Beggs and Harry J. Bias, both of Santa Cruz, for respondent.

SPENCE, J.

This is an appeal by the defendant executrix from a judgment in favor of plaintiff in an action brought by plaintiff to recover upon two promissory notes executed by Ralph H. Smith, deceased, during his lifetime.

Deceased died in 1928. Plaintiff held two promissory notes, one dated January 3, 1927, for the sum of $12,000 and the other dated January 10, 1928, for the sum of $5,000. Claims were duly presented to the defendant executrix, and upon her failure to approve or reject said claims within the time provided by law, plaintiff brought this action. The trial court found in favor of plaintiff upon the issues of due execution and consideration and accordingly judgment was entered in plaintiff's favor.

[1, 2] Appellant first contends that the evidence is insufficient to support the findings.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 20 P.2d 937.

The attack is directed solely to the findings relating to consideration. Appellant had alleged in her answer that each of said notes was executed "without any consideration whatever; that said Ralph H. Smith received nothing of value for the execution of said instrument and that plaintiff parted with nothing of value." The trial court made findings that said allegations were not true and found as to each note that "plaintiff paid unto Ralph H. Smith adequate consideration for the execution and delivery of said promissory note." In our opinion these findings are supported by the evidence.

On the trial respondent introduced sufficient evidence to make out a prima facie case and then rested. Thereupon appellant called respondent to the witness stand under section 2055 of the Code of Civil Procedure in an effort to show want of consideration for the notes. Respondent was questioned in a searching examination covering her affairs over a period of almost twenty years. It appears that respondent met the deceased in 1918 when he acted as her attorney in her divorce action. From about 1920 until a few months prior to his death in 1928, respondent and deceased lived together in the same house in Santa Cruz. The evidence shows that deceased handled her affairs during that time and that respondent had the utmost confidence in the deceased. She testified that he invested and reinvested her money without rendering an accounting; that the notes represented "money that he had of mine, attending to my business"; and that at the time he gave her the $5,000 note he said "he still owed me this $5,000, and it may be some more."

In an effort to discredit respondent's testimony counsel for appellant questioned her at length. Her bank statements running back as far as 1912 were introduced in evidence. Numerous checks passing between respondent and deceased were admitted and also some receipts executed by said parties. Respondent was questioned regarding the estates of her deceased father, mother, and husband, her divorce action, the property, real and personal, owned by her over a long period of time, including notes, mortgages, bonds, and stocks. No detailed account of the financial transactions between respondent and deceased is found in the record. If respondent's testimony is true the money and property coming into the hands of deceased from time to time for her account exceeded the amount of the notes in controversy. On the other hand, the evidence showed that checks totaling several thousand dollars had passed from deceased to respondent over a period of years and that receipts for various securities had passed between the parties in 1925. It is impossible, however, to piece together the fragmentary evidence and determine just how much of respondent's money and property was held by deceased or the manner in which said money and property was invested and reinvested. The relationship between the parties was undoubtedly one of trust and confidence and this may account for the apparently informal manner in which they handled their financial affairs. Respondent claimed that the amount represented by the notes was due her from deceased and that deceased expressly stated this to be the fact at the time of executing the second note. Counsel for appellant states in his brief that the "plaintiff and respondent is practically the only witness in this case, and upon the truth or falsity of her statements rests its merits." This statement impliedly concedes that there is sufficient evidence to support the findings. It is true that during the lengthy examination covering the details of transactions many years before, respondent frequently answered that she did not know or could not recall. It is further true that some of the documentary evidence produced contradicted previous testimony given by respondent. We cannot say, however, that her testimony was so inherently improbable as to be wholly unworthy of belief and the question of the credibility of the witness was one for the trial court. As in our opinion the evidence was sufficient to support the findings without regard to the presumption of consideration arising from the execution of the instrument, we deem it unnecessary to discuss the authorities cited by counsel relating to this presumption and to the burden of proof on the issue of consideration.

[3] Appellant further contends that the trial court erred in its rulings on evidence. After appellant's counsel had completed his examination of respondent, counsel for respondent started to examine her about the withdrawals shown by one of her bank statements which is in evidence. Appellant objected to respondent's "refreshing her memory" from the bank statement. Counsel for respondent argued that the bank statement was being used "not for the purpose of recollection but for the purpose of explaining what they (the withdrawals) were for." Considerable argument followed and thereafter respondent was permitted, with the bank statement before her, to state from her "own knowledge what checks were withdrawn from your bank account and given to Mr. Smith for the purpose of investment." There was no error in permitting respondent to have the bank statement before her for this purpose. Counsel for appellant used the statement in his examination of respondent and he has relied upon said statement showing the deposits and withdrawals both in the trial court and on this appeal. An effort has been made to connect the items on the statement with various transactions. It was proper to permit respondent to identify, if she could, the items which had reference to transactions with the deceased.

[4] Respondent has called our attention to the form of the judgment and has requested a modification. The judgment against the defendant executrix is not in the form prescribed by section 1504 of the Code of Civil Procedure then in effect. We deem it proper to modify the judgment in accordance with the request of respondent, although the point is not raised by appellant.

The judgment is modified by adding thereto the following: "It is ordered, adjudged and decreed that said defendant executrix shall pay said sums so found to be due together with interest, costs of suit and attorneys' fees all in due course of administration." As so modified the judgment is affirmed, respondent to recover her costs on this appeal.

We concur: NOURSE, P. J.; STURTEVANT, J.

125 Cal.App. 265

SNODGRASS v. HAND et al.

Civ. 1024.

District Court of Appeal, Fourth District, California.

Aug. 5, 1932.

Rehearing Denied Aug. 29, 1932.

Appeal and error ⇐800.

Motion to dismiss appeal for failure timely to file transcript was denied, where transcript was filed before motion was made and submitted (Rules of the Supreme and District Courts of Appeal, Rule 5).

Appeal from Superior Court, San Diego County; George H. Thompson, Judge.

Action by Donald Snodgrass, by Karl C. Snodgrass, guardian ad litem, against Henry W. Hand and another. From an adverse judgment, defendants appeal. On plaintiff's motion to dismiss the appeal.

Motion denied.

Edward J. Kelly, of San Diego, for appellants.

Stickney & Stickney, of San Diego, for respondent.

MARKS, J.

This is a motion to dismiss an appeal from a judgment of the Superior Court of San Diego county because of the failure of appellants to file their record on appeal within the time specified in section 1 of rule 1 of the Rules of the Supreme and District Courts of Appeal of the state of California, and seeking to invoke the penalty for the failure to so file the record prescribed in section 1 of rule 5 of the same rules.

The judgment in question was rendered on July 31, 1931. A motion for new trial was denied on September 29, 1931, and notice of this order served on either September 30 or October 1, 1931. Notice of appeal was filed October 9, 1931. On October 9, 1931, an order was signed by a superior judge of the court below giving defendants until November 9, 1931, in which to settle and file a bill of exceptions. Various other similar orders were signed and filed, the last of which purported to give appellant to July 10, 1933, to settle and file the bill of exceptions. We suppose that *1933* is a typographical error. The notice of motion to dismiss, certificate of the clerk, affidavits, and points and authorities, were filed here on June 29, 1932. On July 6, 1932, appellants filed their printed transcript on appeal, and on July 8 filed their opening brief. Appellants filed their points and authorities and an affidavit of their attorney, wherein is set forth that they have a good and meritorious cause on appeal, the reasons for delay in having the bill of exceptions settled and filed, and seeking relief from default under section 473 of the Code of Civil Procedure, if it be considered they were in default. The motion to dismiss was made, argued, and submitted in this court on July 12, 1932. The transcript on appeal bears the following indorsement: "Due service of the within transcript, and receipt of copy thereof is hereby admitted this 6 day of July, 1932. Stickney & Stickney, Attorneys for plaintiff and respondent."

Section 1 of rule 1 of the rules adopted for this court by the judicial council provides in part as follows: "The appellant in a civil action shall, within forty days after an appeal is perfected, except as hereinafter stated or as otherwise provided by law, serve and file the printed transcript of the record, duly certified to be correct by the attorneys of the respective parties, or by the clerk of the court from which the appeal is taken. If a proceeding for the settlement of a bill of exceptions which may be used in support of such appeal is pending or may still be instituted, the time aforesaid shall not begin to run until the settled and authenticated bill of exceptions has been filed, or the time in which a proceeding for such a bill of exceptions may be instituted has expired, or such proceeding, if instituted, has been dismissed by the trial court."

Section 1 of rule 5 of the same rules provides the penalty that may be enforced here for failure to file the record in time. This rule has been construed in Toth v. Metropolitan Life Ins. Co., 113 Cal. App. 55, 297

P. 564, 565, as follows: "Rule V of the rules of this court provides as follows: 'If the transcript, or the points and authorities, though not filed within the time prescribed, be on file at the time such notice is given, that fact shall be sufficient answer to the motion.' In Jaques v. Board of Supervisors, 22 Cal. App. 627, 135 P. 686, 688, the court used the following language: 'Besides, although the language of rule 5 is that if the transcript, not having been filed within the time prescribed, "be on file at the time the notice is given, that fact shall be a sufficient answer to the motion," it has been held that if the transcript, properly authenticated by the clerk of the superior court, has been filed prior to the hearing of the motion, the ground for the motion has thereby been removed. In re Ryer, 110 Cal. 560, 42 P. 1082; Woodside v. Hewel, 107 Cal. 141, 40 P. 103; Warren v. Hopkins, 110 Cal. 506, 42 P. 986, 906; Poole v. Grand Circle, Women of Woodcraft, 17 Cal. App. 229, 119 P. 201.'" See, also, the cases of Fishman v. Silva, 108 Cal. App. 121, 291 P. 430; Tyner v. Axt, 111 Cal. App. 187, 295 P. 97; and North v. Evans, 114 Cal. App. 714, 300 P. 893.

The motion to dismiss the appeal is denied.

We concur: BARNARD, P. J.; JENNINGS, J.

125 Cal.App. 303

SULLIVAN v. VERA (PRESTINARI, Intervener).

Civ. 8586.

District Court of Appeal, First District, Division 1, California.

Aug. 9, 1932.

1. **Fraudulent conveyances** ⇐308(1).

Whether execution of chattel mortgage in consideration of pre-existing debt at time when mortgagor owed employee money for wages and was liable for compensation for employee's injury was fraudulent as to employee *held* fact question for trial court (Civ. Code, §§ 3431, 3432).

Facts disclosed that the mortgagee took a chattel mortgage to secure certain advancements of money he had made to the mortgagor; that the mortgagor operated a dairy and owed his employee a certain sum of money as wages for his services as milker; that employee in less than a month after the execution of the mortgage filed suit to collect wages, and had also secured an award against the mortgagor for compensation for an injury sustained prior to the mortgage execution; and that mortgagee knew of employee's compensation claim, but was unaware of his claim for labor.

2. **Appeal and error** ⇐1010(1).

Trial court's finding supported by evidence cannot be interfered with by appellate court.

3. **Appeal and error** ⇐994(3).

Credence given testimony is within trial court's province, and court's denial of credence to particular testimony cannot be disturbed, unless discretion is abused.

4. **Acknowledgment** ⇐52.

Certificate of acknowledgment to mortgage *held* sufficient to support finding of due execution as against creditors, though contradicted by parol evidence (Civ. Code, §§ 2956, 2957).

5. **Mortgages** ⇐61.

As between mortgagor and mortgagee, mortgage is valid and may be enforced, even though not complying with statutory requirements as respects acknowledgment.

6. **Appeal and error** ⇐193(1).

Intervening creditor could not attack sufficiency of mortgagee's complaint in chattel mortgage foreclosure for purpose of enabling himself to raise defects of mortgage for first time on appeal.

7. **Appeal and error** ⇐169.

Appellate courts will not review or consider points made for first time on appeal.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by John H. Sullivan against Frank Vera, in which Peter Prestinari intervened. From a judgment for plaintiff, the intervener appeals.

Affirmed.

Fred A. Watkins, of San Francisco, for appellant.

Edmund Scott, of Redwood City, for respondent.

WOODWARD, Justice pro tem.

This is an appeal by the intervener from a judgment in favor of plaintiff for the foreclosure of a chattel mortgage bearing date March 6, 1930, and given by defendant to plaintiff to secure the payment of a promissory note in the principal sum of $6,500, with interest at seven per cent. Appellant, a creditor, intervened in the action as against both litigants, alleging, among other things, that the chattel mortgage sought to be foreclosed had been executed by the defendant Vera, "without consideration and with intent to hinder, delay and defraud creditors," includ-

ing appellant, and that plaintiff had accepted the mortgage with full knowledge of the facts. It is averred also, on information and belief, that the instrument was not acknowledged before the notary public purporting to have taken the same. The defendant made no appearance as against plaintiff, but filed an answer to the complaint in intervention, denying generally the allegations thereof.

The factual background of the controversy may be epitomized thus: During the month of July, 1925, the defendant purchased a ranch from plaintiff, paying a small amount in cash on the purchase price and executing his note, secured by a deed of trust on the property, for the balance. He thereupon began to operate a dairy on the premises, but soon met with financial difficulties and defaulted in payments due plaintiff. Plaintiff, however, evidently believing the defendant would eventually make a success of his business, began to advance him various sums of money to pay for labor and to purchase equipment, including a tractor, pump, electric motor, piping for irrigation, lumber, and other materials. These pecuniary advances aggregating more than $6,500, began in November, 1925, and ended in January, 1930, at which time the plaintiff, dissatisfied with the arrangement, demanded security for his loans. It was in these circumstances that defendant, two months later, executed the mortgage in question.

It seems that for several years prior to the date of the mortgage appellant had worked continuously as a milker for the defendant, and had failed to draw or demand the greater part of his wages. On April 17, 1930, less than a month after the execution of the mortgage, appellant filed a suit in the Superior Court for the collection of his back wages and, three months later, obtained a judgment against Vera in the sum of $810. It is an admitted fact, also, that on December 15, 1929, appellant, in due course of his employment as a milker for defendant, sustained an injury consisting of a fracture of his right arm. Thereafter he filed a claim with the Industrial Accident Commission, which, on May 7, 1930, made him an award of $9.49 a week for temporary disability, payments to begin as of December 23, 1929. The commission found that the employer was uninsured. On these facts appellant intervened in the present action, claiming that the chattel mortgage was executed in anticipation of his judgment for wages and also of the award for compensation.

The trial court found, in substance, that the mortgage was executed by the defendant for a valuable and sufficient consideration and with no intent to hinder, delay, or defraud the intervener or any other creditor of the defendant; that the instrument was accepted by plaintiff in good faith and as security for a sum in excess of $6,500, which he had theretofore advanced the defendant; that the mortgage was duly acknowledged by the parties thereto before Frank L. Crist, a notary public in and for the county of Santa Clara.

Appellant states in his opening brief that he cannot criticize the trial court's finding on the question of adequate consideration, but insists that the mortgage is invalid for two reasons: (1) That it was given and accepted to hinder, delay, and defraud creditors; (2) that it is not in the form prescribed by section 2956 of the Civil Code of California. The points thus relied upon by appellant in his specifications of error will be considered in the order named.

The first point relied on is the usual challenge to the sufficiency of the evidence to support the trial court's finding on the issue of fraud. Without an extensive discussion of the testimony, it may be pointed out that plaintiff testified he had demanded the mortgage in order to protect his interests; that, when the same was executed, he did not know of defendant's indebtedness to appellant for wages, but was aware of appellant's injury and of the claim filed pursuant thereto; that he did not demand or accept the chattel mortgage for the purpose of enabling Vera to avoid appellant's claim; that said mortgage note did not cover any part of the obligation secured by the deed of trust. The defendant, called as an adverse witness by appellant, admitted the amount claimed by plaintiff and the purpose for which it was advanced. It could scarcely be said that the defendant's testimony was the result of collusion. On the contrary, appellant's counsel terminated the cross-examination somewhat abruptly, declaring at the time: "I won't ask this witness any more questions. I think what he says is true." Mrs. Flossie Tripp, called as a witness on behalf of the appellant, testified that she had executed the mortgage as "Flossie Vera," wife of the defendant; that she was a partner of Vera's; that she had lived with him as his wife, but had never been married to him; that Vera did not tell her of his business affairs, and that she did not know of any advances made him by the plaintiff; that, when she signed the mortgage, she was alone with the defendant, and did not then or thereafter acknowledge it before a notary public; that subsequent to the execution of said instrument Vera had informed her it was "kind of a bluff paper."

Appellant suggests that the admitted facts, together with the circumstances surrounding the transaction, throw more light on the issue of fraud than the parol testimony of the parties. This view seems to be based largely on the assumption that the execution of the mortgage in consideration of a pre-existing debt, and at a time when the defendant owed appellant a substantial sum for

wages and had also become liable to him for compensation by reason of the injury to his arm, was in itself an act inherently fraudulent. This contention, as an abstract proposition, cannot be sustained. One who owes another money is not, in every instance, estopped from executing a chattel mortgage to a third person in consideration of a pre-existing debt. On the contrary, except in certain circumstances not present in the instant case, "a debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another." Civ. Code, § 3432. And, "in the absence of fraud, every contract of a debtor is valid against all his creditors, existing or subsequent, who have not acquired a lien on the property affected by such contract." Civ. Code, § 3431; Parkinson Brothers Co. v. Figel et al., 24 Cal. App. 701–712, 142 P. 135. It is not suggested in the briefs that appellant had acquired any lien on the property involved prior to the execution of the mortgage.

[1-3] Whether the transaction in question was tainted with fraud was primarily a question of fact for the trial court to determine, and, since its finding thereon is supported by the evidence, we cannot, under well-established rules of appellate practice, interfere. It may be observed parenthetically that the credence to be given the testimony of a witness is a matter wholly within the province of the trial court, and, if the trial court denies credence to the testimony of a particular witness, as manifestly occurred in the instant case, its discretion cannot be disturbed, unless abused. This rule is too well known to require the citation of authorities.

[4] As to appellant's second specification of error: In his complaint it is alleged, as already pointed out, that the mortgage in question was not actually acknowledged before a notary public. Section 2956 of the Civil Code prescribes the form for chattel mortgages, and section 2957 of the same Code explicitly provides that a mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers in good faith and for value, unless (subdivision two) "it is acknowledged or proved, certified, and recorded in like manner as grants of real property." It has been held that the term "creditors," as used in the last-mentioned Code section, " 'is general, and applies to creditors existing prior to the mortgage, as well as subsequent.' " Noyes v. Bank of Italy, 206 Cal. 266, 271, 274 P. 68, 71; Cardenas v. Miller, 108 Cal. 250, 258, 39 P. 783, 41 P. 472, 49 Am. St. Rep. 84. The trial court, however, found adversely to appellant on the question of whether the chattel mortgage had been properly acknowledged, and this finding, in similar circumstances, was sustained in the case of Ware v. Julian (Cal. App.) 9 P.(2d) 906, 907, wherein it is stated: "We are satisfied that the prima facie evidence of the certificate of acknowledgment was sufficient to support the finding of due execution even though contradicted by the oral testimony of appellant. This holding not only accords with all the authorities, but is in line with the recent decision of our own Supreme Court in Smellie v. Southern Pacific Co., 299 P. 529."

[5-7] In his opening brief counsel for appellant presents two points which admittedly were not raised in the court below. It is now urged for the first time that the mortgage is fatally defective for two reasons: (1) That the due date of the obligation is omitted; and (2) that the description of the mortgaged property is insufficient. In an effort to avoid the well-known inhibitory rule with reference to points made for the first time on appeal, appellant contends that the plaintiff's complaint, by reason of the defects now presented, does not state a cause of action. This contention cannot be sustained. Assuming that the mortgage in question does not fully comply with the requirements of section 2956 of the Civil Code, this fact would not affect the original complaint as a pleading. As between the mortgagor and the mortgagee, a mortgage is valid and may be enforced even though it does not comply with statutory requirements. Lemon v. Wolff, 121 Cal. 272–276, 53 P. 801, 802; Loosemore v. Baker, 175 Cal. 420–423, 166 P. 26. It has been held that intervening creditors cannot raise or litigate questions as to validity of note and mortgage as between original parties; all they can demand is judgment protecting their interests and preventing enforcement of judgment to their prejudice. Horn v. Volcano Water Co. et al., 13 Cal. 62–72, 73 Am. Dec. 569. Appellant claimed no title to the mortgaged property. His only interest in the foreclosure suit was to prevent a diminution of the defendant's general assets to his prejudice. It may be observed that appellant did not attack the mortgage through process authorizing a seizure of the property. It was said in the Lemon Case, supra, that "only a creditor who has acquired a lien upon the mortgaged property by virtue of some legal proceeding, or who is armed with some process authorizing a seizure of the property" can question the sufficiency of a mortgage which is valid between the parties. Assuming, however, but not deciding, that appellant, by reason of his accrued claims, was in a position to challenge the statutory sufficiency of the mortgage, we know of no rule under which he was relieved from the duty of properly pleading his objections. Aside from the general rules of pleading, section 387 of the Code of Civil Procedure provides that one entitled to intervene may, if he is appearing adversely to

both plaintiff and defendant, file a complaint "setting forth the grounds upon which the intervention rests." Appellant elected to base his action on fraud. He omitted from his complaint the grounds on which he now relies, and did not raise the points in the court below. It is the law of this state that appellate courts will not review or consider points made for the first time on appeal. Douglas v. Southern Pacific Co., 203 Cal. 390–397, 264 P. 237; Imperial Valley L. Co. v. Globe G. & M. Co., 187 Cal. 352, 359, 202 P. 129; Greene v. Riordan, 97 Cal. App. 462, 470, 276 P. 141.

For the reasons herein stated, the judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

125 Cal.App. 141

GRAHAM v. YELLOW CAB CO. OF LOS ANGELES (two cases).

Civ. 7861.

District Court of Appeal, Second District, Division 1, California.

July 29, 1932.

1. Damages ⇐26.

Person injured through another's negligence may recover for damages certain to result in future, as well as those accruing before trial.

2. Damages ⇐216(10).

Instruction to consider "mental anxiety" plaintiff had suffered or would suffer because of her injuries in determining damages therefor *held* proper, especially where complaint alleged that she suffered great "mental anguish."

3. Damages ⇐50.

Mental worry, distress, grief, and mortification are proper elements of mental suffering, for which person injured because of another's negligence may recover damages.

4. Appeal and error ⇐1033(5).

Instruction to consider "mental anxiety," suffered by plaintiff because of injuries, in determining damages therefor, *held* favorable, not prejudicial, to her, though complaint claimed damages arising from "mental anguish."

"Anxiety" is at most but form of, and of same nature as, "anguish," though lesser in degree.

[Ed. Note.—For other definitions of "Anguish," see Words and Phrases.]

5. Appeal and error ⇐110.

No separate appeal lies from order denying motion for new trial.

Appeals from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Consolidated actions by Ada I. Graham and Jennie B. Graham, respectively, against the Yellow Cab Company of Los Angeles. From judgments for plaintiffs and an order denying a new trial, defendant appeals.

Judgments affirmed, and appeals from order denying new trial dismissed.

Faries & Williamson and McIntyre Faries, all of Los Angeles, for appellant.

George C. Watson and Richard A. Dunnigan, both of Los Angeles, for respondents.

HOUSER, J.

In a separate action against the defendant for damages for personal injuries which ensued by reason of its alleged negligence, each of the plaintiffs recovered a judgment. For the purpose of trial the two actions were "consolidated." The questions raised by the appellant from each of such judgments, as well as from "an order denying a new trial," are limited to alleged errors committed by the trial court in its instruction to the jury. To all practical intents and purposes, the instruction given in the one action was identical with that given in the other. In the case of Ada I. Graham against the defendant the instruction of which appellant complains was as follows:

"If you find for the plaintiff, Ada I. Graham, then in determining what damages, if any, you are to give to her for the injuries, if any, she received, as set out in the complaint, you may award her such damages in such sum as in your judgment will fairly and reasonably compensate her for the injuries she has received, if any, and in estimating the damages in that behalf, you may consider what before the accident was her health and physical activity, if shown to you, and the extent and nature of her injuries, if any, and also to what extent the injuries, if any, she has received, or any of them, are permanent in their character, as well as the physical pain and mental anxiety, if any, which she has suffered, or will certainly suffer in the future because of her injuries. You may also consider what, if any, effect such injuries are reasonably certain to have upon Ada I. Graham in the future in respect to pain and suffering, and also what, if any, effect such injuries are reasonably certain to have in the future in respect to plaintiff's power to earn money. And you may allow plaintiff such sum as will fairly and reasonably compensate her, but in no event should

your judgment be for more than the amount sued for in plaintiff's complaint, to-wit: The sum of $25,000.00."

Specifically, it is contended by the appellant that by the said instruction the defendant was prejudicially affected in its substantial rights because thereby the jury was authorized to assess damages in favor of plaintiff and against the defendant not only for "mental anxiety" which she may have suffered preceding the rendition of the judgment, but as well for such "mental anxiety" and for such general injuries as were reasonably certain to result to plaintiff in the future.

[1] With reference to the right of a person injured through or by the negligence of another to maintain an action against the latter and to recover a judgment therein not only for such proper damages as may have accrued up to the time of trial, but as well for like damages which are certain to result in the future, the law is so well established that it is deemed unnecessary to cite authorities to that effect.

In the case of Worden v. Central Fireproof Building Co., 172 Cal. 94, 155 P. 839, 840, the rule which relates to the sufficiency of an allegation of general damages which have resulted or which may result from a personal injury sustained by reason of the negligence of a defendant is thus stated:

"Complaint is made of an instruction given to the jury, relating to the measure of damages, which is as follows: 'If the injury has impaired the plaintiff's power to earn money, such sum as will compensate him for such loss of earning power.' It was not necessary to allege specially the damage to the complainant from this cause. The complaint alleged that by reason of the injury he had suffered great physical pain, 'and will continue to suffer,' and that the alleged injury to his knee is permanent, 'all to his damage in the sum of $15,000.' This is a sufficient allegation of the damage and it includes whatever loss of earning power may have been caused by the permanent injury stated. Consequences which naturally follow from a personal injury, because of the nature of the injury, are general damages, and need not be specially pleaded in order to recover damages resulting therefrom. Treadwell v. Whittier [80 Cal. 574, 22 P. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175], supra; Sloane v. Southern Cal. Ry. Co., 111 Cal. 668, 685, 44 P. 320, 32 L. R. A. 193; Castino v. Ritzman, 156 Cal. 587, 588, 105 P. 739; Storrs v. Los Angeles Traction Co., 134 Cal. 91, 93, 66 P. 72."

To the same effect, see Scragg v. Sallee, 24 Cal. App. 133, 140, 140 P. 706, 708, wherein it is said that:

"The rule is that the future and permanent effect of injuries directly or necessarily resulting to the plaintiff from the negligence of the defendant need not be specially pleaded in order to warrant proof thereof or recovery therefor. It is only such damages which are not the necessary result of the injuries which must be specially pleaded. Treadwell v. Whittier, 80 Cal. 574, 22 P. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175; Bonneau v. North Shore R. R. Co., 152 Cal. 413, 93 P. 106, 125 Am. St. Rep. 68; Castino v. Ritzman, 156 Cal. 587, 105 P. 739; Zibbell v. Southern Pacific Co., 160 Cal. 237, 253, 116 P. 513.

"There are numerous elements which may enter into the whole of the damage which necessarily results from the infliction of certain bodily injuries. Among these is that of physical and mental suffering which the injured party has endured and will endure from his injuries as the cause (Sutherland on Damages [3d Ed.] § 945), and 'it is not necessary in such a case to state separately the amount of the loss that is caused by each element of damage. A general statement of the whole amount of damage will suffice when all the damage claimed is the natural and ordinary effect of the injuries alleged.' Castino v. Ritzman [156 Cal. 587, 105 P. 739], supra."

[2] It therefore becomes apparent that, even in the absence of a special allegation of damages of the character of that set forth in the instruction of which appellant complains, plaintiff was entitled to have given to the jury just such an instruction as was given to it. But fortifying plaintiff's position in the matter, it appears that plaintiff's complaint contained the following allegation: "That plaintiff suffered numerous bruises, cuts and contusions in and about her head, body and limbs; that plaintiff was thereupon rendered unconscious; that plaintiff's nose was crushed and fractured, and that breathing of plaintiff through her said nose has been permanently impaired; that plaintiff suffered a permanent injury to her right ear; that plaintiff's right arm was bruised, wrenched and injured; that plaintiff suffered an injury to her spine; that her back was severely wrenched, bruised and injured; that plaintiff suffered internal injuries; that plaintiff has suffered since said accident severe and lasting headaches; that she sustained a permanent nervous shock; that plaintiff suffered great physical pain and mental anguish. That by reason of the premises this plaintiff has sustained damages in the sum of Twenty-five Thousand Dollars ($25,000)."

It follows that in the particular under consideration appellant's point is not well taken.

[3] But appellant urges that because by the terms of plaintiff's complaint she claimed damages which arose from "mental anguish" suffered by her as a result of the accident, she may not recover damages for any "mental anxiety" that she may have suffered. In that connection, appellant contends that such a dictionary difference exists between the words "anguish" and "anxiety" that by the instruction given to it the jury was induced to include within its verdict an item of damage for which no recovery legally may be had.

However, whatever technically may be the distinction between the words "anguish" and "anxiety," nevertheless, in accordance with the views which are thoroughly and painstakingly expressed in the case of Merrill v. Los Angeles Gas & Electric Co., 158 Cal. 499, 111 P. 534, 540, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134, the law of this state is to the effect that, in an action for damages for personal injuries arising from a negligent act, "mental worry, distress, grief, mortification, where they are shown to exist, are properly component elements of that mental suffering for which the law entitles the injured party to redress in monetary damages." See, also, Steinberger v. California Electric, etc., Co., 176 Cal. 386, 168 P. 570; Ryan v. Oakland Gas, etc., Co., 21 Cal. App. 14, 130 P. 693; Freiburg v. Israel, 45 Cal. App. 138, 187 P. 130; May v. Farrell, 94 Cal. App. 703, 271 P. 789; Bethurum v. Krumm, 109 Cal. App. 5, 292 P. 287.

[4] Moreover, since by the authorities to which reference has been had, in a proper situation of the parties and the facts relative to the cause of action, a recovery of a judgment in which may be included an item of damage on account of "mental anguish" suffered by the plaintiff is permissible, and since it is manifest that, at most, "anxiety" is but a form of, and necessarily of the same nature as, "anguish," though lesser in degree, it follows that, regarding the instruction of which complaint is made, the specific language or word therein to which attention is directed was in favor of the defendant, rather than as strong against it as other appropriate language or words might have been, and consequently that, by reason of the instruction as given to the jury, the appellant has no just cause for complaint.

[5] It is ordered that the judgments be, and they are, affirmed. Since no separate appeal lies from an order denying a motion for a new trial, it is ordered that appellant's appeals in that regard be, and they are, dismissed.

We concur: CONREY, P. J.; YORK, J.

125 Cal.App. 34

HAYWARD LUMBER & INVESTMENT CO. v. NASLUND et al.

Civ. 764.

District Court of Appeal, Fourth District, California.

July 21, 1932.

Rehearing Denied Aug. 11, 1932. Hearing Denied by Supreme Court Sept. 19, 1932.

1. Mortgages ⇐151(3).

Where future advances under trust deed are obligatory on part of beneficiary, trust deed is prior to mechanic's lien.

2. Bills and notes ⇐167.

Note otherwise negotiable is not rendered nonnegotiable by conditions in mortgage or trust deed or by fact its payment is secured by such mortgage or deed (Civ. Code, § 3265 as amended by St. 1923, p. 193).

3. Bills and notes ⇐370.

Note executed without consideration had potential validity and became enforceable instrument when negotiated to innocent purchaser for value before maturity (Civ. Code §§ 2909, 3109).

4. Mechanics' liens ⇐197.

Materialman's lien is based on owner's title, and lienholder stands in owner's shoes as far as regards innocent purchaser.

5. Mortgages ⇐258.

Promissory note imparts negotiable character to mortgage or trust deed securing its payment, making mortgage or deed in hands of innocent purchaser free from equities between original parties (Civ. Code, § 3265 as amended by St. 1923, p. 193).

6. Mortgages ⇐258.

Holder of subsequent materialman's lien could not impeach prior trust deed for absence of consideration for deed and note where such deed was held by innocent purchaser (Code Civ. Proc. § 1186).

Prior trust deed could not be impeached under such circumstances since the holder thereof took every reasonable precaution to protect his rights before purchasing the note and deed, materialman commenced furnishing materials when the trust deed was already on record and constituted constructive notice to him, and since the negotiable character of the note was imparted to the trust deed which secured its payment making the deed free in the hands of an innocent holder from equitable defenses between the original parties.

7. Mortgages ⇐151(3).

Duly recorded trust deed constitutes constructive notice to persons thereafter furnishing materials and has precedence over any materialman's lien for materials subsequent-

ly commenced to be furnished (Code Civ. Proc. § 1186).

8. Alteration of instruments ⇐24(1).

Erasure and substitution in property description in trust deed after execution, consented to by both trustor and beneficiary, did not render deed inadmissible in mechanic's lien foreclosure (Code Civ. Proc. § 1982).

9. Mortgages ⇐186(5).

Evidence in mechanic's lien foreclosure sustained finding that note and trust deed were delivered before lien accrued.

10. Appeal and error ⇐931(1).

Apparent contradictions in evidence must be resolved in favor of judgment.

11. Appeal and error ⇐1010(1).

Reviewing court is not justified in disturbing judgment, unless evidence is insufficient to support judgment upon any hypothesis.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Suit by the Hayward Lumber & Investment Company against Sam Naslund and others. From an adverse judgment, plaintiff appeals.

Affirmed.

LeRoy B. Lorenz, of Los Angeles, for appellant.

Clyde C. Downing, of Santa Ana, and Harvey & Heard, of Bakersfield, for respondents.

THOMSON, Justice pro tem.

This is an appeal by the plaintiff from the judgment of the trial court, sitting without a jury, in a suit to foreclose a materialman's lien on certain real property.

The principal question presented by this appeal is the matter of priority between a certain materialman's lien and a certain deed of trust.

In the complaint, which is in the ordinary form for the foreclosure of a mechanic's lien, defendant Sam Naslund is sued as the owner of the premises and the purchaser of the building materials furnished by appellant. The trial court found, in substance, that, at all times involved in the action, defendant Stapp was the owner of the real property in controversy; that said property stood of record in the name of the defendant Naslund, but that Naslund had no right, title, or interest in the premises, except a possessory interest, but held the record title for the sole benefit of Stapp; that Naslund commenced the erection of a building on said premises on July 7, 1927, on which day Naslund made a contract with appellant under which appellant, on July 7th, began the delivery of materials to said premises for said building, and continued to deliver such materials for said building until September 24, 1927; that, on November 26, 1927, appellant filed for record in the office of the county recorder of Kern county its claim of lien for said building materials. The trial court further found that, on June 21, 1927, Naslund executed and delivered to Stapp his promissory note, negotiable in form, for $2,500, payable three years after date, and at the same time and as part of the same transaction Naslund executed and delivered to Stapp a deed of trust of said premises, securing the payment of said note; that in said trust deed defendant Security Trust Company was named as trustee and Stapp was named as beneficiary; that the trust deed was recorded in said county recorder's office on July 6, 1927, one day before plaintiff began to furnish said building materials. The trial court further found that, on or about November 26, 1927, for value received, the promissory note was indorsed by Stapp to respondent Hasenjaeger, and at the same time the trust deed was assigned and transferred to Hasenjaeger; that thereafter Hasenjaeger indorsed the note and assigned and transferred the trust deed to defendant Marthasville Bank, and thereafter, for value received, said bank reindorsed the note and reassigned the trust deed to Hasenjaeger, who has been ever since the owner and holder of the note and trust deed and all rights of the beneficiary thereunder. The trial court further found that the execution of said promissory note and said trust deed by Naslund to Stapp was without any consideration, but that neither Hasenjaeger nor the Marthasville Bank had any knowledge or information or belief that the execution of the note and trust deed was without consideration, and each of said last-named defendants became the holder of the note before maturity, and took the same in good faith and for value, and neither of them had any notice of any infirmity in said note or of any defect in the title thereto. The trial court adjudged that the deed of trust was prior to appellant's materialman's lien.

Appellant's lien attached to the premises as of July 7, 1927, that being the date on which appellant began to furnish materials for the building. Code Civ. Proc., § 1186; McClain v. Hutton, 131 Cal. 132, 144, 61 P. 273, 63 P. 182, 622; Powers v. Soule-Martin Lumber Co., 209 Cal. 557, 560, 289 P. 809.

Appellant contends that the materialman's lien is prior to the trust deed for the reason that, although the trust deed was recorded the day before the accrual of appellant's lien, still, as the execution of the note and trust deed was without consideration, it follows that the trust deed did not constitute an incumbrance within the meaning of section 1186 of the Code of Civil Procedure; and that, if the deed of trust ever did acquire a legal status, it must have been when the note

and trust deed first changed hands for a valuable consideration, which was after appellant's lien accrued.

[1] In this connection appellant cites a number of authorities holding in effect, that, where a deed of trust which is recorded prior to a mechanic's lien, does not require the beneficiary to advance the entire amount for which it is given as security, but gives the beneficiary an option as to whether or not he will advance such sum, advances made by such beneficiary, after notice of the lien claimant's rights, are voluntary payments, and the mechanic's lien is prior to the trust deed as to those payments. See Owens-Parks Lumber Co. v. McCarty (Cal. App.) 9 P.(2d) 310, March 15, 1932; W. P. Fuller & Co. v. McClure, 48 Cal. App. 185, 191, 191 P. 1027; Yost-Linn Lumber Co. v. Williams (Cal. App.) 9 P.(2d) 324, March 12, 1932. From this appellant argues that, in the instant case, there being no payment of consideration at the time of the execution of the note and trust deed, the principle involved is similar to a case in which the consideration is to be advanced in the future at the option of the beneficiary, and, therefore, the materialman's lien is prior to the trust deed because it accrued before any consideration was advanced or paid for the note and trust deed. It is also well settled that, where the future advances are obligatory on the part of the beneficiary, the trust deed is prior to the mechanic's lien. Fickling v. Jackman, 203 Cal. 657, 662, 265 P. 810; Valley Lumber Co. v. Wright, 2 Cal. App. 288, 291, 84 P. 58. In the cases in which the mechanic's liens are held to be prior to the mortgage or trust deed, the holder of the note and security had notice or knowledge, either by the terms of the instrument itself, or otherwise, as to whether the advances which were the consideration for the note and mortgage or trust deed were optional or obligatory; and, consequently, such holder had notice or knowledge as to whether or not the lien of the mortgage or trust deed would be postponed. Appellant's argument overlooks the very important fact that respondent Hasenjaeger is an innocent purchaser for value. He had no notice of any want of consideration or other defects in the note or trust deed. Neither the note nor the trust deed involved in this case gives any indication that the consideration was to be optional. Even if it were optional, it is not necessary to state that fact in the instrument when the amount of liability to be incurred in it is expressly limited, as in the present case. Owens-Parks Lumber Co. v. McCarty, supra. Each of the instruments provided on its face for an unconditional payment of a certain amount, at one specified time.

[2] So far as the promissory note is concerned, considered apart from the trust deed, there is no doubt that Hasenjaeger purchased it free and clear of all equities and defenses against it. Civ. Code, §§ 3133 and 3138. This is conceded by appellant in its opening brief, which states: "Appellant does not question the liability of any of the parties to the note." Prior to the 1923 amendment to section 3265 of the Civil Code, if a note was secured by a mortgage, the note, although negotiable in form, was not negotiable in law, if the purchaser took it with knowledge of the mortgage. But since said amendment (St. 1923, p. 193) a promissory note, otherwise negotiable in form, is not rendered non-negotiable by reason of the fact that its payment is secured by a mortgage or trust deed, nor is its negotiability affected or abridged by any conditions contained in the mortgage or trust deed securing the same. 17 Cal. Jur., pp. 887, 888; 19 Cal. Jur., pp. 945, 946; Witty v. Clinch, 207 Cal. 779, 785, 279 P. 797.

[3] It becomes important, therefore, to consider in what way, if at all, this amendment affects a mortgage or trust deed given as security for the payment of a negotiable instrument. The lien of a mortgage or trust deed is a mere incident of the debt or obligation which it is given to secure; or, as expressed in section 2909 of the Civil Code, "a lien is to be deemed accessory to the act for the performance of which it is a security, whether any person is bound for such performance or not. * * *" In this connection appellant argues that "there cannot be a mortgage if there is no debt or other obligation to be secured"; and that the absence of consideration for the note and trust deed in controversy was an absolute defense against Stapp, the beneficiary and holder of the note and trust deed, at the time appellant's materialman's lien accrued, because at that time the trust deed was "only a piece of paper; * * * it did not secure a debt because there was no debt between the parties to the note, actually or in contemplation." Such a contention has merit, no doubt, when applied to the parties to the original instruments and those holding under them with notice. It is without merit, however, when extended to bona fide purchasers for value, before maturity, without notice of any defects. As stated in section 3109 of the Civil Code, "absence or failure of consideration is matter of defense as against any person not a holder in due course. * * *" Although, in the instant case, the note while in the hands of the payee was subject to impeachment for lack of consideration, still, even from the time of its execution, this instrument was not "only a piece of paper," as contended by appellant, but it had a potential validity, which, by reason of the statute, became a real, enforceable instrument immediately upon being negotiated to an innocent purchaser for value, before maturity. Such transfer purged the instrument of any imperfections or defenses available to others than a holder

in due course. Jones on Mortgages (7th Ed.) vol. 1, §§ 525, 612, 616; vol. 2, § 827a, p. 324.

[4-6] The materialman's lien is based upon the title of the owner and the lienholder "stands in the shoes" of the owner, so far as an innocent purchaser is concerned. If the quality of negotiability which is possessed by the note is imparted to the trust deed which secures its payment, it follows that the holder of a subsequent materialman's lien cannot impeach the trust deed by reason of the absence of consideration for the execution of the note and trust deed, when such trust deed is held by an innocent purchaser. We are of the opinion that, since the amendment of 1923 to section 3265 of the Civil Code, the negotiable character of such a promissory note does impress a similar quality or characteristic upon the mortgage or trust deed which secures its payment. As expressed in 19 R. C. L., § 127, p. 356, "While a mortgage does not of itself possess the quality of negotiability, yet, when given to secure a negotiable obligation, it will, by the weight of authority, so far partake of the character thereof that whenever the obligation is so transferred as to free it from all equities existing in favor of the maker of the note, prior indorsers, or third persons, the mortgage will also be freed therefrom." The same principle is expounded in Jones on Mortgages (7th Ed.) vol. 2, p. 331, as follows: "A mortgage note, if negotiable in form, is of course assignable by indorsement, and the assignee takes the legal title to it. But the debt being the principal thing imparts its character to the mortgage. * * * When, therefore, the debt secured is in the form of a negotiable note, a legal transfer of this carries with it the mortgage security; and inasmuch as a negotiable promissory note by the commercial law, when assigned for value before maturity, passes to the assignee free of all equitable defenses to which it was subject in the hands of the payee, it does not lose this character which it has under the commercial law when it is secured by a mortgage. The mortgage rather is regarded as following the note, and as taking the same character; and it is the generally received doctrine that the assignee of a mortgage securing a negotiable note, taking it in good faith, before maturity, takes it free from any equities existing between the original parties." See, also, 41 Cor. Jur., § 700, p. 683, and § 712, p. 693; American Savings Bank & Trust Co. v. Helgesen, 64 Wash. 54, 116 P. 837, Ann. Cas. 1913A, page 390. The foregoing is the doctrine which is followed in most of the jurisdictions of the United States. Contrary to this general doctrine, however, it is held in a few states that, although the mortgage note is negotiable, the mortgage itself is only assignable in equity, and, therefore, the assignee, having to resort to equity to enforce his rights, is compelled to do equity toward the mortgagor, and allow him all the rights of defense he had against the mortgagee. Jones on Mortgages (7th Ed.) vol. 2, § 838, p. 342. No California cases which have passed upon this question since said amendment of 1923 have been called to our attention, and we assume that the effect of this amendment on mortgages and trust deeds has not been determined by a court of last resort in this state. We are of the opinion that, since said amendment of 1923 to section 3265 of the Civil Code, the majority doctrine should be adopted and followed in this jurisdiction. The contrary doctrine would greatly curtail the use of negotiable instruments, and it would unduly restrict the purpose of said amendment.

In the case at bar, even under the principles of equity applicable to nonnegotiable instruments, appellant's lien should be subsequent to the trust deed. The evidence shows that the respondent Hasenjaeger took every reasonable precaution to protect his rights before purchasing the note and trust deed. He caused a search of title to be made by a title company, he ascertained when appellant began the delivery of the materials, and he learned that the trust deed had been recorded prior to the time the materialman's lien accrued. There was nothing on the face of the promissory note or the trust deed to impeach their validity, or which disclosed any infirmities or defects of title, or which would ordinarily arouse the suspicion of a prudent man that the transaction was irregular or fraudulent in any respect. Since the said amendment to said section 3265, he was not required to investigate the validity of the promissory note, or to inquire as to the consideration or the circumstances surrounding its execution, as he was taking it in due course. Civ. Code, § 3138; Witty v. Clinch, supra.

[7] Contrast Hasenjaeger's precaution with appellant's conduct. The trust deed was on record before it began to furnish materials, and a trust deed which is duly recorded has precedence over any materialman's lien for materials the furnishing of which was subsequently commenced; the record of the trust deed being constructive notice to persons who thereafter furnish such materials. Code Civ. Proc., § 1186; 18 Cal. Jur., p. 125; Middleton v. Arastraville Mining Co., 146 Cal. 219, 225, 79 P. 889; Valley Lumber Co. v. Wright, supra. If appellant had taken ordinary precautions before commencing the delivery of the materials, it would have discovered that the trust deed was recorded, and it could then have taken such steps to protect its interest as might seem advisable. Had appellant discovered the trust deed on record, it could have refused to furnish the materials; or if appellant had discovered the lack of consideration for the note, it, no doubt, could have obtained an order of court restraining the assignment of the note and trust deed on the

ground that his materialman's lien was impaired by the fraudulent trust deed, and that appellant was exposed to the chance that the note and trust deed might pass into the hands of a bona fide assignee for value. Jones on Mortgages (7th Ed.) vol. 1, § 628, pp. 1034, 1035. It was the duty of appellant to take such precautions as a reasonably prudent man would have done under similar circumstances, and appellant was negligent in failing to ascertain that the trust deed was on record. Jones on Liens (3d Ed.) § 1545, p. 781; Owens-Parks Lumber Co. v. McCarty, supra. It is also a legal maxim that, when one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer. Civ. Code, § 3543.

It follows, therefore, that the trial court did not err in its conclusion of law and judgment that the trust deed held by Hasenjaeger is prior to appellant's materialman's lien.

[8] Appellant next contends that the trust deed was not admissible in evidence under section 1982 of the Code of Civil Procedure, for the reason that a correction was made therein, after its execution, consisting of an erasure of "four (4)" and the substitution therefor of "three (3)," after the word "block" in the description of the property. The evidence shows that a mistake was made in the description; that it was intended by the parties to execute a trust deed on lot three; that, after the instrument had been recorded on June 22d, the mistake was discovered and collected and the trust deed recorded on July 6th, before appellant began the delivery of any materials. Appellant claims that the evidence does not show that the trustor consented to the alteration. The evidence does show, however, that it was intended by the trustor and the beneficiary named in the instrument to have the trust deed cover lot three, instead of lot four; that the trust deed was a "dummy" transaction as between Naslund, the trustor, and Stapp, the beneficiary, the trustor claiming no interest in the trust deed or the property covered thereby; that Naslund merely held the record title for the benefit of Stapp; and that Stapp consented to the correction. Under the circumstances of this case, as between appellant and Hasenjaeger, the instrument was admissible in evidence.

[9] Appellant advances the further contention that the trial court's finding to the effect that the note and trust deed were delivered before appellant's lien accrued, is not supported by the evidence. But the witness Naslund testified, in substance, that he executed the trust deed in controversy to Stapp; that, at the time, he (Naslund) understood that he was executing a trust deed of the property involved in this action to Stapp; that he signed the note in controversy and thereupon he "handed it back to Mr. Stapp." Again, in answer to a question by the court, he testified as follows: "The court: * * * and then you made this note and trust deed and gave it back to him (Stapp) * * *?" To which question the witness answered "Yes." In addition to this, Stapp testified that he got the trust deed from Naslund. Such evidence warranted the trial court in making the finding complained of by appellant.

[10, 11] Appellant further asserts that the findings relating to transfers of the note and trust deed are unsupported by evidence. There is a considerable amount of evidence in the record with respect to these transfers. We deem it unnecessary to discuss it, except to say that the apparent contradictions must be resolved in favor of the judgment, and that there is ample evidence to support the findings criticized by appellant. A reviewing court is not justified in disturbing a judgment unless it appears that upon no hypothesis is there sufficient substantial evidence to support it. Packer v. Wagner, 109 Cal. App. 26, 32, 292 P. 523; Waxman v. Jennings, 72 Cal. App. 671, 674, 238 P. 98; Taylor v. U. S. Fidelity & Guaranty Co., 86 Cal. App. 382, 386, 260 P. 898.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

125 Cal.App. 192

PEOPLE v. GARDNER.

Cr. 2223.

District Court of Appeal, Second District, Division 1, California.

July 30, 1932.

Rehearing Denied Aug. 11, 1932.

1. Intoxicating liquors ⇐236(19).

Evidence *held* sufficient to sustain conviction for possession of still.

2. Criminal law ⇐1169(1).

Error in overruling objection to compound question asked by prosecution *held* not to require reversal, where no substantial prejudice resulted.

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Benjamin F. Gardner was convicted of possessing a still, and he appeals.

Affirmed.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Paul Taylor and Richard Kittrelle, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

HOUSER, J.

Defendant Gardner and one Stromberg were charged with the commission of the crime known as "possession of a still," alleged to have been operated by them for the purpose of manufacturing intoxicating liquor for beverage purposes.

On the trial, after all the evidence had been introduced, through his attorney, defendant Stromberg indicated "that he would change his plea to the court and plead guilty." Thereupon the trial court found each of the defendants "guilty of the offense charged, to-wit, the possession of a still, a felony." From the ensuing judgment, as well as from an order by which his motion for a new trial was denied, defendant, Gardner, has appealed to this court.

[1] It is first urged by appellant that the evidence adduced on the trial of the action was insufficient to support the judgment.

Although not established without contradiction as to each of several important items of testimony, from the record and based upon substantial evidence, it may be assumed that the jury believed that on several different occasions the two defendants together called at a real estate office for the ostensible purpose of renting a chicken ranch for the use of defendant Stromberg. As was testified by a salesman who was employed by the proprietor of the real estate office:

Defendant Gardner said "that he wanted to rent a ranch with some chicken equipment for his partner, there; that he wasn't very well, and he wanted to get him out in the country; that he wanted to get in the chicken business. I told him we had a dandy place, just about what he wanted. He said he didn't want a big house; just a small house with a few rooms, and that this was a dandy place for him; and I took him over there to 1917 Holly and showed him the place.

"Q. What else was said there? A. Well, they looked the place over, and they went all over the chicken equipment and through the house. * * *

"Q. Then what happened after that? A. Well, I think we disbanded then and there and they came back later on, as near as I can remember.

"Q. Where did you see them the next time? A. Why, they came back to the office, and something was said about a lease—they were going to draw up a lease, and, of course, I had nothing to do with the lease. The broker took care of the lease.

"Q. And were both defendants together at that time? A. Yes, sir."

The real estate broker who was the employer of the salesmen in his office, testified that he had seen defendant Stromberg at the real estate office on several different occasions, and that on the third visit of defendant Stromberg to the office, under the name of "Harry Allen," Stromberg signed a lease of the chicken ranch. It also appeared that the defendants were arrested within two weeks after the lease of the chicken ranch was executed, at which time the still was in full operation. A police officer testified that in a chicken house on the leased premises he found a complete still for the manufacture of intoxicating liquor; that at the time they were arrested for the commission of the offense in question the two defendants were together on the leased property, "sitting in the car directly back of the house, between the house and the garage." According to the testimony of defendant Gardner, he was the owner of the automobile to which the policeman referred, but that on several different occasions within the two weeks following the leasing of the chicken ranch he rented the automobile to defendant Stromberg, although on each of such occasions defendant Gardner "would drive it for him" (Stromberg). It also appeared that, at the time when defendants were arrested, defendant Stromberg had two keys in his possession which, respectively, fitted the outer and the inner door of the chicken house in which the still was operated. Sufficient evidence was introduced to justify the conclusion by the trial court that at the time of his arrest defendant Gardner had in his possession a similar set of keys; that said keys and the keys in the possession of defendant Stromberg were manufactured by the same company; that defendant Gardner purchased and paid for certain "black iron gas pipe," which was delivered by the seller thereof on the leased property; and that pipe similiar in size and character was used in the construction and the operation of the still.

In the case of People v. Borrego, 211 Cal. 759, 297 P. 17, wherein in many respects the facts were similar to, but taken together were much weaker than, those which relate to the instant case, the Supreme Court ruled that the evidence was sufficient to support a verdict of guilt of the defendant. Likewise in People v. Mitsunaga, 91 Cal. App. 298, 266 P. 1020, and People v. Helt, 100 Cal. App. 279, 279 P. 1046. Primarily the question of whether the evidence established the guilt of defendant was for the determination of the trial court; and, since its conclusion appears to have been based upon substantial and sufficient evidence, it is not the province of this court to disturb the ensuing judgment. As is stated in People v. Martinez, 20 Cal. App. 343, 344, 128 P. 952, 953, and reiterated in People v. Mitsunaga, 91 Cal. App. 298, 301, 266 P. 1020: "* * * Where the circumstances are such as to reasonably justify an infer-

ence of guilt, as found by the jury, the fact that an inference of innocence might likewise be reasonably drawn therefrom does not present a question of law for review by an appellate court any more than does a verdict based upon direct conflicting evidence; in neither case will the verdict be disturbed. * * *"

[2] Appellant also contends that the trial court erred in overruling his objection to a compound question asked by the prosecution of one of its witnesses. Although it is manifest that the objection was well taken and properly might have been sustained by the trial court, since the effect produced no substantial prejudice to the rights of defendant, the error should not result in a reversal of the judgment.

A further specification of error by appellant, which consists in a complaint that, over the objection of defendant, various exhibits were received in evidence, is not (the record considered) worthy of serious attention by this court.

The judgment and the order by which the motion for a new trial of defendant was denied are affirmed.

We concur: CONREY, P. J.; YORK, J.

KENNEDY v. McINTURFF. *

Civ. 768.

District Court of Appeal, Fourth District, California.

July 29, 1932.

Rehearing Denied Aug. 19, 1932. Hearing Granted by Supreme Court Sept. 24, 1932.

1. Waters and water courses ⇐183½.

One procuring purchaser of water district bonds *held* not entitled to payment of commission from proceeds, in absence of showing of amount of surplus (St. 1921, pp. 922, 931, §§ 32, 45).

Public Utilities District Act (St. 1921, p. 922), § 32, provides that proceeds of sale of bonds shall be applied exclusively to objects mentioned in ordinance authorizing their issuance until fully accomplished and any surplus transferred to general fund, except that surplus exceeding $5,000 shall be transferred to appropriate fund to pay interest and maintain sinking fund or provide for retirement of bonded indebtedness, and section 45 (St. 1921, p. 931) provides that board of directors or other officers of district shall have no power to incur any debt or liability by issuing bonds or otherwise in excess of express provisions of act.

2. Appeal and error ⇐901.

Appellate court cannot presume error in order to reverse judgment, but must affirm it when no error appears in record.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Petition by Elmer J. Kennedy, doing business under the firm name and style of the Elmer J. Kennedy Company, for a writ of mandate to H. McInturff, Treasurer of the Stratford Public Utility District, Kings County. Judgment for respondent, and petitioner appeals.

Affirmed.

K. B. Kennicott, of Los Angeles, for appellant.

Clarence H. Wilson, Dist. Atty., of Hanford, for respondent.

MARKS, J.

Petitioner brought this action in the court below by filing his petition for writ of mandate to compel payment of a warrant drawn in his favor on the funds of the Stratford public utility district in the possession of respondent. This warrant was drawn by the board of directors of the district, and was for services rendered by petitioner in the sale of bonds. The cause was submitted to the trial court upon an agreed statement of facts, and judgment rendered for respondent. Petitioner has appealed from this judgment.

From the agreed statement of facts it appears that the Stratford public utility district is a public utility district organized in Kings county under the provisions of an act providing for the incorporation and operation of such districts in unincorporated territory. Stats. 1921, p. 906. Under the terms of this act, the county treasurer of Kings county, respondent here, was made the acting treasurer of the district and custodian of its funds. The district was governed by a board of directors.

On the 11th day of August, 1930, the electors of the district authorized the issuance of bonds in the sum of $30,000 for the acquisition, construction, and completion of a waterworks system for the distribution of water within the district. The board of directors made several unsuccessful attempts to sell these bonds.

Under date of October 10, 1930, petitioner addressed a letter to the board of directors, wherein he offered to find a purchaser for the bonds who would pay their par value and ac-

crued interest to the date of delivery. This offer was in consideration of the payment to him of a commission of $1,625. The bonds were dated September 1, 1930. The offer was accepted by the board of directors on the day of its receipt.

Petitioner produced a purchaser, to whom the bonds were sold, and presented a demand for the payment of his commission. This was allowed by the board of directors and a warrant drawn upon respondent, but payment was refused upon the ground that the expenditure was not authorized by law. It is stipulated in the agreed statement of facts that the sum of $1,625 is a reasonable amount to be paid as a commission for the sale of the bonds and "that the work contemplated by said proposition as set forth in the notice of election has been completed and paid for in full and that there still remains from the sale of said bonds sufficient money to pay said order, requisition and warrant in full."

The sole question to be considered on this appeal is whether or not, under the circumstances disclosed by the record, the district can pay petitioner a commission for the sale of bonds out of the moneys received from the sale of these bonds, which were issued for the purpose of the acquisition, construction, and completion of a water works system under the terms of the Public Utilities District Act. We have been referred to no case in California which is decisive of this question.

We find in the Public Utilities District Act (Stats. 1921, p. 906) the following provisions: "Sec. 32. * * * The bonds so issued shall be issued in denominations of not less than one hundred dollars and not more than one thousand dollars, and may be sold by the board of directors at such times and in such manner as they shall determine, but shall not be sold at less than par and accrued interest. Any such bonds shall have the same force, value, and use as bonds issued by a municipality of this state. The proceeds from the sale of bonds shall be placed in the treasury to the credit of the proper fund, and shall be applied exclusively to the purposes and objects mentioned in the ordinance authorizing their issue until such objects are fully accomplished; after which, if any surplus remains, such surplus may be transferred to the general fund; except that if such surplus exceeds the sum of five thousand dollars, then such surplus and the whole thereof shall be transferred to the appropriate fund or funds to pay interest and maintain the sinking fund, or provide for the retirement of the bonded indebtedness in connection with which such surplus remains. * * * Sec. 45. The board of directors or other officers of the district shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, in excess of the express provisions of this act, and any debt or liability incurred in excess of such express provisions shall be and remain absolutely void."

[1] It clearly appears from the portion of section 32 of the Public Utilities District Act which we have quoted that the Legislature did provide and require that all moneys received from the sale of the bonds should be first used exclusively for the purposes named in the call for the election authorizing their issuance; that if, after the utility has been fully completed and paid for, there remained a surplus exceeding the sum of $5,000, such surplus should be transferred to an appropriate fund and used exclusively to pay interest upon the bonds and maintain the sinking fund or provide for the retirement of the bonded indebtedness; that, if a surplus remained amounting to $5,000 or less, it might be transferred to the general fund of the district. It is apparent that the only circumstance under which the petitioner might be paid his commission out of the bond money would be when a surplus remained that did not exceed $5,000. The record does not disclose the amount of the surplus which remained; the agreed statement of facts merely containing the statement that the surplus was sufficient to pay the $1,625 demanded by petitioner.

[2] It is fundamental that a judgment will not be reversed unless error appears in the record. In order that error might be made to appear, we would have to assume that the surplus did not exceed $5,000. We cannot presume error in order to reverse a judgment; therefore we must affirm it where none is made to appear.

Nothing which we have said should be construed as holding that the commission could be paid to petitioner if the surplus were $5,000 or less. This question is not decided. However, the reasoning and arguments used in the following cases would seem to point to the conclusion that it should not be paid. Stephens v. Richardson, 184 Cal. 721, 195 P. 651; Ellis v. Stephens, 185 Cal. 720, 198 P. 403; Hunter v. County of Santa Barbara, 110 Cal. App. 698, 294 P. 1082; Peery v. City of Los Angeles, 187 Cal. 753, 203 P. 992, 19 A. L. R. 1044; Uhler v. City of Olympia, 87 Wash. 1, 151 P. 117, 152 P. 998.

Judgment affirmed.

We concur: BARNARD, P. J.; SCOVEL, Justice pro tem.

125 Cal.App. 367

LOWY v. McKEON DRILLING CO. et al.

Civ. 8290.

District Court of Appeal, First District, Division 1, California.

Aug. 13, 1932.

1. Mines and minerals ⇐109.

Contract giving certain portion of any oil produced for drilling services gave no proprietary interest in land, nor in any production therefrom except as produced under contract.

Lessee entered into drilling contract with plaintiff's predecessor, whereby latter was granted right to drill for oil on two separate parcels of land and right to receive for his services a portion of oil produced by such drilling operations. Plaintiff's contention that under this contract he became vested with an interest in whatever hydrocarbon substances were afterwards produced, from any part of the lot, regardless of when, how, or by whom they were produced, was without merit, since the drilling contract on which plaintiff's right of ownership was based carried no proprietary interest in the land, nor in the production therefrom except such as was produced by drilling operations prosecuted thereunder, and plaintiff therefore had no interest in the oil produced under another contract.

2. Mines and minerals ⇐109.

That grantee of right to drill for oil capped second well and removed equipment *held* not to authorize finding of forfeiture of rights on theory of abandonment.

The fact that plaintiff's predecessor capped second well before it was brought on production, and removed equipment, did not operate as a forfeiture of future rights under the drilling contract because under the terms thereof he had the right thereafter, and at any time up to expiration of lease, to re-enter premises and resume drilling operations thereon, since he had completed a producing well on the west half of lot as required by contract.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by Charles F. Lowy against the McKeon Drilling Company and others for declaratory relief. From an adverse judgment, plaintiff appeals.

Reversed, with directions.

Charles F. Lowy, and Edward J. Cotter, both of Los Angeles, for appellant.

Spalding & Myers, J. Karl Lobdell, and Harold L. Watt, all of Los Angeles, for respondents.

KNIGHT, J.

This is an action for declaratory relief. It was alleged in the complaint that for several years past plaintiff had been the owner of 8¼ per cent. "of the oil, gas and other hydrocarbon substances produced, saved and sold from the East half of Lot Five (5) in Block One (1) of Webber Tract No. Two (2)," in Los Angeles county, that by mesne assignments the defendant Three-In-One Petroleum Corporation acquired the lease to said premises and sublet the same to the defendant G. C. Fairchild, who in December, 1927, entered into a contract with the McKeon Drilling Company to complete the drilling of an oil well thereon and bring the same on production; that as a result of said contract plaintiff's ownership in a portion of the oil production from said premises was repudiated; and he asked, therefore, that his rights thereto be determined, and that he be granted such other relief as would be just and equitable. The defendants filed separate answers, consisting merely of denials of plaintiff's ownership in any of the substances produced on the east half of said lot. The judgment was that plaintiff take nothing by his action, and therefrom plaintiff has taken this appeal.

It appears from the evidence that on February 17, 1922, W. H. Biel, as lessee entered into a drilling contract with R. C. Steel, whereby the latter was granted the right to drill for oil on two separate parcels of land and to receive for his services a portion of the oil produced by such drilling operations. Parcel 1 included property not here involved. Parcel 2 embraced all of lot 5 of the Webber tract; and by mesne assignments plaintiff acquired an 8¼ per cent. interest in the oil, gas, and other hydrocarbon substances produced, saved, or sold as a result of the drilling operations prosecuted under the Steel contract. Pursuant to the Steel contract, a producing well was completed on parcel 1, and afterwards a producing well was completed on the west half of parcel 2 (lot 5). Thereafter drilling operations were started on the east half of lot 5; but before the well was brought on production the hole was capped, the equipment was dismantled, removed, and sold, and nothing further was done toward developing the well until about five years later, when the defendant McKeon Drilling Company, operating under the drilling contract let by Fairchild, the sublessee of the Three-In-One Petroleum Corporation, which had acquired the Biel lease, entered upon the premises, reopened the well, continued the drilling, and brought the well on production. The trial court found that plaintiff was not entitled to any portion of the

hydrocarbon substances produced under the McKeon contract; and the evidence supports such finding, because, as shown, plaintiff's ownership in any of the production from said lot 5 or elsewhere was restricted to substances produced under the Steel drilling contract. He acquired no interest whatever in the production under the McKeon contract.

[1] The main argument advanced by plaintiff with reference to the above finding is that, inasmuch as an oil producing well was completed on the west half of said lot 5 under the Steel contract, the parties claiming thereunder were vested with an interest in whatever hydrocarbon substances were afterwards produced, saved, or sold from any part of said lot, regardless of when, how, or by whom they were produced. There is no force in the argument, for the reason that the Steel drilling contract upon which plaintiff's right of ownership is founded carried no proprietary interest in the land, nor in any of the production therefrom except such as was produced by the drilling operations prosecuted under the Steel contract; and, to repeat, there was no production thereunder from the east half of said lot. Whether or not the letting of the McKeon contract amounted to a breach of the Steel contract is a question not here involved; the action being one purely for declaratory relief.

[2] The trial court went much farther, however, and found that "the predecessors in interest of the plaintiff abandoned said premises [the east half of lot five], and all rights theretofore by them, or any of them, acquired in said premises under and by virtue of said [Steel] drilling agreement aforesaid," and concluded as matter of law therefrom that "plaintiff has no right, title or interest in or to any of the oil, gas or other hydrocarbon substances produced, saved or sold from the East Half of Lot Five. * * *" As will be observed, the effect of such finding and conclusion was to declare a forfeiture of all future drilling rights under the Steel contract as to the east half of lot 5 as of the date of the rendition of said findings, to wit, July, 1929. In the state of the pleadings above set forth and in the absence of any affirmative defenses pleaded in that behalf, it may be seriously doubted, as plaintiff contends, whether the trial court had the authority to declare a forfeiture of the rights acquired under the Steel drilling contract; but, assuming that it did, the evidence, in our opinion, is legally insufficient to support a finding and conclusion to that effect. As will be noted, they were based entirely upon the fact that, after starting the second well on lot 5, the hole was capped and the equipment dismantled and sold. But the evidence shows without dispute that the lease held by Biel at the time he entered into the Steel drilling contract fixed a ten-year term. The lease was dated September 30, 1921, which gave Biel until September, 1931, to develop oil on any part of lot 5, and the right to enter into drilling contracts covering the entire period of the lease. The Steel contract was drawn to that effect, no limitation of time being placed on the termination of the drilling operations to be prosecuted thereunder. In this regard it provided that, if Steel performed the terms and conditions thereof pertaining to parcel 1, he was given the option of drilling on parcel 2 (lot 5), providing drilling operations were commenced within a specified time. It further provided that if he "shall perform the conditions and terms of this agreement and shall actually start the drilling operation on parcel No. 2, and the drilling of the well thereon as hereinbefore specified he shall continuously and in good faith prosecute the work of drilling said well with all due diligence until the oil producing sands under said parcel are found or until he is satisfied that said parcel is not oil bearing." And, continuing, said contract read: "It is the intention of this agreement and the second party agrees to perform each and all of the terms and conditions of the oil leases held by the party of the first part upon each of said premises hereinbefore described, he, however, binding himself only to drill a well upon parcel No. 1, and having the option of drilling a well on parcel No. 2. If, however, he proceeds to drill a well on parcel No. 2 he shall perform all of the terms and conditions of the oil lease on said parcel No. 2." Admittedly Steel complied with all the terms and conditions of said contract as to parcel 1. Thereupon he entered upon parcel 2 and performed the terms and conditions of said contract with respect thereto by completing a producing well on the west half of lot 5, following which he started to drill a second well on lot 5, to wit, on the east half thereof; but, as stated, in May, 1923, before the same was brought on production, he discontinued the drilling operations, capped the hole, and removed the equipment. However, having completed one producing well on said parcel, he complied with his contract, which did not require him to drill a second well thereon, although he had the option of doing so. And, if he started to drill a second well, there was nothing in said contract requiring him to complete the same and bring it on production within any specified time, or which required him to drill continuously. Therefore the fact that in May, 1923, he capped the second well before it was brought on production, and removed the equipment, did not operate as a forfeiture of future rights under the contract because, as shown under the terms thereof, he had the right thereafter, and at any time up to the expiration of the Biel lease, to re-enter the premises and resume drilling operations thereon. And, that being so, he was entitled to declaratory relief to that effect.

For the reasons stated, the judgment is re-

versed, with directions to the trial court to modify its findings on the issue of abandonment and thereupon to re-enter judgment defining plaintiff's rights under the Steel contract in conformity with the views herein expressed.

We concur: TYLER, P. J.; CASHIN, J.

125 Cal.App. 326

WEBB et al. v. BOYLE et al.

Civ. 971.

District Court of Appeal, Fourth District. California.

Aug. 11, 1932.

Rehearing Denied Sept. 8, 1932. Hearing Denied by Supreme Court Oct. 10, 1932.

1. Automobiles ⇐76.

Trucking concern having no fixed terminus and transporting only upon special contracts *held* not "common carrier" required to obtain permit from railroad commission (St. 1917, p. 330 et seq.).

Evidence disclosed that trucking concern transported personal property to any destination to which its consignee directed delivery; that they maintained no fixed terminus; that they accepted goods for transportation only upon special contracts and did not undertake generally and for all persons indifferently to carry goods and deliver them for hire; and that they consistently maintained that they were private carriers.

[Ed. Note.—For other definitions of "Common Carrier," see Words and Phrases.]

2. Appeal and error ⇐843(1).

Where judgment is supported by all necessary findings, based on competent evidence, other findings need not be considered on appeal.

Appeal from Superior Court, San Diego County; A. C. Finney, Judge.

Action by Elmer Webb and another, doing business as Excondido Truck Line, against C. E. Boyle and another, doing business as C. E. Boyle & Son. From a judgment for defendants, plaintiffs appeal.

Affirmed.

H. J. Bischoff, of San Diego, for appellants.

A. R. Honnold, of Escondido, for respondents.

MARKS, Acting P. J.

Appellants, who had a permit from the railroad commission of California to operate as a transportation company under the provisions of the Auto Stage and Truck Transportation Act (Stats. 1917, p. 330, and the acts amendatory thereof), instituted this action to enjoin respondents from transporting goods over the public highways of the state, alleging that they were operating as a transportation company as defined in the aforementioned act without a permit from the railroad commission. Judgment was rendered for respondents. This judgment is attacked here upon the ground that the findings upon which it rests are not supported by the evidence.

The facts in this case are not involved and the law applicable to them is so well settled that an extended discussion of them is unnecessary.

[1] The portions of the Auto Stage and Truck Transportation Act applicable here bring under its terms a transportation company operating as a common carrier over any public highway in the state between fixed termini, or over a regular route and not operating exclusively within an incorporated city and town. In Forsyth v. San Joaquin Light, etc., Corp., 208 Cal. 397, 281 P. 620, 623, the Supreme Court said: "Section 2168 of the Civil Code defines a common carrier as follows: 'Every one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier, of whatever he thus offers to carry.' 'Private carriers are such as carry for hire and do not come within the definition of common carrier. Certain prominent characteristics mark the difference between these two classes. To impress upon one the character of common carrier it must be shown that he "undertakes generally and for all persons indifferently to carry goods and deliver them for hire; and that his public profession of his employment be such that if he refuses, without some just ground, to carry goods for anyone, in the course of his employment and for a reasonable and customary price, he will be liable to an action." On the other hand, private carriers are not bound to carry for any person unless they enter into a special agreement so to do.' 4 Cal. Jurs. 815. This same principle is enunciated in the case of Associated Pipe Line Co. v. Railroad Commission, 176 Cal. 518, L. R. A. 1918C, 849, 169 P. 62, 65. In that case this court said, quoting in part from the case of Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77 [see, also, Rose's U. S. Notes]: ' "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created." But so long as he uses his property

for private use, and in the absence of devoting it to public use, the public has no interest therein which entitles it to a voice in its control.'" See, also, Klein v. Baker, 112 Cal. App. 157, 296 P. 631.

[2] The evidence in the record discloses that the respondents were engaged in the operation of a trucking business and transported personal property to any destination to which its consignee directed delivery. They maintained no fixed terminus unless the garage in Escondido, where their trucks were kept when not in operation, could be held to be such a terminus. They accepted goods for transportation only upon special contracts and did not undertake "generally and for all persons indifferently to carry goods and deliver them for hire." They consistently refused to accept goods for transportation from shippers generally and maintained that as they were private carriers they were not obliged to do so. The trial court found in accordance with these facts. The findings are amply supported by the evidence and support the judgment. This makes it unnecessary to consider other findings attacked by appellants as not supported by the evidence. Where a judgment is supported by all necessary findings based upon material and competent evidence, other findings made are not essential and become immaterial and need not be considered on appeal.

Judgment affirmed.

We concur: JENNINGS, J.; HARDEN, Justice pro tem.

125 Cal.App. 80

MERRILL et al. v. HOOPER et al.

Civ. 8265.

District Court of Appeal, First District, Division 1, California.

July 26, 1932.

Rehearing Denied Aug. 25, 1932.

1. Quieting title ⇐44(3).

In action to quiet title to triangular parcel of realty at dividing line between tracts, testimony of competent engineer, produced by defendant, pursuant to survey made, *held* not conclusive.

Testimony of competent engineer engaged by the defendant, pursuant to survey made by him, was not binding on trial court, where survey was based on identification by defendant of locations of original monuments in accordance with her recollection thereof, and especially in view of fact that testimony of plaintiff and defendant was in sharp conflict.

2. Appeal and error ⇐931(1).

Where trial court determined issue in plaintiff's favor, appellate court must assume on appeal that conflict in evidence was resolved in plaintiff's favor, and appellate court is concluded thereby.

3. Adverse possession ⇐114(1).

In action to quiet title to triangular strip between tracts, evidence *held* to establish title in plaintiffs by adverse possession (Code Civ. Proc. § 322).

4. Adverse possession ⇐25.

In determining title by adverse possession, possession by tenants of adverse claimants constitutes their possession (Code Civ. Proc. §§ 322, 326).

5. Adverse possession ⇐44.

Temporary periods of vacancy, not evincing intention to abandon possession, do not interrupt continuity of adverse claimants' possession (Code Civ. Proc. § 322).

6. Adverse possession ⇐111.

Complaint in action to quiet title, alleging fee ownership in plaintiff, *held* sufficient to present question of title by adverse possession (Code Civ. Proc. § 322).

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Lucile A. Merrill and another against Jennie B. Hooper and others, wherein Jennie Hooper Arnold filed a cross-complaint. Judgment in favor of the plaintiff, and the defendant Jennie Hooper Arnold appeals.

Affirmed.

G. W. Nix, of Los Angeles (Victor R. Hansen, of Los Angeles, of counsel), for appellant.

Charles L. Evans, of Los Angeles, for respondents.

OGDEN, Justice pro tem.

This is an appeal from a judgment quieting title to a triangular parcel of real property, improved with a building, situated on the northwest corner of Thirty-Third and Hooper avenues in the city of Los Angeles. The complaint is in the usual simple form, alleging ownership in fee in the respondent Lucile A. Merrill as her separate property. The answer denies ownership in respondents, and alleges it to be vested in appellant. By way of affirmative defense the latter alleges therein that she has been in the adverse possession of the premises, under claim of title, for more than the five-year statutory period prior to the commencement of the action, and that respondents' cause of action, if any there were, was barred by the provisions of sections 318,

319, and 322 of the Code of Civil Procedure. A cross-complaint containing corresponding allegations, was also filed by appellant. The answer to the cross-complaint, in addition to denying the allegations thereof, likewise set up the same provisions of the Code of Civil Procedure in bar of appellant's cause of action, if any had existed. The trial court found in favor of the allegations of the complaint and answer to the cross-complaint and adversely to those of the answer and cross-complaint.

The parcel involved was originally part of a large tract of land granted by United States patent to one Dalton in the year 1873. One J. W. Hooper, the successor in interest of Dalton, granted the southern portion of this tract to one Shattuck, through whom respondents claim record title, and the northerly portion to one A. L. Hooper, through whom appellant claims the record title. The controversy, which has been of long standing, arises out of a dispute as to the correct location of the dividing line of said northerly and southerly portions so conveyed. The same point of beginning is referred to in both the conveyance from J. W. Hooper to Shattuck and from J. W. Hooper to A. L. Hooper; it being designated as the intersection of two line fences which had, long prior to the present controversy, disappeared.

[1] In an attempt to establish her record chain of title, appellant produced, at the trial, the testimony of a competent engineer, showing, pursuant to a survey made by him, the property in question to be included within the northerly portion of the original tract as conveyed to her predecessor in interest. The survey made by this witness was, however, based upon the identification, by appellant to him, of the locations of the original monuments in accordance with her recollection thereof. Especially in view of the fact that the testimony of appellant at the trial was in sharp conflict with that of respondents, the trial court was therefore not bound by this evidence.

Respondents, in so far as tracing their chain of record title is concerned, contented themselves with the introduction in evidence of the various deeds, from the one in which respondent Lucile A. Merrill is named as grantee back to the deed from Hooper to Shattuck above referred to. However, since there was no evidence offered tending to show the location of the property in question with reference to the descriptions contained in the earlier deeds and the inclusion of the former in the latter, these conveyances were not sufficiently helpful to establish respondents' title by virtue of them.

[2] We are, however, satisfied that there was sufficient evidence offered by respondents to establish title by adverse possession. As heretofore stated, the evidence in this regard was conflicting. The trial court, having determined title to be in respondents, we must assume, resolved that conflict in their favor, and on appeal this court is concluded thereby.

The evidence offered by respondents showed that, as far back as the year 1913, appellant knew that one Stimson, a predecessor in interest of respondents and who constructed a building and fence upon the property, claimed ownership adversely to her; that on January 12, 1918, Mrs. Merrill acquired a deed thereto from one Woodbury, the immediate successor in interest of said Stimson; that at the time of acquisition of this deed the property was vacant, but that respondents immediately attempted to rent it and soon did, for a short period, as a store; that in 1919 they leased it for purposes of a cigar factory for one year, it being so occupied for several months; that in September or October, 1920, respondents rented the premises to one Miller, who occupied them as tenant and later as purchaser under contract from Mrs. Merrill until he was evicted in October, 1924, by legal proceedings commenced by her; that the building was then locked up and for sale or rent signs displayed thereon; respondents maintaining an endeavor to secure a new tenant.

The testimony of appellant with reference to possession of the premises from 1918 to 1924 was rather meager. She testified that it was unoccupied in 1918 and 1919; that in 1920 she authorized the same Miller, whom respondents claimed as a tenant and purchaser under contract, to occupy the premises without payment of rent and that it was so occupied until 1924; that she subsequently rented it to a Mrs. Capillo for three or four months, and then, in 1925, to a Mr. and Mrs. Garrison; the latter being in actual possession at the time of the commencement of this action on March 16, 1926.

[3] The question of payment of taxes upon the property is not involved, as it is conceded that during all of the times mentioned they were assessed to and paid by both parties hereto.

It appears from the foregoing that the evidence is sufficient to establish respondents' continued occupation and possession of the premises, within the meaning of section 322 of the Code of Civil Procedure, for more than the required five-year period, to wit, from the early part of the year 1918, when respondents acquired their deed and first installed a tenant therein, until the latter part of the year 1924, when appellant, through her tenant, Capillo, effected a re-entry.

[4, 5] Respondents entered into possession under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question. Section 322, Code Civ. Proc. The possession by their tenants was their possession. Section 326, Code Civ. Proc. The temporary periods of vacancy, not evincing

any intention of abandonment of possession, did not interrupt the continuity of their possession. 1 Cal. Jur. 554.

[6] The complaint, having alleged ownership in fee, was sufficient to present the question of title by adverse possession. 1 Cal. Jur. 620; Garbarino v. Noce, 181 Cal. 125, 183 P. 532, 6 A. L. R. 1433.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

125 Cal.App. 229

ALLEN v. LACK.

Civ. 931.

District Court of Appeal, Fourth District, California.

Aug. 4, 1932.

1. **Landlord and tenant** ⇐231(6).

Evidence *held* to justify finding of no breach of implied warranty that leased land was suitable for growing alfalfa (Civ. Code, § 1932).

There was evidence that most of land was good and all of it fair for growing alfalfa; that considerable crops were produced and large numbers of stock pastured thereon; that some alfalfa was cut; that lessee pastured land when too wet, in violation of contract; that he irrigated too much at times; and that such conditions were detrimental to alfalfa growing.

2. **Landlord and tenant** ⇐231(6).

Evidence *held* to support finding that lessee knew of land's unfitness for growing alfalfa before rescinding lease (Civ. Code, § 1691).

3. **Landlord and tenant** ⇐34(1).

Lessee obtaining improvement of land, represented as suitable for growing alfalfa, by lessor, after nearly two seasons' experience, seeking and accepting subsequent reduction of water rent, paying rent for another year, and continuing to occupy and use land, waived right to rescind contract for failure of consideration.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action by E. A. Allen against George M. Lack, who filed a cross-complaint. Judgment for plaintiff, and defendant appeals.

Affirmed.

Harry W. Horton, of El Centro, for appellant.

C. L. Brown, of El Centro, for respondent.

BARNARD, P. J.

This is an action to recover certain rentals claimed to be due under the provisions of a written lease. Under date of November 14, 1924, the plaintiff leased 160 acres of land to the defendant for the term beginning January 15, 1925, and ending July 15, 1928. The lease recited that the plaintiff was then planting the premises to alfalfa and barley; that he would care for and irrigate the same until a good stand was obtained; that he would replant any portion of the premises upon which a good stand was not obtained; and that all of this work should be completed by January 15, 1925. The defendant agreed to take good care of the alfalfa after January 15, 1925, and "each year to replant such portion of said premises to alfalfa upon which a good stand is not maintained and growing, and each year during the fall to disc said alfalfa and plant barley therewith. * * *" The lease also contained a provision to the effect that the premises were leased only for the purpose of growing alfalfa and barley for feed, and that the lessee was not to pasture or permit any live stock upon the premises while the same were wet.

The defendant took possession of the premises on January 15, 1925, and thereafter paid the monthly rental called for by the lease. On August 7, 1926, the parties entered into a supplemental agreement, which by its terms was to be attached to and become a part of the lease. This provided as follows:

"The party of the second part represents that the Southwest quarter of the above Tract will irrigate much better if the borders are so changed that it irrigates from South to North. Party of the first part agrees to change these borders and will put in a new head ditch with concrete gates in each land for irrigating the same, and will leave the ground ready to plant and will pay and supply to the party of the second part 700 pounds of alfalfa seed for planting the same which party of the second part agrees to at once put in.

"It is further understood and agreed that the party of the first part does not guarantee a good stand on said land, and he is not to be asked to furnish any more seed or do any more work on any part of the above 160 acres. The party of the second part agrees to continue paying the rent as heretofore and this agreement shall be in no way construed to cancel any of the terms of the lease now in force on the said Tract, dated November 14, 1924. * * *"

On October 22, 1926, a further agreement was signed by the parties reducing the amount of water rent that should be paid by

the defendant. The defendant continued to farm the premises, and, for a time, to pay the rent; the last payment being made October 6, 1927, but covering the rent to June 15, 1927.

No further rent being paid, this action was brought on March 5, 1928, to recover the rent due up to that date, and later a supplemental complaint was filed covering the rent for the balance of the term. On March 13, 1928, a notice of rescission was served by the defendant upon the plaintiff, based upon an alleged failure of consideration, stating that the property was delivered back, but making no mention of adjusting or accounting for the value of the use of the property up to that time. In due time an answer and cross-complaint were filed, with various amendments, in which the allegations of the complaint were denied, and further alleging that the plaintiff had represented the land in question to be suitable for the growing of alfalfa; that these representations had been relied on; that they were false; that there was a consequent failure of consideration; and that the contract had been rescinded on March 13, 1928. After a trial, judgment was entered for the plaintiff, and this appeal followed. The court found against the defendant as to the making of any misrepresentations. This finding is neither attacked, nor does the record show that any evidence in support of any such allegation was offered.

[1] The appellant now relies upon an implied warranty, under section 1932 of the Civil Code, that the land in question was suitable for the growing of alfalfa. If it be assumed that this section applies under these circumstances, it neither conclusively appears that the greater part of this land was unfit for such purpose, nor that any partial failure of crops occurred without the fault of the appellant. The record contains considerable evidence to the effect that the greater part of the land was good alfalfa land, that most of it was very good, and that all of it was fair for that purpose. It appears that some considerable crops were produced during each of the four seasons involved, that large numbers of stock were pastured thereon, and that some alfalfa was cut. There was also evidence that the appellant pastured the land when it was too wet, in violation of his contract, that he irrigated too much at times, and that these conditions were detrimental to the growing of alfalfa, especially on this particular land. While there was much evidence to the contrary, no more appears than a conflict upon this point.

The court also found that the appellant elected not to rescind the lease, that he reaffirmed the contract, and that he continued to carry out the terms of the lease and its modifications by continuing to farm the premises; by paying the rental therefor up to June 15, 1927; by executing the supplemental agreements of August 7, 1926, and October 22, 1926; and by continuing to use and occupy the property until after this suit was filed. The court also found that the appellant continued to occupy and use the premises after this action was begun, and until about June 1, 1928, within one and one-half months of the expiration of the lease. It was further found that all of these acts were done by the appellant with knowledge of "the quality of the land and its adaptability to grow alfalfa and barley."

In respect to these particular findings, it is first maintained that there is no evidence that the appellant continued to use the premises between March 13, 1928, and June 1, 1928. While largely immaterial, this finding is amply sustained by both written and oral evidence, including the testimony of the appellant.

[2, 3] It is next urged that the evidence is not sufficient to sustain the finding that the appellant had knowledge of the unfitness of this land for the purpose named, prior to March 13, 1928; it being argued that up to that time the appellant was merely diligent in endeavoring to grow such crops, and that not until that date did he make up his mind he would be unable to do so. Not only does the evidence fail to disclose any reason for the sudden discovery, after this action was commenced, that the land was not suitable for the growing of alfalfa, but there is considerable evidence which, with its reasonable inferences, supports the findings in question. The appellant testified that in the spring of 1925 only thirty-five acres of the land had a good stand of alfalfa and twenty acres a fair stand; that as soon as the barley was "eaten off" the land was reseeded; that he reseeded the place every spring and fall during the time he was there and also reseeded certain portions of it between irrigations; that the reseedings produced practically nothing; that he complained to the respondent in 1926 "about the place not growing alfalfa or barley"; that the respondent then agreed to reborder and replant the southwest forty acres; that this was done, but thereafter the same results were obtained; and that on March 13, 1928, he finally became convinced that alfalfa and barley could not be grown on the place for feed. Another witness testified that in the spring of 1926 he dug holes in the land, examined the soil, showed this to the appellant and told him what was the matter with the land. This testimony, with considerable other evidence, supports the findings complained of. Civ. Code, § 1691. After an experience covering nearly two seasons, and after having had the defects in the soil particularly pointed out to him, the appellant sought and obtained from the respondent a further concession by way of improvements to one-quarter of the land, and signed an agreement to the

effect that the respondent did not guarantee a good stand of alfalfa and that he should not be required to do anything more on any part of the land. A few months later the appellant sought and accepted from the respondent a further favor in the reduction of the water rent; he then continued to pay rent over a period of another year; he continued to occupy the place with no further complaint until after this suit was filed; and, in fact, he continued to receive the beneficial use of the place until the term of the lease had practically expired. We think that any possible right of rescission was waived, and that the defense sought to be set up in the cross-complaint was barred by laches. Freligh v. McGrew, 95 Cal. App. 251, 272 P. 791.

The judgment appealed from is affirmed.

We concur: MARKS, J.; HARDEN, Justice pro tem.

HART v. FARRIS et al. *

Civ. 913.

District Court of Appeal, Fourth District, California.

July 22, 1932.

Rehearing Denied Aug. 15, 1932. Hearing Granted by Supreme Court Sept. 19, 1932.

1. Automobiles ⇐244(34).

Evidence supported finding of negligence of motorist, allegedly not keeping lookout, where headlights would have disclosed bicycle 300 feet away (St. 1923, p. 517, § 28½, subd. b, as added by St. 1929, p. 510, § 7).

Although evidence was conflicting, there was testimony that automobile was traveling in excess of 20 miles an hour within residence district as defined by California Vehicle Act (St. 1923, p. 517, § 28½, subd. b, as added by St. 1929, p. 510, § 7; that driver was not keeping lookout ahead; and that he admitted responsibility for collision with bicycle, which would have been disclosed by headlights of automobile at any point within 300 feet ahead of automobile.

2. Automobiles ⇐244(46).

On basis of testimony, even if uncorroborated, of bicyclist injured by automobile, jury *held* justified in negativing contributory negligence.

3. Automobiles ⇐226(2).

That bicycle struck by automobile was unlighted, thereby violating statute, would not preclude bicyclist's recovery because contributorily negligent, unless such violation proximately contributed to accident (St. 1923, p. 550, § 105).

4. Automobiles ⇐244(46).

Evidence warranted conclusion that absence of lights on bicycle did not constitute contributory negligence; automobile headlights disclosing bicycle 300 feet away, and motorist failing to keep lookout (St. 1923, p. 550, § 105).

5. Automobiles ⇐212.

Automobiles being parked along curb, bicyclist riding 18 feet from curb *held* not violation of ordinance keeping bicycles within 5 feet of curb unless turning or passing vehicles.

6. Trial ⇐228(3).

Contributory negligence instruction *held* faulty because using "approximate" instead of "proximate" in discussing cause of injury.

[Ed. Note.—For other definitions of "Approximate; Approximately" and "Proximate," see Words and Phrases.]

7. Trial ⇐261.

Court is not required to modify instruction to make it correct.

8. Automobiles ⇐246(48).

Instruction that bicyclist and motorist had equal right to street *held* not erroneous; ordinance keeping bicycles within 5 feet of curb being inapplicable because of parked automobiles.

9. Automobiles ⇐246(28).

Instruction that bicyclist need not look back for vehicles approaching from behind to avoid collisions *held* not erroneous.

10. Trial ⇐29(3).

That court in negligence case required witness several times to indicate on plat meaning of "here" in her testimony *held* proper.

11. Trial ⇐29(3).

If counsel is asking proper questions without delay or repetition, court should ordinarily refrain from taking over questioning of witness, particularly in jury trials.

12. Trial ⇐31.

Court's questioning defendants' witness, thereby developing strong evidence for defendants, *held* not error available to defendants, in absence of timely objection.

13. New trial ⇐77(2).

Court may interpose its judgment as against jury's only where verdict is so grossly disproportionate as to shock sense of justice and raise strong suspicion of prejudice or passion.

14. Damages ⇐130(1).

$20,000 for woman 41, sustaining fractured ribs, vertebræ, and wounds confining her to bed for over two months, and causing suf-

fering from heart trouble which probably would greatly shorten life, *held* not excessive.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Gerda Hart against Robert Farris and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Noon & Noon and Charles A. Brinkley, all of San Diego, for appellants.

Fred A. Steiner, of San Diego, and Eugene D. Williams, of Los Angeles, for respondent.

HARDEN, Justice pro tem.

Defendants appeal from a judgment entered upon the verdict of a jury in favor of plaintiff for the sum of $20,000 and for costs. The action is one for damages for personal injuries sustained by plaintiff arising out of a collision between a bicycle ridden by plaintiff and an automobile driven by the defendant Malcolm L. Farris. The accident occurred on El Cajon avenue in the city of San Diego at about 7 p. m. on January 30, 1930. Malcolm L. Farris, the son of defendants, Robert Farris and Mabel Farris, was driving the automobile with the consent of his parents; and his mother, Mabel Farris, and a friend were passengers therein. El Cajon avenue is a thoroughfare 75 feet in width running in an easterly and westerly direction. Three parallel streets intersect El Cajon avenue at right angles. From west to east they are Cherokee street, Thirty-Seventh street, and McClintock street. The scene of the accident was within a residence district as defined by the California Vehicle Act (St. 1929, p. 510, § 7). The collision occurred at a point approximately 52 feet west of McClintock street and 18 feet from the southerly side of El Cajon avenue. On the day of the accident, the sun set at 5:19 p. m.

[1] The first of several points raised is that the evidence did not establish negligence on the part of the defendants. The testimony of plaintiff was to the effect that at the time of the collision she was riding her bicycle in an easterly direction along the southerly side of El Cajon avenue; that immediately after an automobile had passed her bicycle on the left side she was run down from the rear by the automobile of defendants. There was evidence from which the jury could have concluded that at the time of the collision defendants' automobile was traveling in excess of 20 miles per hour and that the driver was not keeping a lookout ahead. There was also evidence of declarations made by the driver of the automobile admitting responsibility for the collision. It was shown that the headlights of the automobile lighted the highway to such an extent that a person riding a bicycle at any point within a distance of 300 feet ahead of the automobile would be visible to the driver thereof. It was also in evidence that the force of the impact threw plaintiff a distance of from 18 to 20 feet in an easterly direction. While there was testimony tending to exonerate the driver of the automobile from fault, it merely created a conflict in the evidence to be determined by the jury. The evidence was ample to support a finding of negligence upon the part of the driver of the automobile.

[2] The next point raised is that the evidence established contributory negligence on the part of plaintiff barring a recovery. Several contentions are advanced in support of this claim. The first one is that the evidence established that plaintiff having ridden her bicycle in an easterly direction along the north side of El Cajon avenue from Cherokee street to a point between Thirty-Seventh and McClintock streets approximately north of the scene of the accident, turned her bicycle at that point and proceeded to cross El Cajon avenue between street intersections by riding due south. There is no merit in this contention. Plaintiff testified that she rode along the north side of El Cajon avenue from Cherokee street to Thirty-Seventh street; that she turned south upon reaching Thirty-Seventh street and crossed El Cajon avenue to a point where she could and did fall in with the east-bound traffic; that she then proceeded easterly along the south side of El Cajon avenue to the point of collision. Her testimony to the effect that she pursued said course was corroborated to some extent by the testimony of other witnesses. But, whether corroborated or not, plaintiff's testimony alone was sufficient to justify the jury in finding in accordance therewith.

[3, 4] Appellants' second contention in connection with the defense of contributory negligence is that the evidence established that, in violation of the requirements of section 105 of the California Vehicle Act (St. 1923, p. 550), plaintiff's bicycle was not equipped with a lamp on the front nor with a reflex mirror or lamp on the rear exhibiting a red light. It was admitted that the bicycle carried no light at all. Appellants contend that such fact establishes negligence per se upon the plaintiff's part barring recovery. A violation of the provisions of the statute by plaintiff would not bar her from recovery on the ground of contributory negligence unless such violation of law proximately contributed to the accident. Berges v. Guthrie, 51 Cal. App. 547, 197 P. 356; Godeau v. Levy, 72 Cal. App. 13, 236 P. 354. Presumably the jury concluded that, in view of the lack of attention of the driver of the automobile to the road ahead and the good light which the headlights of the automobile reflected

ahead for a distance of 300 feet, the absence of lights on the bicycle was not a contributing factor in the accident. Such was the view of the trial court as expressed in denying appellants' motion for a new trial. Such a conclusion had ample support in the evidence.

[5] Appellants' third contention in connection with said defense is that the evidence established contributory negligence as a matter of law, in that it was shown without conflict that plaintiff, in violation of the provisions of a city ordinance in effect at the time, operated her bicycle at a greater distance than 5 feet from the right-hand curb of the roadway. The provisions of the ordinance in question are: "Section 26. * * * The rider of a bicycle upon a roadway shall ride as nearly as practicable within five feet of the right-hand curb or edge of the roadway, except when passing a standing or other vehicle or making a left-hand turn at an intersection."

The evidence disclosed that automobiles were parked along the right-hand curb of the roadway at the scene of the collision. The ordinance therefore did not oblige plaintiff to ride her bicycle within 5 feet of the right-hand curb of the roadway. There is nothing in the situation that would warrant us in holding that plaintiff violated the provisions of the ordinance.

All of the questions raised here in support of the contention that plaintiff was guilty of contributory negligence were for the determination of the jury in the first instance and for consideration by the trial court upon motion for a new trial.

[6, 7] The next point raised involves the action of the court in refusing to give the second paragraph of an instruction numbered 14 requested by defendants. Said instruction narrated the facts as contended for by defendants in connection with their defense of contributory negligence, and concluded with the statement: "* * * And if you further find that the manner in which said movement was so executed by plaintiff was the *approximate* cause of the injury to plaintiff, then you will find that the plaintiff was guilty of contributory negligence, and your verdict must be for the defendants." (Italics ours.) Upon the authority of Waniorek v. United Railroads of San Francisco, a Corp., 17 Cal. App. 121, 128, 118 P. 947, and of Renton, Holmes & Co. v. Monnier, 77 Cal. 449, 19 P. 820, appellants contend that it was reversible error for the court to refuse to give the second paragraph of said instruction for the asserted reason that a party has a right to have an instruction given to the jury based upon his theory of the case if there is any evidence to support it. It will be noted that the instruction made use of the expression "approximate cause" instead of "proximate cause" in connection with the injury to plaintiff. In the case of State Compensation Ins. Fund v. Jorn, 186 Cal. 782, 200 P. 624, 625, the trial court erroneously used the word "approximately" instead of "proximately" in submitting a special issue to the jury in connection with the question of contributory negligence. It was there said: "Standing alone it might be misleading and prejudicial. * * * In common parlance the two words, 'proximate' and 'approximate,' are used interchangeably, and the dictionaries give them as synonyms. It is true, however, that the word 'proximate' has a distinct and separate legal significance; but, in view of the explicit instructions making the negligence to depend upon the 'proximate' cause, the jury could not well have been misled by the substitution of the word 'approximate' in the submission of the special issue. The courts have frequently held such an interchange of these terms in instructions without prejudice. [Citing cases.]"

While the use of the expression "approximate cause" was probably inadvertent, thereby the instruction was rendered faulty. The court was not required to modify it to make it correctly state the law. Dover v. Archambeault, 57 Cal. App. 659, 208 P. 178; Williamson v. Tobey, 86 Cal. 497, 25 P. 65. Plaintiff also requested the court to give an instruction whereby she undertook to recite the facts from her point of view and to conclude with a direction that, if the jury found such facts had been established, plaintiff should have judgment. Said requested instruction was also refused. It was not error to refuse said instruction requested by defendants.

[8, 9] Appellants also complain of a portion of the instructions of the court to the effect that bicycle riders had the same right as automobile drivers to the use of the streets. The complaint rests upon the contention that, under the provisions of the city ordinance, bicycle riders were required to ride within 5 feet of the right-hand curb. We have already shown that under the circumstances said provision of the ordinance was not applicable. The instruction was not erroneous. Complaint is also made of the instruction: "Bicycle riders * * * are not required to look back for vehicles approaching from behind to avoid collisions, or to avoid being run over from behind." No particular error is pointed out in said instruction; and we see none.

The instructions given correctly and fairly stated the law upon all phases of the case.

[10-12] Complaint is also made concerning the action of the trial court in the examination of an important witness called by the defendants. Aside from the occupants of

the automobile, this was the principal witness relied upon by the defendants to establish their defense of contributory negligence. Shortly after her examination began, the court intervened several times to require her to indicate upon a plat what she meant by "here" in her description of the accident. Such action of the court was proper and tended to clarify her testimony. Somewhat further along in the examination of the same witness the court asked questions concerning the facts and circumstances of the accident; and this examination proceeded to considerable length. It is said that the court virtually took the witness from counsel and conducted the examination to the prejudice of appellants. If counsel is proceeding by proper questions and without delay or repetition to elicit the evidence, it is better to permit him to develop his own case, particularly in jury trials. Here the questions propounded by the court were fair and competent and showed no desire to discredit the witness. On the whole, the examination by the court developed strong evidence in behalf of defendants. Counsel did not object to the court's examination at the time. Therein we find no error.

[13, 14] The remaining point is that the verdict was excessive. The plaintiff was of the age of 41 years at the time of trial, and was the mother of two children of the ages of 9 and 13 years, respectively. The trial was conducted thirteen months after the accident. The only expert witness called to testify to plaintiff's injuries was the physician who attended her after the accident, although she was examined at the instance of the defendants by their physician. In the accident plaintiff suffered fractures of the eighth, ninth, and tenth ribs in a line directly under the arm; and the eighth rib was also fractured near the spine. The right transverse process of the third lumbar vertebra was fractured. There was a lacerated wound of the scalp; and there were lacerations and contusions of the liver, resulting in hemorrhage into the abdomen. Plaintiff was confined to a hospital for five weeks following the accident, and was obliged to lie flat on her back for one month; and soon after leaving the hospital she was required to return to her bed for a month. Between the time of the accident and the trial she spent considerable time in bed. At the time of the trial she was anæmic and suffered from palpitation of the heart upon exertion. Her physician testified that the valves of her heart did not function properly and that she suffered from endocarditis, or inflammation of the lining of the heart; that, due to said heart trouble, he doubted if she would live; that, if she survived, her activities would be very much limited; and that the probabilities were that the heart trouble would greatly shorten her life. In his opinion the injuries sustained had lessened her resistance, and the lack of resistance had led to the heart trouble. Before the accident she was in good health. A motion for a new trial upon the ground, among others, that the verdict was excessive, was denied by the trial court. It is only where the verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice, and raise at once a strong suspicion that it is based on prejudice or passion rather than sober judgment, that the court is at liberty to interpose its judgment as against that of the jury. Smith v. Royer, 181 Cal. 165, 183 P. 660; Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513. Under the conditions shown to exist here, we cannot hold that the amount of the award bears no just relation to the injuries sustained, nor that it was excessive. It finds support in the evidence.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

125 Cal.App. 214

GELFAN v. BESSOLO & GUALANO, Inc., et al.

Civ. 7378.

District Court of Appeal, Second District, Division 1, California.

Aug. 1, 1932.

1. Guaranty ⇐25(3).

Evidence *held* to support finding that defendant signed contract of guaranty under no agreement that signature of codefendant was to be obtained by plaintiff.

2. Contracts ⇐35.

Plaintiff who was permitted to substantially perform contract *held* entitled to enforce it though he had not signed it (Civ. Code, § 3388).

3. Appeal and error ⇐1011(1).

Finding of trial court on conflicting evidence is conclusive.

4. Contracts ⇐246.

In action for money due under painting contract calling for notice of completion, that there was no evidence that notice had been filed *held* immaterial where provision was eliminated by subsequent agreement of parties.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Appeal from Superior Court, Los Angeles County; Claude F. Purkitt, Judge.

Action by Abe Gelfan against Bessolo & Gualano, Inc., and others. From a judgment in favor of plaintiff, named defendant and defendant Angelo Bessolo appeal.

Affirmed.

Lawrence M. Cahill, of Los Angeles, for appellants.

Benjamin & Benjamin and Aaron Elmore, all of Los Angeles, for respondent.

TAPPAAN, Justice pro tem.

Plaintiff, who was a painting contractor, instituted this action against defendant Bessolo & Gualano, Inc., a corporation, which was the general contractor engaged in the erection of three separate apartment houses, for an alleged balance claimed by him as due under the terms of three agreements had with said defendant for the painting of said apartment houses, and as against defendant Angelo Bessolo under the terms of an alleged agreement of guaranty whereby said defendant guaranteed to plaintiff payment of the balances due him from Bessolo & Gualano, Inc., under the terms of his painting contract with said corporation.

Plaintiff's complaint contains five counts. The first three counts set forth three causes of action arising under the three separate painting contracts, a fourth count set up the cause of action upon the alleged contract of guaranty; and the fifth count of the complaint set out a common count for money. The defendants and appellants in their answer deny generally all of the material allegations of plaintiff's complaint. Defendant Angelo Bessolo denies the execution and delivery of the contract of guaranty, and further alleges that said contract was secured from him under an agreement that the signature of a codefendant, Fidelity Union Casualty Company, was to be obtained by plaintiff to said agreement, which signature was not secured by plaintiff. The answer also set up a number of special defenses which in effect allege a failure on the part of plaintiff to complete his said contracts in accordance with their terms and specifications, to the damage of defendants. The trial court found in plaintiff's favor and gave judgment for the sum claimed in the complaint less the sum of $70 allowed to defendants by reason of some minor omissions upon plaintiff's part. From this judgment defendants appeal.

Appellants' first attack upon the judgment is directed against the court rulings under which the alleged contract of guaranty was admitted in evidence. Appellants' first contention in this regard is that this contract was incomplete and not binding in that it had not been signed by all the parties who it was intended should become signers. The contract, after reciting that plaintiff and defendant Bessolo & Gualano, Inc., had made and entered into certain painting contracts, provided: "Whereas, work has been discontinued by mutual understanding between the parties hereto and the Fidelity Union Casualty Company; and, Whereas, the parties hereto and the Fidelity Union Casualty Company and Gilo Bessolo are desirous that the said work be completed by the said Abe Gelfan; and, Whereas, there are certain amounts due and unpaid on account thereof and on account of certain extra work authorized in writing by the said Bessolo & Gualano, Inc., Now, Therefore, the undersigned as sureties and guarantors agree as follows." Then followed the agreement to pay the balances unpaid upon the painting contracts in consideration of plaintiff completing the said contracts, the terms upon which payment was to be made, and a statement of the balances unpaid upon the several contracts. This contract was signed by defendant Angelo Bessolo, and "accepted and approved" by defendants Bessolo & Gualano, Inc. Under the signature of defendant Angelo Bessolo there appears the following:

~~"Fidelity Union Casualty Company~~
~~"By~~
~~"Vice President"~~

The theory as advanced by appellant is that the contract upon its face shows that it was intended to be signed by the Fidelity Union Casualty Company. It is true that in some instances the failure of one of the contemplated parties to a contract, to become bound thereon, has the effect of rendering the contract voidable as to those who have become bound thereon. Illustrations of this rule are found in the cases where the consent of one to be bound is predicated upon certain specified other parties becoming bound as well and also in those cases where the contemplated contract to be effective, involves the relinquishment of some right by one or all the parties before it can become operative. The case of Barber v. Burrows, 51 Cal. 404, cited and relied upon by appellants falls in the latter class, involving as it does the extension of time of performance of an existing contract, and the one who had failed to sign being a surety for the performance of the terms of the original contract. From an examination of the contract itself it does not appear that the Fidelity Union Casualty Company was a necessary party to the contract by its terms or one that was necessary to the contract so that the contract could be operative. If the theory as advanced by appellant is to be sustained at all it must be sustained by evidence that there existed some understanding or agreement between defendant Angelo Bessolo and the plaintiff that his (Bessolo's) signature was

conditional in nature and subject to the Fidelity Union Casualty Company becoming bound with him.

[1] From an examination of the evidence it appears that there is a sharp conflict in the evidence in this regard. Angelo Bessolo testified:

"Q. Now, just prior to signing this what did you tell Mr. Gelfan, if anything, or what did he say to you? A. I don't say anything at all, Mr. Gualano, he placed that paper there and he says, now this is all right, don't worry, he told me, just sign, he says it is all right, and if he says it is all right it is all right with me, I would not worry anything he says.

"Q. That is what Mr. Gualano says? A. Yes, sir.

"Q. Then what did Mr. Gelfan say? A. Mr. Gelfan say nothing, he didn't say anything.

"Q. Now then you signed this instrument, did you Mr. Bessolo? A. Yes, sir.

"Q. And did Mr. Gelfan take possession of it at that time? A. Yes, sir."

The Mr. Gualano referred to by Bessolo testified: "Q. Well, what did he say, what did Mr. Gelfan say? A. Well, I don't remember exactly, but he said in effect that he would have the bonding company sign it. * * * He would proceed with the papers and return me a copy. * * * Well, I told him that the Fidelity Union Casualty Company I thought would probably not sign it. * * * He (Bessolo) wanted to make sure that the Fidelity Union Casualty Company would sign the agreement. He (Gelfan) told him he would go right over and have it signed."

The testimony given by the plaintiff flatly contradicts Gualano's story that the delivery of the agreement to him was conditioned upon the securing of the signature of the bonding company. There is substantial evidence presented by the record to support the finding of the trial court that the delivery of the agreement was not one upon condition; at best, there is but a conflict in the evidence, and the finding of the trial court cannot be questioned here.

[2] Appellants' complaint that plaintiff failed to sign the agreement is without merit. The evidence shows that plaintiff was permitted to substantially perform the contract and under the circumstances presented here was entitled to enforce it though he had not signed. Civ. Code, § 3388; Cavanaugh v. Casselman, 88 Cal. 543, 549, 26 P. 515; Winter v. Kitto, 100 Cal. App. 302, 306, 279 P. 1024.

What has been said in reference to the point just discussed is a sufficient answer to appellants' contention that the trial court was in error in overruling defendant Angelo Bessolo's motion for a nonsuit. The record also discloses evidence sufficient to support the judgment rendered as against this defendant.

[3] Appellants next attack the sufficiency of the evidence supporting certain of the findings made by the court as to the special defenses set up in the answer. The record in each instance contains substantial evidence to support the finding as made, and the best that can be said as to appellants' contention is that the evidence is conflicting in nature. This being the case, the question cannot be raised upon this appeal.

[4] The fact that there is no evidence that "notice of completion" had been filed is immaterial under the circumstances as disclosed by the record. It does not appear that this question was raised by appellants at the time of the trial. The work required by the contract, as the court found, had been substantially completed. The buildings had been occupied before the time of the trial. The evidence as to the quality of the work was of a conflicting nature and the trial court chose to credit plaintiff's testimony rather than that of defendants. The filing of the notice was an act that should have been performed by other than plaintiff. The authorities support respondent in his position that the proof of filing of the notice was unnecessary. Rosenheim v. Howze, 179 Cal. 309, 176 P. 456; Wallace v. Carlin, 92 Cal. App. 31, 267 P. 596. In any event the notice of completion became necessary only because the original contract so provided, but that provision of the original contract was thereafter eliminated by a subsequent agreement of the parties. The evidence is sufficient to sustain the finding that plaintiff substantially performed his contract. Rischard v. Miller, 182 Cal. 351, 353, 188 P. 50; Musto, etc., Co. v. Pacific States Corp., 48 Cal. App. 452, 192 P. 138.

An examination of appellants' other specifications of alleged error, many of which are but restatement of the matters presented elsewhere in the record and already discussed in this opinion, fails to disclose any error that would justify a reversal of the judgment.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

PEOPLE v. HEISE.*

SAME v. ROBERTSON.

Cr. 2188, 2189.

District Court of Appeal, Second District, Division 1, California.

July 22, 1932.

Rehearing Denied Aug. 4, 1932.

Hearing Granted by Supreme Court Aug. 18, 1932.

1. Corporations ⇐182.

Generally, fact that company was stockholder in another company gave former no right of possession to any of latter company's property.

2. Assault and battery ⇐69.

Owner of property has legal right to eject trespassers therefrom, using such force in so doing as may be necessary to accomplish such purpose, and rule applies to one lawfully in charge of premises for such owner.

3. Assault and battery ⇐91.

Evidence *held* insufficient to sustain conviction of water company employees for simple assault when removing employees of stockholder from company's weir of which they had unlawfully taken possession (Pen. Code, § 240).

Appeals from Superior Court, Los Angeles County; William Frederickson, Judge.

Henry Heise and Raymond Robertson were convicted of simple assault, and they appeal.

Reversed.

John C. Packard and Koenig & Brunton, all of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

TAPPAAN, Justice pro tem.

The defendants were charged by separate informations with the crime of assault with a deadly weapon; tried upon the charges contained in the informations; and were found guilty in each case of the crime of simple assault. From the orders of the court denying their motions for a new trial, and from the judgment entered against them and assessing a fine in each case, defendants appeal. The cases against the defendants involve the same transaction, and have been consolidated for hearing and determination here.

Appellants were employed by a water company which owned one hundred and sixty acres of land upon Big Rock creek, where it maintained a weir to divert the waters of the creek to ditches on the east and west sides of the creek. Some time before the happenings from which the charges here involved arose, there had been a controversy between the shareholders in the water company as to the amount of water which should be diverted into the respective ditches. One faction had for a long time maintained at the weir a tent and man to secure what it deemed a just division of the waters. An action was filed by the water company, and the man and tent were removed from the property of the water company. The only conflict in the evidence is that as to the alleged assault. On the morning in question, defendant Heise came to inspect the weir, found the complaining witness and another on the weir, and found that they had changed the flow of the water by nailing boards upon one side of the weir and removing boards from the other side. The complaining witness testified that defendant Heise brandished a hand ax, and on leaving said he would "get my man that will get you." Heise returned later with defendant Robertson. Heise stopped some seventy-five or one hundred yards from the weir, and Robertson came on to the weir. He had an ax in his hand. As to what next occurred there is a sharp conflict in the testimony. Robertson contends that the complaining witness sat upon the boards of the weir, and that he used the ax in attempting to remove the boards. The complaining witness' testimony is to the effect that Robertson hit him with the head of the ax. A scuffle then took place, and complaining witness' clothing was torn. The language used by the contending parties was of the character ordinarily engendered by situations of this kind. Defendants contend that only the hands were made use of in the removal of the complaining witness from the weir boards, while the complaining witness says that his removal was accelerated by the application of the head of the ax. Whether or not an ax is, or is not, a deadly weapon, depends upon the mode in which it is made use of. People v. Guidice, 73 Cal. 226, 227, 15 P. 44.

The court in the instant case must have found that the ax, if it was used at all, was not here used as a deadly weapon.

Appellants' specification of error is that, under an information for assault with a deadly weapon alleged to have been committed by the use of excessive force in the evicting of a trespasser, the offense is "battery," and not "simple assault." To sustain appellants' position, it is obvious that the complaining witness, at the time of the alleged acts, must have been a trespasser, and that undue force must have been employed against him. The court, in finding appellants guilty of simple assault, negatived the use of excessive force. "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Pen. Code, § 240.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 20 P.2d 317

Either by stipulation of the parties, or as an assertedly assumed fact on the part of the trial judge, it satisfactorily appears that the Mutual Water Company was the owner and in the rightful and legal physical possession, not only of the weir and the water which were the subject of the quarrel between the complaining witnesses on the one side and the defendants on the other, but as well of the real property upon which the weir was located; that defendant Heise was an employee of the Mutual Water Company, and as such, and for and in behalf of said company, was in charge of the weir and the water; and that defendant Robertson was also an employee of the same company, working under the immediate direction of defendant Heise.

The uncontradicted evidence further shows that another corporation, named the Rock Creek Water Company, owned one-third of the capital stock of the Mutual Water Company; but as such stockholder claimed the right of physical distribution to it of 9/24 of the water owned by the Mutual Water Company. For the asserted reason that, instead of receiving 9/24 of such water, it was receiving only that to which it may have been entitled, to wit, 8/24 thereof, it caused its employees, who were the two complaining witnesses, to clandestinely and unlawfully seize, and to take and to hold, physical possession of the weir and to so arrange it that 9/24 of the water would be received by the Rock Creek Water Company. It was while the prosecuting witnesses were in such unlawful physical possession of the said property of the Mutual Water Company that the incidents which are hereinbefore detailed occurred.

[1] At the outset, it is obvious that, generally speaking, the mere fact that the Rock Creek Water Company was a stockholder in the Mutual Water Company gave the former company no right of possession to any part of the property of the latter company. In other words, because the Rock Creek Company was the owner of one-third of the capital stock of the Mutual Water Company, in the absence of some statute, or some regulation of the Mutual Water Company by which a special right was conferred in its stockholders to a division or the possession of its corporate property, a stockholder, as such, would have no right to assume, or to take, or to hold, physical possession of any property of which the corporation was the owner. And, assuming the absence of any statute, rule, or regulation by which such a special right in a stockholder to possession of corporate property was conferred, a stockholder, as such, of a corporation who unlawfully took possession of corporate property, would be a trespasser, just as in such circumstances any nonstockholder would occupy such a position with reference to property belonging to the corporation. But in the instant case, aside from any such principle of law, the fact in itself that in taking possession of the weir and the water the Rock Creek Company did not confine itself to an 8/24 of the water, but actually converted to its own use 9/24 thereof, should be sufficient to brand its act, or the act of its employee, as that of a trespasser.

[2] As a general principle of law, it is clear that the use of force ordinarily would constitute a battery; but it is also well-established law that the owner of property has a legal right to eject trespassers therefrom, using such force in so doing as may be necessary to accomplish such purpose; and the rule holds good as to "one who is lawfully in charge of the premises" for such owner. 5 Cor. Jur. 745, and authorities there cited. In 3 California Jurisprudence, at pages 188 et seq., the rule is thus announced: "The right of the owner of premises to expel trespassers is substantially the same under the code as at common law. At common law the owner of real estate had the right to enter upon his property to expel by force an intruder, and in doing so was entitled to use all the force necessary to secure possession. Having the right of entry and exercising it, he was not subject to an action for tort or damages resulting from his entry or from any force used upon, or physical injury sustained by one in wrongful possession, provided he used no more force than was necessary to dispossess him. * * *" The case of Walker v. Chanslor, 153 Cal. 118, 94 P. 606, 17 L. R. A. (N. S.) 455, 126 Am. St. Rep. 61, is illustrative of the point. In that case it appears that a corporation, known as the Superior Sunset Oil Company, was in possession and occupation of certain land, claiming it as its own under mining locations thereon. Notwithstanding such possession, it was held that the real owners of the property had a right to summarily eject the Superior Sunset Oil Company, together with its employees, and in so doing, if necessary, to resort to the use of firearms.

[3] If in the circumstances of the instant case the defendants would have been justified in the law in actually using as much physical force and violence toward and against the trespassers as was or became necessary to eject them from the property, it is difficult, if possible, to understand how, under such conditions, the defendants could possibly be legally guilty of an assault, which is a lesser crime, and which does not either embrace or contemplate the use of force or violence. To my mind, it is manifest that, in the situation presented by the evidence, prejudicial error was committed by the trial court in adjudging the defendants guilty of assault.

The judgments and orders appealed from are reversed.

We concur: HOUSER, Acting P. J.; YORK, J.

125 Cal.App. 61

DE BRITO et al. v. SAN DIEGO PACKING CO.*

Civ. 904.

District Court of Appeal, Fourth District, California.

July 22, 1932.

Rehearing Denied Aug. 19, 1932. Hearing Denied by Supreme Court Sept. 19, 1932.

1. Appeal and error ⇐758(3).

Specifications of error in court's findings, stated in substance only, without specifying particulars wherein evidence was insufficient to support them, *held* insufficient (Code Civ. Proc. § 648).

2. Appeal and error ⇐758(3).

Sufficiency of evidence to support court's findings cannot be considered, where specifications of error do not specify particulars wherein it was insufficient (Code Civ. Proc. § 648).

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Abel De Brito and others against the San Diego Packing Company, a corporation, which set up a counterclaim. Judgment for defendant, and plaintiffs appeal.

Affirmed.

William H. Wylie and H. P. L. Beck, both of San Diego, for appellants.

James G. Pfansteil, of San Diego, for respondent.

V. N. THOMPSON, Justice pro tem.

This action was brought by plaintiffs and appellants against defendant and respondent for the purpose of recovering the amounts of certain payments totaling $4,067.21 claimed by them to have been made only as "deposits" upon the total purchase price of $12,000, in pursuance of the terms of a written contract for the purchase of a certain fishing boat named "Shina No. 2." Upon the execution of the contract, July 21, 1928, possession of the boat was delivered to appellants. The complaint in effect purports to set forth a rescission of the contract, and a right to recover the amounts of said payments on that ground, and also upon the ground that respondent wrongfully retook said boat and resold it at a time when appellants were not in default under the terms of the contract; that by reason thereof appellants were entitled to a return of the money paid by them, together with interest thereon from November 1, 1928, at the rate of 7 per cent. per annum. A copy of the contract is attached to the complaint, referred to and marked "Exhibit A."

Title to the boat remained in the respondent until the full sum of $12,000 was "* * * deposited with it as and for the purchase price."

Respondent in its answer admits the making of the contract, as well as the making of the initial payment of $3,000 by appellants upon the execution of the contract, the delivery of possession of the boat to appellants, and further credits amounting to $1,067.21 made upon the purchase price. Respondent contends that all the payments which were made were actually payments upon the purchase price, rather than simply "deposits," as contended by appellants. This contention is brought about between the parties because of the peculiar phraseology used in the written contract, referring to the payments as "deposits" to be applied upon the purchase price.

Respondent also contends that appellants, after using the fishing boat commercially for approximately six months, returned it to respondent's wharf in San Diego Bay and there abandoned it in a dilapidated condition, with bills and maritime liens against it, without having paid current and past due taxes and insurance upon it as required by the contract, necessitating respondent, for its own protection, retaking possession of the boat, having it repaired, paying the costs thereof, as well as bills, liens, and insurance standing against it; that such abandonment constituted a repudiation of the contract, entitling respondent to resell the boat to third persons, which it did in July, 1929. Respondent further sets up a counterclaim to recover from appellants interest on the deferred portion of the contract price as provided in the contract, moneys expended by it as above outlined, and also a claim for the reasonable value of the use of the boat for the period during which it was used by appellants.

The case was tried by the court without a jury; findings were made generally supporting respondent's contentions and claims, and conclusions of law were made in part as follows: "* * * That the equity of the defendant's counter claim is equal to any equity the plaintiffs may have in said boat; that defendant take nothing by its counter claim; that defendant have judgment against said plaintiff for its costs of suit herein." Judgment was entered accordingly, from which plaintiffs and appellants take this appeal.

[1] The evidence which was produced before the trial court is summarized in the transcript on appeal under the title "Plaintiffs' bill of exceptions." Following which appears: "Specifications of Error." "Said plaintiffs specifically except to the following acts found by the court and the conclusions

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Hearing denied 14 P.(2d) 305.

drawn therefrom." Then follow thirteen separate paragraphs, each setting forth in substance particular findings which were made by the trial court.

Respondent in its reply brief points out that appellants' entire "specifications of error" make no statement that the facts found by the court are excepted to on the ground of insufficiency of the evidence to support such findings, and interposes an objection to a review of the evidence upon this appeal for that reason. A reading of the several paragraphs mentioned discloses that each refers to the finding of the trial court in substance alone, and does not refer to the matter of insufficiency of the evidence to support such finding. The bill of exceptions not only fails to specify that the evidence is insufficient to support the findings, but it also fails to state the particulars wherein the evidence is insufficient as is required by section 648, Code of Civil Procedure.

The point raised by respondent is presented especially by the parties by leave of this court. Appellants cite the cases of Tannahill v. Greening, 85 Cal. App. 714, 716, 259 P. 1017, and Mazuran v. Stefanich, 95 Cal. App. 327, 330, 272 P. 772, 773, in support of their contention that the specifications of error assigned by them are sufficiently set forth. In the first case cited, findings to which exceptions were taken were referred to by number only, after grounds of exception had been stated, "* * * insufficiency of the evidence to warrant the finding." The question involved in that case concerned only the matter of a sufficient identification of the finding excepted to. It was held there that reference in the exceptions to the findings by number was sufficient. If only the matter of identification of the finding to which exceptions are taken was to be considered, the decision in the case of Tannahill v. Greening, supra, would sustain appellants' position in this respect. In the case of Mazuran v. Stefanich, supra, the only specification of error which was set out in the bill of exceptions was "that the evidence is insufficient to justify the decision of the court rendered in this action," which was held to be too general to meet the requirements of the statute.

The Supreme Court of California, in the case of Regoli v. Stevenson, 179 Cal. 257, 258, 176 P. 158, 159, has stated the rule upon this point very definitely in the following language: "The bill of exceptions wholly fails to specify the particulars wherein the evidence is insufficient to support such findings; nor, indeed, are any errors specified therein. In the absence of such specifications of the particulars wherein the evidence is insufficient to support the findings, the question cannot be reviewed on appeal. [Citing cases.]"

There are many decisions in other jurisdictions also which seem to be fully applicable to the instant case, some of which are based upon the requirements of statutes similar to our own, and some of which are based upon requirements of court rules. The decisions cited by respondent, all being by the Supreme Court of the State of Utah, pass upon the form of the exceptions substantially as they are set forth in the case at bar, where the exceptions refer only to particular findings, without any statement as to the grounds upon which such exceptions are taken or based. In each of these cases the findings to which exceptions were taken were referred to only by number, while in the case at bar the substance of each finding is set forth. In the Utah cases referred to the insufficiency of the statements of specifications was held because of the failure of the statements to include matters required by the rules of the Supreme Court of Utah, i. e., a statement of grounds upon which the exceptions were taken. In the instant case we have a definite statute, mandatory in its terms, as to what shall be stated in the exceptions. These requirements are necessary not only in a strict legal sense, but also because of the actual necessity of the court and respondent having before it an exact statement of the matters excepted to, the grounds or reasons for such exceptions, and the particulars in which it is claimed that the findings or judgment of the trial court are not justified.

Appellants in their opening brief discuss the evidence taken before the trial court, and urge questions of both law and fact in connection with their appeal. Thus, we have before us a concrete example of the specifications of error by appellants not stating grounds or reasons why findings excepted to are not sufficient, when from reading appellants' opening brief it is apparent that questions of both law and fact probably are involved, or should be involved, in this appeal.

[2] As to the propriety of this court considering the appeal further, the rule is definitely stated in the case of Regoli v. Stevenson, supra, and also in 3 C. J. 1357, 1359, wherein the following language appears: "It not only follows from the very nature of assignments or specifications of error, but also it is expressly required by most of the statutes or rules of court, that an assignment or specification of errors or reasons of appeal must both directly and clearly allege error or errors of the trial court, and point definitely and specifically, and substantially in form, if any, prescribed by the statute or rule, the particular error or errors relied upon, and as a general rule an assignment of errors not complying with this rule will not be considered by the appellate court."

Many cases are therein cited from various jurisdictions in support of this rule, and also cases referred to in which assignments

or specifications of error have been held to be insufficient to warrant an appellate court in reviewing the matters relied upon, some of which are very similar in principle to the case at bar.

For the reasons stated, this court will not consider the matters attempted to be urged upon this appeal.

The judgment is affirmed.

I concur: BARNARD, P. J.

MARKS, J.

I concur. It is evident from a reading of appellants' brief that the principal ground upon which they rely for a reversal of the judgment is that a number of the findings made by the trial court are either not supported by the evidence or are contrary to it.

The record on appeal is quite brief and I have examined the evidence set forth in the bill of exceptions. It seems clear to me that the findings of which appellants complain in their brief are amply supported by the record. Some of the questioned findings are supported by such a preponderance of the evidence that it might almost be said that there is no evidence to the contrary. Other of the findings are based upon conflicting evidence, but there is substantial material evidence in the record to support them. The balance of the findings of which appellants complain are supported by strong inferences reasonably drawn from competent and material evidence.

On appeal all conflicts in the evidence must be resolved in favor of the judgment and all reasonable inferences from the evidence must be drawn in its support. Witherow v. United American Insurance Co., 101 Cal. App. 334, 281 P. 668. In my opinion if the case were considered on its merits the judgment would be affirmed.

On Rehearing.

PER CURIAM.

Because of an apparent lack of knowledge or misunderstanding of the records of this court on the part of counsel for appellants as shown in their petition for rehearing, we deem it advisable to call attention to the following:

This cause was placed on the calendar for oral argument on June 14, 1932. There were present on the bench at that time Mr. Presiding Justice BARNARD, Mr. Justice JENNINGS, and Mr. Justice pro tempore SCOVEL. The minutes of the court show that before the calling of the calendar the following occurred: "Presiding Justice Barnard announced that unless objection was offered, it would be deemed as stipulated that Justice Marks and any justice pro tem. may participate in the decision of any cause on this calendar."

The minutes of that day contain the following concerning this case: "4 Civil No. 904, De Brito et al. vs. San Diego Packing Co. Hearing on merits. Wm. H. Wylie, Esq., appeared for appellants and was granted leave to file reply memorandum. Jas. G. Pfanstiel, Esq., appeared for respondent and was granted 5 days to reply thereto. Cause then to be submitted." The cause was not orally argued, and no objection was made to the presumed stipulation as announced by the presiding justice.

The cause was submitted on July 11, 1932, at which time Mr. Justice pro tempore V. N. THOMPSON was sitting on this court under assignment of the Judicial Council of California.

The petition for rehearing is denied.

125 Cal.App. 282

PEOPLE v. MORRISON et al.

Cr. 231.

District Court of Appeal, Fourth District, California.

Aug. 5, 1932.

Rehearing Denied Aug. 17, 1932.

Hearing Denied by Supreme Court Sept. 2, 1932.

1. Constitutional law ⇐109.

There is no vested right in particular rules of evidence.

2. Constitutional law ⇐249, 311.

Generally, neither due process nor equal protection is denied by statute making one fact presumptive evidence of another.

3. Aliens ⇐10.
Constitutional law ⇐249.

Statute placing on defendant, proved to be member of race ineligible for naturalization, burden of proving citizenship or eligibility thereto, but not placing like burden on defendant not proved to be of such race, *held* not discriminatory (Alien Land Law, § 9b, as added by St. 1927, p. 881, § 2; Const. U. S. Amend. 14, § 1).

Appeal from Superior Court, San Diego County; A. C. Finney, Judge.

George Morrison and H. K. Ozaki were convicted of conspiring to violate the Alien Land Law, and they appeal.

Affirmed.

J. Marion Wright, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

BARNARD, P. J.

The defendants were jointly accused by indictment of the crime of conspiring to violate the Alien Land Law of this state. Stats. 1921, p. lxxxiii; Stats. 1923, p. 1020; Stats. 1927, p. 881. The indictment charged that the defendant Ozaki was and is an alien ineligible to citizenship under the laws of the United States; that he was a citizen and subject of the empire of Japan; and that he was not and is not authorized by law or by any treaty between the United States and the empire of Japan or any other country to acquire, possess, enjoy, use, cultivate, or occupy any real property, or to have the beneficial use of, or any interest in, any real property in this state for agricultural purposes. It also charged that the defendants conspired to violate the provisions of the Alien Land Law, in that they willfully, unlawfully, and feloniously combined, conspired, and agreed by unlawful means and devices to bring about and accomplish the possession, enjoyment, use, cultivation, and occupancy for agricultural purposes, by the defendant Ozaki, of certain land described, which is situated in the county of San Diego. It was further charged that this land was and is agricultural land, and that, in furtherance of and to accomplish and effect the purpose and objects of said conspiracy, the defendant Morrison put the defendant Ozaki into possession of, and aided and encouraged him to take possession of, to use, enjoy, cultivate, and occupy, said land, and that the defendant Ozaki entered into possession thereof, and used, enjoyed, cultivated, and occupied the same, and raised and harvested crops thereon for his own use and benefit.

The case was tried before the court without a jury, on the following stipulated facts: "It is stipulated that the defendant George Morrison is, and was, at all times mentioned in the indictment, a native born citizen of the United States of America, and lessee of the land described in said amended indictment; that said land is agricultural land, and at all times mentioned in said amended indictment has been used exclusively for agricultural purposes; that on or about the 1st day of November, 1930, the said George Morrison did knowingly and willfully combine, confederate and agree with one H. K. Ozaki to bring about and accomplish the possession, enjoyment, use, cultivation and occupancy for agricultural purposes by said H. K. Ozaki, and thereafter to continuously keep and maintain the said H. K. Ozaki, in such possession, enjoyment, use, cultivation and occupancy, for agricultural purposes, and to the use and beneficial interest of the said H. K. Ozaki of all of the said land, and thereafter, and pursuant to said confederation, combination and agreement, and as a result thereof, and in furtherance of, and to accomplish and effect the purposes and objects thereof, the said George Morrison did put the said H. K. Ozaki into possession of, and did permit, aid and encourage the said H. K. Ozaki to go into possession of, and to use, enjoy, cultivate and occupy the said land, and did use, enjoy, cultivate and occupy the same, and did raise and harvest crops thereon, for the use and benefit of said defendants, and each of them; that said H. K. Ozaki is a member of a race ineligible to citizenship in the United States of America, to-wit, of the Japanese race, but that there is no evidence nor proof nor agreement as to the place of birth of the said H. K. Ozaki nor as to whether or not the said H. K. Ozaki is a citizen of the United States of America."

The defendants offered no evidence, and the court found each of the defendants guilty. Judgment was pronounced, but sentence was suspended, and each of the defendants was placed on probation. This appeal is from the judgment and from an order denying a motion for a new trial.

This case is practically identical with the case of People v. Osaki, 209 Cal. 169, 286 P. 1025, with the exception that the appellant maintains that the one point here raised was not passed upon or determined in that case. The only point raised is that section 9b of the Alien Land Law, as adopted in 1927 (as added by St. 1927, p. 881, § 2), is discriminatory and in violation of the equal protection clause of section 1 of the Fourteenth Amendment to the Constitution of the United States, in that a defendant who is proved to be a member of a race ineligible to citizenship is put to the burden of proving his citizenship or his eligibility to citizenship, whereas, a defendant who is not proved to be of such a race is not required to assume a like burden. Section 9b of this act, which is thus attacked, reads as follows:

"In any action or proceeding, civil or criminal, by the State of California, or the people thereof, under any of the provisions of this act, when the complaint, indictment or information, alleges the alienage and ineligibility to United States citizenship of any defendant, proof by the state, or the people thereof, of the acquisition, possession, enjoyment, use, cultivation, occupation or transferring of real property or any interest therein, or the having in whole or in part of the beneficial use thereof by such defendant, or of any such facts, and in addition proof that such defendant is a member of a race ineligible to citizenship under the naturalization laws of the United States, shall create a prima facie presumption of the ineligibility to citizenship of such defendant, and the burden of proving citizenship or eligibility to citizenship as a defense

to any such action or proceeding shall thereupon devolve upon such defendant.

"The Legislature hereby declares that its purpose in adopting this section is not to modify, limit or affect in any manner the provisions of section 9a of this act."

[1, 2] This section of the Alien Land Law establishes a rule of evidence. People v. Osaki, supra. While a presumption of ineligibility for citizenship arises, under the terms of the section, from proof of certain other facts, nothing in the act operates to preclude any defendant from the right of presenting his defense to the main fact thus to be presumed. There is no vested right in particular rules of evidence, and, as a general rule, neither due process of law nor equal protection of the law is denied by a statute which makes one fact presumptive evidence of another fact. Virginia & West Virginia Coal Co. v. Charles (C. C. A.) 254 F. 379; People v. Mallon, 222 N. Y. 456, 119 N. E. 102, 4 A. L. R. 463; Fong Yue Ting v. United States, 149 U. S. 698, 13 S. Ct. 1016, 37 L. Ed. 905. The rule is thus stated in 51 A. L. R. at page 1141: "The general rule is well established that it is competent for the legislative body to provide by statute or ordinance that certain facts shall be prima facie or presumptive evidence of other facts, if there is a natural and rational evidentiary relation between the facts proved and those presumed; such statutes or ordinances are within the well-settled powers of a legislative body to change the rules of evidence and do not infringe upon the rights of the judiciary or violate any other provisions of the Federal or State Constitution."

In Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 17 S. Ct. 255, 261, 41 L. Ed. 666, it is said: "The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not merely that a classification has been made, but also that it is one based upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary selection."

In Truax v. Corrigan, 257 U. S. 312, 42 S. Ct. 124, 131, 66 L. Ed. 254, 27 A. L. R. 375, the court said: "In adjusting legislation to the need of the people of a state, the Legislature has a wide discretion, and it may be fully conceded that perfect uniformity of treatment of all persons is neither practical nor desirable, that classification of persons is constantly necessary. * * * Classification is the most inveterate of our reasoning processes. We can scarcely think or speak without consciously or unconsciously exercising it. It must therefore obtain in and determine legislation; but it must regard real resemblances and real differences between things, and persons, and class them in accordance with their pertinence to the purpose in hand."

[3] We are unable to see how it can be maintained that such a classification as the one resulting from the statute here attacked is not a natural and reasonable one. In Terrace v. Thompson, 263 U. S. 197, 44 S. Ct. 15, 19, 68 L. Ed. 255, a case involving the Alien Land Law of the state of Washington, the court said: "The rights, privileges and duties of aliens differ widely from those of citizens; and those of alien declarants differ substantially from those of nondeclarants. * * * Two classes of aliens inevitably result from the naturalization laws—those who may and those who may not become citizens. The rule established by Congress on this subject, in and of itself, furnishes a reasonable basis for classification in a state law withholding from aliens the privilege of land ownership as defined in the act." In Porterfield v. Webb, 263 U. S. 225, 44 S. Ct. 21, 22, 68 L. Ed. 278, where the Alien Land Law of this state was attacked as denying to ineligible aliens the equal protection of the law, the court said: "This case is similar to Terrace et al. v. Thompson, supra. In that case the grounds upon which the Washington Alien Land Law (Laws Wash. 1921, c. 50) was attacked included those on which the California act is assailed in this case. There the prohibited class was made up of aliens who had not in good faith declared intention to become citizens. The class necessarily includes all ineligible aliens, and in addition thereto all eligible aliens who have failed so to declare. In the case now before us the prohibited class includes ineligible aliens only. In the matter of classification, the states have wide discretion. Each has its own problems, depending on circumstances existing there. It is not always practical or desirable that legislation shall be the same in different states. We cannot say that the failure of the California Legislature to extend the prohibited class, so as to include eligible aliens who have failed to declare their intention to become citizens of the United States, was arbitrary or unreasonable."

In Cockrill v. People of State of California, 268 U. S. 258, 45 S. Ct. 490, 491, 69 L. Ed. 944, in discussing the presumptions created by section 9 of our Alien Land Law (St. 1921, p. lxxxv), the court said: "The statute is not repugnant to the equal protection clause. The rule of evidence applies equally and without discrimination to all persons—to citizens and eligible aliens as well as to the ineligible. In the application of the law at the trial, no distinction was made between the citizen and the Japanese. Plaintiffs in error maintain that invalidity results from the fact that, where payment of the purchase price is made by an ineligible alien, the law creates a presumption of a purpose to prevent, evade,

or avoid escheat, while no such presumption arises where such payment is made by a citizen or eligible alien. But there are reasonable grounds for the distinction. Conveyances to ineligible Japanese are void as to the state and the lands conveyed escheat. Payment by such aliens for agricultural lands taken in the names of persons not of that class reasonably may be given a significance as evidence of intent to avoid escheat not attributable to like acts of persons who have the privilege of owning such lands. The equal protection clause does not require absolute uniformity, or prohibit every distinction in the laws of the state between ineligible aliens and other persons within its jurisdiction. The state has a wide discretion and may classify persons on bases that are reasonable and germane having regard to the purpose of the legislation. [Citing cases.] The fact that in California all privileges in respect of the acquisition, use, and control of the land for agricultural purposes are withheld from ineligible Japanese constitutes a reasonable and valid basis for the rule of evidence."

There seems to be no substantial difference between the prima facie presumption created by section 9b of this act and the presumption created by section 9 thereof, which was under consideration in the case last cited, and we are unable to see why most of the reasoning there employed as applicable to said section 9 is not equally pertinent to the question now before us.

Not only is the classification of persons according to their eligibility or noneligibility to citizenship, which is ultimately involved in the operation of section 9b, a reasonable and natural one, having regard to real differences between two classes of persons whose rights and obligations are essentially unlike, but these differences have a real pertinence to the purpose of the statute.

Not only does the statute in question present to every defendant a fair opportunity to repel the presumption created thereby, but, as a matter of fact, the burden of meeting such a presumption is placed upon all defendants alike, whether they are citizens or not, and whether or not they are eligible to citizenship. When a prima facie presumption arises, under the terms of the statute, from a sufficient allegation and evidence of certain facts, the burden of meeting the same is placed upon any defendant regardless of his citizenship or his eligibility to citizenship. The fact that some defendants may be able to meet and overcome the presumption created, while other defendants may not, is inherent in the nature of the case, and has no relation to the question of equal protection of the law.

In our opinion, this statute is not in conflict with the equal protection clause of section 1 of the Fourteenth Amendment to the Federal Constitution.

The judgment and order appealed from are affirmed.

We concur: MARKS, J.; JENNINGS, J.

PEOPLE v. MORRISON et al. *

Cr. 232.

District Court of Appeal, Fourth District, California.

Aug. 5, 1932.

Rehearing Denied Aug. 17, 1932.

Hearing Granted by Supreme Court Sept. 2, 1932.

Aliens ⇐10.
Constitutional law ⇐311.

Statutes placing on defendant, proved to be member of race ineligible for naturalization, burden of proving citizenship or eligibility to citizenship, but not imposing like burden on defendant not proved to be of such race, *held* not to deny due process (Alien Land Law, § 9a, as added by St. 1927, p. 881, § 1; Code Civ. Proc. § 1983, as added by St. 1927, p. 434; Const. U. S. Amend. 14).

Appeal from Superior Court, San Diego County; A. C. Finney, Judge.

George Morrison and H. Doi were convicted of conspiring to violate the Alien Land Law, and they appeal.

Affirmed.

J. Marion Wright, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

BARNARD, P. J.

The defendants were jointly accused by indictment of the crime of conspiring to violate the Alien Land Law of this state. Stats. 1921, p. lxxxiii; Stats. 1923, p. 1020; Stats. 1927, p. 881. The indictment alleged that the defendants willfully, unlawfully, and feloniously combined and conspired by unlawful means and devices to bring about and accomplish the possession, enjoyment, use, cultivation, and occupancy for agricultural purposes, by the defendant Doi and for his use and benefit, of certain described real property situated in the county of San Diego, which real property is alleged to be agricultural in

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 22 P.2d 718.

character. It is alleged that the defendant Doi was and is an alien ineligible to citizenship under the laws of the United States, and that he is a citizen and subject of the empire of Japan, and not authorized by law or treaty to acquire, enjoy, occupy, or to have any beneficial interest in any real property in this state for agricultural purposes. It is also alleged that in furtherance of said conspiracy, and for the purpose of accomplishing and effecting the purposes and objects thereof, the defendant Morrison put the defendant Doi into possession of the agricultural land described, and permitted, aided, and encouraged him to take possession thereof, and to use, enjoy, cultivate, and occupy the same, and that the defendant Doi took possession of said land, used, enjoyed, cultivated, and occupied the same, and raised and harvested crops thereon for his own use and benefit.

Trial by jury was waived, and the action was tried before the court. The only evidence introduced consisted of the following stipulation: "It is stipulated that the defendant George Morrison is, and was, at all times mentioned in the indictment, a native born citizen of the United States of America, and lessee of the land described in the said amended indictment; that said land is agricultural land, and at all times mentioned in said amended indictment has been used exclusively for agricultural purposes; that on or about the 27th day of August, 1931, the said George Morrison did knowingly and wilfully combine, confederate and agree with one H. Doi, to bring about and accomplish the possession, enjoyment, use, cultivation and occupancy for agricultural purposes by said H. Doi, and thereafter to continuously keep and maintain the said H. Doi in such possession, enjoyment, use, cultivation and occupancy, for agricultural purposes, and to the use and beneficial interest of the said H. Doi, of all of the said land, and thereafter, and pursuant to said confederation, combination and agreement, and as a result thereof, and in furtherance of, and to accomplish and effect the purposes and objects thereof, the said George Morrison did put the said H. Doi into possession of, and did permit, aid and encourage the said H. Doi to go into possession of, and to use, enjoy, cultivate and occupy the said land, and said H. Doi did go into possession of said land, and did use, enjoy, cultivate and occupy the same, and did raise and harvest crops thereon, for the use and benefit of said defendants and each of them."

The defendants were found guilty and released on probation. This appeal is from the judgment and from an order denying a motion for a new trial.

The only point raised is that section 9a of the Alien Land Law as adopted in 1927 (Stats. 1927, p. 881, § 1), and section 1983 of the Code of Civil Procedure, also adopted in 1927 (St. 1927, p. 434), are unconstitutional as violating the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

Section 9a of this act thus attacked reads as follows: "In any action or proceeding, civil or criminal, by the State of California, or the people thereof, under any of the provisions of this act, when the proof introduced by the state, or the people thereof, establishes the acquisition, possession, enjoyment, use, cultivation, occupation, or transferring of real property or any interest therein, or the having in whole or in part the beneficial use thereof by any defendant, or any of such fact, and the complaint, indictment or information alleges the alienage and ineligibility to United States citizenship of such defendant, the burden of proving citizenship or eligibility to citizenship shall thereupon devolve upon such defendant."

Section 1983 of the Code of Civil Procedure need not be here quoted, but in brief, and so far as here material, it provides that the burden of proving his citizenship or eligibility to citizenship shall rest upon a defendant in such a case as this, when it is alleged that a right or privilege forbidden by the Alien Land Act has been exercised by the defendant, and that he is not a citizen of the United States and not eligible to become such a citizen, and when it has been established that the defendant in question has exercised such a forbidden right or privilege.

This case is presented as being one in all respects similar to the case of People v. Osaki, 209 Cal. 169, 286 P. 1025, 1026, with the exception that this action relates only to the validity of section 9a of this act. The only argument made is to the effect that the decision in the case just mentioned is erroneous.

In the case before us there is neither evidence as to the nationality or race of the defendant Doi nor evidence that he was an alien ineligible to citizenship. To that extent this case may differ from the case of People v. Osaki, as the court there pointed out that the defendant therein was apparently conceded by his counsel to be of the Japanese race, and, in passing upon a certain instruction, the court remarked that the case was apparently tried on the theory that the defendant was of alien, ineligible blood. However, in passing upon the main question there involved, as to whether the 1927 amendments to the Alien Land Law were unconstitutional as violating the due process clause of the state and Federal Constitutions, the court said: "No evidence was offered by either side pointedly directed to the citizenship of said alleged alien. If the Alien Land Acts, which cast upon said alleged alien the burden of proving his citizenship or eligibility to citi-

zenship under the naturalization laws of this country as a prerequisite to the enjoyment of the rights which the evidence shows he undoubtedly exercised, are not in conflict with the due process provisions of the state and federal Constitutions, the judgments of conviction must stand."

The question thus stated is the same question now raised in this case, although here limited to section 9a of this act. While the court in the case just referred to considered sections 9a and 9b together, it discussed the question now before us at considerable length, and, as we take it, arrived at the conclusion that neither section 9a nor section 9b of this act (as added by St. 1927, p. 881, § 2) is in conflict with the due process clause of the Constitution.

We regard the decision in the case referred to as controlling in the instant case, and upon that authority the judgment and order appealed from are affirmed.

We concur: MARKS, J.; JENNINGS, J.

125 Cal.App. 268

PEOPLE v. SHOICHI NAKAMURA et al.

Civ. 929.

District Court of Appeal, Fourth District, California.

Aug. 5, 1932.

1. Escheat ⇐1.

Proceeding by state to escheat agricultural lands pursuant to Alien Land Law is not criminal proceeding but civil action (Alien Land Law, §§ 2, 7–9, as amended by St. 1923, pp. 1021–1024, §§ 2, 6–8).

2. Witnesses ⇐293½.

State suing to escheat agricultural lands pursuant to Alien Land Law could call defendants as witnesses; proceeding being civil (Alien Land Law, §§ 2, 7–9, as amended by St. 1923, pp. 1021–1024, §§ 2, 6–8; Code Civ. Proc. § 2055).

3. Depositions ⇐4.

Depositions taken in presence of defendants' counsel, but in defendants' absence, *held* admissible in state's proceeding to escheat agricultural lands pursuant to Alien Land Law, proceeding being civil (Alien Land Law, §§ 2, 7–9, as amended by St. 1923, pp. 1021–1024, §§ 2, 6–8; Const. art. 1, § 13).

4. Escheat ⇐6.

Evidence of corpus delicti *held* sufficient to entitle state suing to escheat agricultural lands pursuant to Alien Land Law to introduce testimony regarding defendants' declarations and admissions, even if proceeding was of criminal nature (Alien Land Law, §§ 2, 7–9, as amended by St. 1923, pp. 1021–1024, §§ 2, 6–8).

5. Aliens ⇐10.
Constitutional law ⇐249.

Alien Land Law placing on defendant proved to be member of race ineligible for naturalization burden of proving citizenship or eligibility to citizenship, but not imposing like burden on defendant not proved to be of such race, *held* not discriminatory (Alien Land Law, §§ 9a, 9b, as added by St. 1927, p. 881, §§ 1, 2; Const. U. S. Amend. 14, § 1).

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by the People against Shoichi Nakamura and others. From an adverse judgment, plaintiff appeals.

Reversed and remanded for a new trial.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., and Stephen Connell, Dist. Atty., and E. N. Clark, Deputy Dist. Atty., both of San Diego, for the People.

Arthur L. Dorn, of San Diego, and J. Marion Wright, of Los Angeles, for respondents.

BARNARD, P. J.

This is an appeal from a judgment in a proceeding brought by the Attorney General of the state of California and the district attorney of San Diego county, for the purpose of establishing an escheat as to certain agricultural lands in accordance with the provisions of the Alien Land Law (St. 1921, p. lxxxiii, as amended).

Among other things, the complaint alleges that the defendant Nakamura is of the Japanese race, and born in the territory of Hawaii; that the defendants Miyada, Ono, Oku, Kurokua, and Nagahiro are of the Japanese race, natives of the empire of Japan, subjects of the Emperor of Japan, and ineligible to citizenship in the United States; that the above-named defendants purchased certain described agricultural land situated in the county of San Diego, and on June 16, 1926, said land was conveyed by deed to the defendant Nakamura; that on that day the other defendants above named paid to the defendant Delpy $6,000 on account of the purchase price of said land; that on two subsequent dates the said Japanese defendants, except Nakamura, made further payments on account of the purchase price of said land; that all of said land has been used for agricultural purposes; that on or about June 16, 1926, the defendants Miyada, Ono, Oku, Kurokua, and Nagahiro entered into possession of said real property, and

ever since said date have occupied the same, using, enjoying, and cultivating the said land as their own and in their own right for agricultural purposes; that the taking of the title to the said land in the name of Nakamura was a mere subterfuge and to conceal the real purpose of the transfer; that all of said acts were done by the defendants Nakamura, Miyada, Ono, Oku, Kurokua, and Nagahiro with intent to violate and evade the Alien Land Law; that by means thereof these defendants have unlawfully obtained possession, use, occupancy, and enjoyment of this agricultural land; and that all of said land has escheated to the state of California. The complaint also alleges that there is no treaty existing between the United States and Japan by which citizens or subjects of the Emperor of Japan are permitted to acquire, possess, enjoy, use, and cultivate land for agricultural purposes in the state of California.

In addition to an answer generally and specifically denying each and every allegation of the complaint, the first six defendants above named filed a supplemental answer setting up, first, a plea of not guilty; second, former jeopardy; and, third, that all matters herein had been previously adjudicated in a former criminal action in which these defendants had been acquitted of a violation of section 10 of the Alien Land Law. A demurrer was sustained as to the first of these last three defenses, but overruled as to the other two.

The court found that the land in question had been deeded to the defendant Nakamura; that upon the execution and delivery of this deed the defendants Miyada, Ono, Kurokua, and Nagahiro moved on to different portions of said property, placed cottages thereon, have ever since resided thereon, purchased seed for use thereon, and busied themselves in the cultivation thereof as agricultural land; that the defendant Oku has never occupied any part of said property; and that Kurokua advanced $2,000 to Nakamura, which was used in making the first payment on the property. However, the court found, "by reason of the want of competent proof in support" of certain allegations of the complaint, that it is not true that certain further payments on the purchase price of the land were made by the defendants alleged to be occupying the premises; that, "no competent evidence sufficient to support the allegations of the complaint in that behalf having been adduced," it is not true that any acts were done by the defendants with the intent to violate and evade the law in question or to avoid escheat; and that, "no competent evidence having been adduced or received in support" of the corresponding allegations of the complaint, it is not true that the defendants alleged to be occupying and farming the property were foreign-born Japanese owing allegiance to the Emperor of Japan. Judgment was entered for the defendants, from which this appeal is taken.

Shortly after the trial began, an attempt was made by the plaintiff to call the defendants alleged to be in possession of the land as witnesses under the provisions of section 2055 of the Code of Civil Procedure. Objection was made to the effect that this is a criminal proceeding, and that under constitutional provisions these defendants cannot be compelled to become witnesses against themselves. These objections were sustained, and this presents what is conceded by all parties to be the principal point to be considered upon this appeal; namely, whether this proceeding is, in substance, civil or criminal.

The respondents rely especially upon the cases of Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 534, 29 L. Ed. 746, and Thurston v. Clark, 107 Cal. 285, 40 P. 435, 437. In Boyd v. United States, the court was dealing with a somewhat similar question, but in a proceeding to declare a forfeiture of certain property because of the evasion of a certain revenue law. The court points out that the act under which the proceeding was brought made an evasion thereof a criminal offense punishable by fine and imprisonment, with the additional punishment that the merchandise involved should be forfeited. The court said: "These are the penalties affixed to the criminal acts, the forfeiture sought by this suit being one of them. If an indictment had been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants,—that is, civil in form,—can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one."

It was therefore held that suits for penalties and forfeitures incurred by the commission of offenses against the law are of a quasi criminal nature, and that they are within the reason of criminal proceedings for all the purposes of that portion of the Fifth Amendment to the Constitution of the United States which declares that no person shall be compelled in any criminal case to be a witness against himself. In Thurston v. Clark, a proceeding for the removal of an officer, the action was held to be, in substance, criminal; it being held that this portion of the Fifth Amendment to the Constitution applies "to all cases in which the action prosecuted is not to establish, recover, or redress private and civil rights, but to try and punish per-

sons charged with the commission of public offenses." In its opinion, the court thus defines a criminal case: "A criminal case is an action, suit, or cause instituted to punish an infraction of the criminal laws, and, with this object in view, it matters not in what form a statute may clothe it; it is still a criminal case. * * *"

On the other hand, in Stone v. United States, 167 U. S. 178, 17 S. Ct. 778, 782, 42 L. Ed. 127, the Supreme Court has pointed out that the rule thus referred to has no application in a case turning wholly upon an issue as to the ownership of property. In that case the court said: "In the present case the action against Stone is purely civil. It depends entirely upon the ownership of certain personal property. The rule established in Coffey's Case [116 U. S. 436, 6 S. Ct. 437, 29 L. Ed. 684] can have no application in a civil case not involving any question of criminal intent, or of forfeiture for prohibited acts, but turning wholly upon an issue as to the ownership of property. In the criminal case the government sought to punish a criminal offense, while in the civil case it only seeks, in its capacity as owner of property illegally converted, to recover its value. * * *"

The decision of the question now before us seems to depend largely upon whether such an escheat as we are considering is a punishment for the infraction of a criminal law, involving criminal intent and being by way of a forfeiture as a penalty for an offense committed, or whether it is a rule of property turning wholly upon an issue as to ownership thereof and title thereto. It may first be observed that, under the statute here in question, neither the acceptance of a deed to agricultural lands nor the occupancy and use thereof is made a crime or a public offense. In re Akado, 188 Cal. 739, 207 P. 245, 246, the court said: "The act forbids such transfer, and this makes it impossible for any person to convey land to an alien ineligible to citizenship by any transfer that would be valid as against the state of California, although it might be valid with respect to all other persons. We must assume that the people in adopting this statute believed that the state of California could protect itself against the alien who had received a conveyance of such land whenever its officers became advised of the fact, without any provision making the execution of the conveyance itself a crime."

In Mott v. Cline, 200 Cal. 434, 253 P. 718, 724, in speaking of another provision of the Alien Land Law not herein involved, the court said: "This is the only act that is made a public offense and penalized by imprisonment or fine or by both. In re Akado, 188 Cal. 739, 207 P. 245. The exaction imposed for all other violations of the act inhibiting transfers is that the conveyance is rendered void as to the state and the real property escheats to the state upon action brought by the Attorney General or district attorney of the county in which the violation occurs. Cockrill v. People of State of California, 268 U. S. 258, 69 L. Ed. 944, 45 S. Ct. 490."

In the case last cited the court also said: "Our statute follows the common law as to the escheat proceedings." The respondents take this statement as holding that complete proceedings for such an escheat are not provided by our statute, and that we must therefore look to the common law and be guided by its procedure in case of a similar escheat. While we think our statute does establish the procedure to be followed, we also think that this procedure is essentially like that which prevailed under the common law under somewhat similar circumstances, and that it is in this sense that the Supreme Court made the statement referred to.

In State v. Savings Union Bank & Trust Co., 186 Cal. 294, 199 P. 26, the court points out that there were two kinds of escheats at common law. The first was based upon a theoretical failure in the line of descent; the theory being that the land reverts to the sovereign because of the technical nonexistence of any heirs. The other form of escheat at common law arose by way of penalty or forfeiture and as a part of the punishment for felony or treason. In that case the court held that an escheat under subdivision 9 of section 1386 of the Civil Code is of the kind first mentioned, and does not imply or require a forfeiture as a condition precedent. It was then held that an escheat under section 1273 of the Code of Civil Procedure is one of the second kind, and therefore in the nature of a statutory forfeiture, and subject to the rules applying to forfeitures. It will be noted that an escheat under subdivision 9 of section 1386 is thus held to be one of the first kind, and not dependent upon a forfeiture, although it does not take effect until the end of the statutory period, and although a form of judicial action is necessary to declare the existence of the escheat. Both at common law and under our decisions some judicial procedure is necessary to perfect the escheat, under either of the classes of escheat referred to. An escheat under this portion of section 1386 applies to any alien, even though he may be eligible to citizenship and even though such an alien may hold real estate against every one, including the state, until office found.

While the court in the case last referred to was considering the two statutes named in connection with the rights of aliens eligible to citizenship, in the statute now before us we are concerned with a consideration of the rights of aliens ineligible to citizenship. If we look to the common law, the form of escheat now before us is analogous to that form which arose from the theoretical failure

of competent heirs and is one of the first kind above referred to, which did not imply or require a forfeiture as a condition precedent. Under the statute here in question, a conveyance to an ineligible alien is absolutely void, and such an alien may not take title at all, unless by virtue of an existing treaty, an exception which has no application here. While a transfer to such an alien is forbidden, neither the act of making nor the act of receiving a conveyance is made a criminal offense. The attempted transfer is merely void for the want of anyone competent to take. Section 2 of the act (as amended by St. 1923, p. 1021, § 2) provides that an ineligible alien may acquire, possess, enjoy, use, cultivate, occupy, transfer, and have the beneficial use of real property only in accordance with an existing treaty, and not otherwise. Section 7 (as amended by St. 1923, p. 1022, § 6) provides that any real property acquired in fee by such an alien in violation of the provisions of the act shall escheat to the state of California as of the date of such acquiring. It also provides that the Attorney General or district attorney of the proper county shall institute proceedings to have the escheat of such property adjudged and enforced, and that, upon the entry of final judgment, the title to such property shall pass to the state as of the date of such acquisition in violation of the provisions of the act. Section 8 (as amended by St. 1923, p. 1023, § 7) makes similar provisions to cover any interest in real property less than a fee. Section 9 (as amended by St. 1923, p. 1024, § 8) provides that such transfer of real property or of an interest therein shall be void as to the state, and that the interest conveyed or sought to be conveyed shall escheat to the state as of the date of the transfer, if it be agricultural land and if the conveyance is made with intent to evade or avoid the provisions of the statute.

It seems to us that this act does not require a forfeiture as a condition precedent to an escheat. It is not a case where an ineligible alien may lawfully hold title to the property until it is later taken away from him by way of penalty. Such an alien may not legally take title in the first place, and there is, therefore, no forfeiture in the sense of taking away a right already accrued, by way of penalty or otherwise. In passing upon a contract with an ineligible alien relating to the use of agricultural land and in considering the Alien Land Law of this state, the court said in Webb v. O'Brien, 263 U. S. 313, 44 S. Ct. 112, 114, 68 L. Ed. 318: "The act as a whole evidences legislative intention that ineligible aliens shall not be permitted to have or enjoy any privilege in respect of the use or the benefit of land for agricultural purposes. * * * The question in this case is not whether the proposed contract is prohibited by section 10, but it is whether appellees have shown that they have a right under the Constitution or treaty to make and carry out the contract." In effect, and by way of historical analogy, this case is similar to a case arising under subdivision 9 of section 1386 of the Civil Code and to cases under the common law where there was a theoretical failure of competent heirs. The present proceeding, provided for by the statute, is only necessary to establish what has already occurred, and is neither necessary as a condition precedent to the working of a forfeiture nor for the purpose of ending a right which has theretofore existed. It is necessary only as a similar proceeding was necessary under the first kind of escheat, above referred to, at common law.

The purpose of this proceeding is to establish that the defendants never had any title or right to the use and benefit of the lands in question if they are within the inhibitions of this statute. Under the common law aliens could acquire real property and retain title to the same until the sovereign power took away their title thereto. Even that was done because of a theoretical absence of heirs and upon the theory that no one existed who was competent to take, and as an escheat of the first kind above referred to, and not of the second kind by way of forfeiture.

Similar questions to the ones now before us were before the court in Rose Duplessis v. Attorney-General, reported in Brown's Parliament Case, 415, English Reports, House of Lords, vol. 1, Full Reprint at page 658—2 Vesey 286. In that case the court said:

"From this order the appellant appealed, and on her behalf it was argued (A. Hume Campbell, E. Starkie, R. Ord, C. Perrot), that every person taking by devise, in law a purchaser; and the incapacity of an alien to hold an estate which he hath purchased, is in the nature of a penalty upon him, or a forfeiture of his interest; and by the known laws of the land, no man can be examined to, nor is bound to disclose, what will subject him to a penalty or forfeiture. That his Majesty having no title or estate in the premises, at the time the information in the Exchequer was exhibited, no act to be done by the Court could give him any estate therein; and therefore the information was premature, and the order for overruling the demurrer ought for these reasons to be reversed.

"On behalf of the Crown it was contended (D. Ryder, T. Bootle), that by the known law of the land, no alien born can take by grant, devise, or other purchase, any freehold, or chattels real, for his own benefit; but can and does, in such cases, take for the benefit of the Crown. That the known method of recovering such estates for the Crown, is by a commission under the great seal to inquire into the facts; and on the inquest finding them, to seize the estate into the King's hands. And, that in order to prove the facts on which it is founded, the King has the same

right to a discovery by the assistance of a Court of Equity, as the subject has, and founded on the same principle of justice, viz. that it is in general against conscience for any one to enjoy the property of another by concealing his right."

In discussing the matter, the court said: "The exception is admitted, but is not applicable to the present case. Here is no crime, unless the being born in a foreign dominion be so; and there can be no punishment where there is no guilt, no command neglected, no prohibition broken. Here is no act of parliament to impute it as a crime, with respect to the public; no prohibition, no condition annexed to a gift, to impute it as a contravention of the private law of the donor. Here is no loss, no forfeiture, no right to be divested; for the appellant took nothing originally, but for the benefit of the Crown. * * *"

The court's conclusion is thus set forth: "After hearing counsel on this appeal, the following question was put to the judges, viz. 'Whether the legal disability of an alien to hold lands, be a penalty or forfeiture?' And the Lord Chief Justice of the Common Pleas having delivered the opinion of the judges in the negative, it was thereupon ordered and adjudged, that the appeal should be dismissed, and the order of the Court of Exchequer therein complained of, affirmed. (Jour. vol. 28, p. 49)."

[1] How, then, can it be said that under our statute the enforcing of the escheat is by way of forfeiture, making the proceeding criminal in substance, when no right has ever been vested in an ineligible alien, when the purported transfer conveyed no title or interest to him, and when no infraction of the criminal laws is involved? The proceeding is neither to punish for crime nor to forfeit a right previously existing, but is to enforce a rule of property and to place the real property involved in hands competent to hold it and in a proper channel of alienation. The right of the state to limit the ownership, use, occupancy, and benefit of agricultural lands to citizens and those eligible to become citizens has been many times upheld, and the portions of this particular act which are here involved are merely for the purpose of enforcing that right. They are neither criminal in substance nor do they involve penalties or forfeitures for offenses against the law.

In such a situation, the statute not only provides the procedure to be followed, but fixes it as that of a civil case. The statute (section 7 of the act) provides that such a proceeding as this shall be instituted "to have the escheat of such real property adjudged and enforced in the manner provided by section four hundred seventy-four of the Political Code and title eight, part three of the Code of Civil Procedure." That title of the Code of Civil Procedure contains the following provision: "But if any person appears and denies the title set up by the state, or traverses any material fact set forth in the information, the issue of fact must be tried as issues of fact are tried in civil actions." Section 1271. We think that this proceeding is neither criminal in substance nor that it involves such a forfeiture as is declared in Boyd v. United States to be essentially a forfeiture for crime, and so falling within the constitutional provision that a person may not be compelled to testify against himself. There is no criminal intent involved here. The land escheats to the state upon certain conditions, but regardless of the intentions of the parties involved. These defendants could not have been indicted for anything involved in this action. The making of such a deed or the acquiring of any such interest as is here involved is not made a crime under the statute. The title to the property in question will not be forfeited by any decree which might be entered, but such decree can only establish that title passed to the state when the attempted conveyance took place. Such a situation is neither criminal nor quasi criminal, since it seeks to forfeit nothing, but seeks only to declare a situation that previously existed.

[2] For the reasons given, we think the court erred in refusing to permit the examination of the defendants under section 2055 of the Code of Civil Procedure.

[3] The point is also urged by the appellant that the court erred in refusing to receive in evidence the depositions of several witnesses. It developed that these depositions were taken in accordance with the provisions of the Code of Civil Procedure and not in accordance with the requirements of the Penal Code for the taking of depositions in a criminal case. In particular, it appeared that the depositions were not taken in accordance with section 13 of article 1 of the Constitution of California, which provides that depositions to be used in a criminal prosecution shall be taken in the presence of the party accused. While these depositions were taken in the presence of counsel for the defendants, the provision of the Constitution just referred to was not complied with. Upon that ground, and in accordance with its conclusion that this proceeding is criminal in substance, the trial court refused to allow the plaintiff to use the depositions. The correctness of this ruling depends upon the answer to the question we have heretofore been considering, and the decision of the point now raised naturally follows the other.

[4] The next point raised is that the court erred in refusing to allow a witness to testify as to a conversation with certain of the defendants alleged to be of the Japanese race and ineligible to citizenship, and as to certain declarations and admissions by them made.

Before objection was made, this witness testified that in a conversation with one of these defendants, in reply to a question as to how he was working the land, this defendant stated that he was receiving half of the crop and a salary of $200 a month. Thereupon the answer was stricken out for the purpose of permitting an objection. The objection was then made that no testimony could be received as to any declarations or admissions on the part of the defendants at that stage of the case, for the reason that the corpus delicti had not then been established. This objection was sustained, the court stating: "Up to this moment there is no evidence before the Court at all of the foreign nationality of any of these defendants that I know of. There is evidence that they are of the Japanese race." If we are correct in our conclusion that this is not a criminal proceeding, this ruling was erroneous. Even if this were held to be a proceeding of a criminal nature, we think the same result obtains. At the time this evidence was offered, the plaintiff had proved that the lands in question were agricultural in character; that the land had been conveyed to the defendant Nakamura; that the other defendants, alleged to be of the Japanese race and ineligible to citizenship, were occupying the land, and had built five houses thereon, having themselves paid for the lumber; and that they had purchased and paid for seed, and were farming the land. The complaint alleged that they were aliens, subjects of the Emperor of Japan and ineligible to citizenship in the United States, and these defendants had offered no proof to the contrary. While it is somewhat difficult to tell what the corpus delicti is, if this is to be considered a criminal proceeding, we think this evidence, with the presumptions that apply (see People v. Osaki, 209 Cal. 169, 286 P. 1025), would in any event be sufficient to furnish such proof of the corpus delicti as is necessary under our decisions, as a foundation for the admission of statements and admissions on the part of the defendants involved.

[5] The last point raised is that the court erred in denying to the plaintiff the benefit of the presumptions created by sections 9a and 9b of the Alien Land Law as adopted in 1927 (Stats. 1927, pp. 880, 881, §§ 1, 2), and the shifting of the burden of proof as provided for under section 1983 of the Code of Civil Procedure, as adopted in 1927 (Stats. 1927, p. 434). At the time this action was tried, the case of People v. Osaki, supra, had been reversed by the District Court of Appeal, but had not been decided by the Supreme Court. Largely on the authority of the opinion of the District Court of Appeal in reversing that case, the trial court held that the provisions of sections 9a and 9b of the Alien Land Law, as adopted in 1927, were in conflict with the due process clause and the equal protection clause of the Fourteenth Amendment to the Federal Constitution. Subsequently the case of People v. Osaki was affirmed by the Supreme Court, it being specifically held that the provisions of these amendments were not in conflict with the due process clause of the Fourteenth Amendment to the Constitution of the United States. The respondents now contend that these amendments to the Alien Land Law are unconstitutional as violating the equal protection clause of the Fourteenth Amendment to the Federal Constitution. The only argument presented is that these amendments are discriminatory, in that a citizen who is of one color and appearance is forced to establish his citizenship, while another citizen who happens to be of a different color or possessed of different features is not required to make such proof.

In the first place, we see nothing discriminatory in the amendments complained of. The rule of evidence created by these sections applies to all persons, citizens, eligible aliens, and noneligible aliens alike. Whatever his status, any defendant must proceed to overcome any prima facie case that may be made out by meeting the conditions of the statute. The mere fact that some defendants may not, because of the facts, be able to overcome such a prima facie case against them, is not controlling.

Not only do the provisions of these amendments apply equally to all persons, including citizens of this country, but the classification of persons, ultimately involved through the operation of these amendments, is a reasonable and natural one. In the case of People v. Morrison and Ozaki, 13 P.(2d) 800, this day decided, we have so held upon reasoning which need not be here repeated and upon the authority of such cases as Truax v. Corrigan, 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A. L. R. 375; Terrace v. Thompson, 263 U. S. 197, 44 S. Ct. 15, 68 L. Ed. 255; Porterfield v. Webb, 263 U. S. 225, 44 S. Ct. 21, 68 L. Ed. 278, and Cockrill v. People of State of California, 268 U. S. 258, 45 S. Ct. 490, 69 L. Ed. 944.

In our opinion, sections 9a and 9b of the act under consideration are not in conflict with the equal protection clause of section 1 of the Fourteenth Amendment to the Constitution of the United States.

For the reasons given, the judgment appealed from is reversed and the cause remanded for a new trial.

We concur: MARKS, J.; JENNINGS, J.

125 Cal.App. 115

BOWDEN v. WOODEN et al.

Civ. 8272.

District Court of Appeal, First District, Division 1, California.

July 27, 1932.

1. **Appeal and error** ⇐1012(1).

Findings in action by judgment creditor to set aside transfers by judgment debtor on ground of fraud cannot be successfully assailed on appeal unless contrary to undisputed evidence.

2. **Bankruptcy** ⇐303(5).

Finding that transfers by debtor to his wife were not fraudulent, *held* justified in action by debtor's trustee in bankruptcy (Civ. Code, § 3442).

Defendant's evidence tended to show that debtor's wife had loaned debtor money to meet his personal obligations and that, when he asked her for more money, she consented on condition that he deed certain lots to her. As to automobiles transferred to her by husband, testimony showed that the automobiles were purchased by the wife, but that certificates of ownership were carried in the husband's name.

3. **Appeal and error** ⇐994(3), 1012(1).

Matters going merely to weight of testimony and credibility of witnesses must be left to trial court's determination.

4. **Appeal and error** ⇐996.

Where different conclusions can be rationally drawn from evidence, case is one for trial court's determination in suit tried without jury.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Leslie S. Bowden, trustee of the estate of Earl Wooden, bankrupt, against Earl Wooden and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Ben F. Griffith, of Los Angeles, for appellant.

Voltaire Perkins, of Los Angeles, for respondents.

PER CURIAM.

This is an action by the trustee in bankruptcy of the estate of defendant Earl Wooden to set aside certain transfers of real and personal property made by Wooden to his wife, upon the ground that the same were made in fraud of creditors; and to have it decreed that certain other real property acquired by Mrs. Wooden in her name was held by her in fraud of her husband's creditors. The trial court found adversely on the charges of fraud, and judgment was entered accordingly in favor of defendants, from which plaintiff appeals, urging as grounds for reversal insufficiency of evidence to sustain the findings.

The creditor claimants in the bankruptcy proceeding were Arthur Huston and his wife, whose respective claims were based on judgments for damages which they obtained against Wooden on account of personal injuries sustained by them in a collision between an automobile driven by Huston and one driven by Wooden. The accident occurred on November 9, 1926; the actions for damages were instituted on February 4, 1927, and tried on February 23, 1928. Judgments for the total sum of $6,649.40 were entered in favor of the Hustons on March 19, 1928, and thereafter executions were issued and returned unsatisfied. On April 24, 1928, Wooden was declared bankrupt.

The property involved consisted of a lot in Burbank, two lots in Los Angeles, and two automobiles. The Burbank property was acquired by Mrs. Wooden under an installment contract which she entered into in May, 1924, a year prior to her marriage to Wooden. The purchase price was $1,300 and the monthly payments of $26 were completed in April, 1928, at which time the property was conveyed to her. The evidence adduced on the part of the Woodens shows that the entire purchase price was paid by Mrs. Wooden out of her separate funds consisting of money earned by her prior to her marriage and certain sums given to her subsequently by her father, and that her husband contributed nothing toward the purchase price and that title to said property was never vested in his name.

The Los Angeles lots were acquired by Wooden in February and August, 1926; and on December 1, 1927, he conveyed them by grant deed to his wife. In February, 1928, Mrs. Wooden conveyed the lots to defendant Granger by grant deed which was recorded the following month. All of these transactions took place prior to the entry of the judgments in the damage suits. With reference to the foregoing property the evidence adduced by defendants in support of their case shows that Mrs. Wooden paid her husband $750 for said lots, and that she afterwards sold them to Granger for $800. In this regard the testimony of Mrs. Wooden was to the effect that she had saved much of the money earned by her prior to her marriage and that her father had given her considerable money from time to time thereafter; that her husband made a practice of borrowing from her to meet his personal obligations, and that she had become discouraged because her separate funds were thus being dissipated with no return, and she felt that, if she gave him more money, there would be slight possibility of getting it

back because he was out of work and unable to pay his rent; that therefore when he asked her for more money to meet outstanding obligations she consented to let him have $750 provided he would deed the lots to her, which he did. Mrs. Wooden's testimony was substantiated in the main by that of Wooden, who testified further that he made an effort first to dispose of the lots through a real estate firm, but was unable to do so. The fact that Mrs. Wooden's father sent her money subsequent to her marriage was more or less corroborated by certain documentary proof; and the fact that Granger paid Mrs. Wooden $800 for the property was shown by the testimony of both, Granger having stated that he believed the property was worth $1,200 and that he willingly paid $800 in cash therefor. It was also shown that prior to such sale Mrs. Wooden endeavored for over a month to dispose of the property through real estate agents; that Granger heard of the property through such an agent and inspected the same before making the purchase.

As to the automobiles, the testimony shows that the same were purchased by Mrs. Wooden from second-hand dealers after she had visited several such places; that she signed the contracts for the purchase thereof and that the installment payments were made with her money; however, the certificates of ownership of the automobiles were carried in Wooden's name until final payment was made thereon, at which time, to wit, in January, 1928, they were transferred to Mrs. Wooden.

[1, 2] Section 3442 of the Civil Code provides that "* * * the question of fraudulent intent is one of fact and not of law; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration; provided, however, that any transfer or encumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors." And in this connection it has been held that, in an action by a judgment creditor to set aside transfers of property by a judgment debtor upon the ground of fraud, the findings of the trial court cannot be successfully assailed on appeal unless they are contrary to the undisputed evidence read in the light of all legitimate inferences to be drawn therefrom. Atkinson v. Western D. Syndicate, 170 Cal. 503, 150 P. 360. In the present case, therefore, the trial court's finding that there was no fraud cannot be disturbed unless the evidence as a whole is undisputed and proves to the contrary; and it is apparent that such is not the case, for, as will be observed, the testimony above narrated, if true, is legally sufficient to sustain the trial court's findings.

[3, 4] The attack plaintiff makes upon the testimony is that it is equivocal, uncertain, improbable, contradictory, and unworthy of belief. It is evident that the points thus made go merely to the weight of the testimony and the credibility of the witnesses, and, of course, such matters must necessarily be left to the determination of the trial court. The rule by which reviewing courts must be guided in passing upon the question of whether findings of fact are sufficiently supported by the evidence is this: That, if the evidence is such that different conclusions upon the matter can be rationally drawn from the evidence, then the case presented is one for the trial court, if the questions of fact be submitted to its arbitrament. Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 41 A. L. R. 1027. While the facts shown by the record in the present case are such as to justify a grave suspicion of the transactions complained of, the showing made by the plaintiff has not established such a case as would justify this court in overthrowing the findings of the trial court. As said in Atkinson v. Western D. Syndicate, supra, in this class of cases, as in any other, the determination of the questions of fact must rest with the trial court. There is nothing inherently improbable in the testimony adduced on the part of the defendants, and, since the trial court accepted the same as true, its decision in the matter is controlling on appeal.

An examination of the facts in Allee v. Shay, 92 Cal. App. 749, 268 P. 962, which is strongly relied on by plaintiff in support of his contention that the conveyance of the Los Angeles lots was fraudulent, shows that there it was admitted that the transfer was made without consideration; where as here there is a sharp conflict on that issue. The case relied upon is therefore not in point.

Since, as shown, the decision of the trial court herein upon the determinative issue in the case is based upon a conflict of evidence, it is beyond the power of this court to interfere therewith.

The judgment is therefore affirmed.

125 Cal.App. 363

Ex parte BRAY.

Cr. 146.

District Court of Appeal, Fourth District, California.

Aug. 12, 1932.

Rehearing Denied Aug. 24, 1932.

Hearing Denied by Supreme Court Sept. 8, 1932.

1. Automobiles ⇐106.

Railroad commission could lawfully provide in cease-and-desist order against truck line that order should become effective in 20 days irrespective of service (St. 1915, p. 158, § 61).

2. Public service commissions ⇐19(4).

Truck operator knowingly violating railroad commission's unserved cease-and-desist order *held* properly committed for contempt; terms of order making it effective irrespective of service (St. 1915, p. 158, § 61).

3. New trial ⇐116(2).

Under statute, service of written notice of entry of judgment is necessary to start running of period for serving and filing notice of intention to move for new trial (Code Civ. Proc. § 659).

4. Appeal and error ⇐348(1).

Service of written notice of entry of judgment is unnecessary to start time for appeal running.

5. Motions ⇐57.

Object of serving order being to give knowledge of contents, proof of such knowledge ordinarily suffices for proof of service.

Application by J. O. Bray for a writ of habeas corpus against the Sheriff of Fresno County to test the validity of an order of the railroad commission adjudging petitioner guilty of contempt and committing him to the county jail.

Writ discharged, and petitioner remanded to custody.

Lindsay & Gearhart, of Fresno, for petitioner.

Arthur T. George, Ira H. Rowell, and Roderick B. Cassidy, all of San Francisco, for respondent.

PER CURIAM.

This is a proceeding in habeas corpus to test the validity of an order of the railroad commission made February 23, 1932, adjudging petitioner guilty of contempt and committing him to the county jail of Fresno county. Said order grew out of proceedings before said commission in connection with the operation by petitioner of an automobile truck line as a common carrier of property, for compensation, over the public highways between Los Angeles and Fresno, without having received a certificate of public convenience and necessity therefor. After a hearing before said commission a "cease and desist" order, dated February 16, 1931, was made by the commission whereby petitioner was ordered to discontinue the operation of said truck line. Said order did not direct that it be served upon petitioner herein. It was made effective by its own terms twenty days from the date thereof. The commission found that petitioner had personal knowledge of said order and its contents prior to April 7, 1931, and that he violated its provisions by the operation of said truck line on the 6th, 15th, and 17th days of April, 1931. The commitment was issued pursuant to said findings. Application was made by petitioner to the Supreme Court for writ of certiorari to test the validity of said order. Said application was denied May 18, 1931. Bray v. Railroad Commission, May 18, 1931. Petitioner was served with a copy of said order on but not before September 15, 1931.

No question is raised as to the jurisdiction of the railroad commission to punish for contempt. Van Hoosear v. Railroad Commission, 189 Cal. 228, 207 P. 903.

[1, 2] It is contended that the imprisonment imposed is illegal because of the fact that petitioner was not served with a copy of said order before the time when it was found that he violated the provisions thereof.

Section 61, Public Utilities Act (St. 1915, pp. 115, 158), provides in respect to such an order: "A copy of such order, certified under the seal of the commission, shall be served upon the corporation or person complained of, or his or its attorney. Said order shall, of its own force, take effect and become operative twenty days after the service thereof, except as otherwise provided. * * *" It will be seen that while the statute provides that a certified copy of the order shall be served, it is further provided in effect that the order may become operative without service thereof if so ordered by the commission. Such was the view of the court in People v. Hadley, 66 Cal. App. 370, 226 P. 836. It was there said, at page 378 of the decision in 66 Cal. App., 226 P. 836, 840: "There is nothing in the act itself which requires service upon any person of any order of the Commission before it shall become operative." We think the clause "except as otherwise provided" refers to a provision to be incorporated into the order of the commission as to the effective date thereof and not to any exception otherwise provided in the statute. We find no exception otherwise provided in the statute. It was stated in Clemmons v. Railroad Commission, 173 Cal. 254, 159 P. 713, 714: "In the absence of any

provision to the contrary in the statute, we see no reason to doubt that the Commission may provide in its discretion for the time when its orders shall take effect."

The commission had jurisdiction to provide in said order that it should become effective twenty days from its date; and we hold that said order was effective twenty days from its date without service thereof upon petitioner.

In said case of People v. Hadley, supra, the defendant was accused by information with the violation of an order of the railroad commission. There was neither allegation of service of the order nor of previous knowledge on the part of the defendant of its provisions, although the order of the commission, set forth at length in the information, directed that a certified copy thereof be served upon the respondent (Hadley) by registered mail. A demurrer to the information was sustained and the order upheld on appeal. The court held that, under such circumstances, service of the order upon the defendant was necessary. Petitioner relies upon the following language quoted from the opinion in said case: "* * * It would appear that in this matter an allegation of service upon the defendant of a certified copy of the order of the Commission prior to the date of the alleged disobedience of such order is absolutely essential to the maintenance of the action against him. It is a part of the foundation of the statement of the offense, and without proof of such service the court is without jurisdiction." Said language is not applicable here for the reason that the order of the commission did not direct service thereof upon petitioner. Said decision recognizes and cites several California cases in support of the rule that, before one may be punished for contempt because of the violation of an order of court, it is essential that it be shown that such person had actual knowledge of the order or that service thereof had been made upon him. In each of the cases of Mitchell v. Superior Court, 163 Cal. 423, 125 P. 1061; In re Grigoris, 99 Cal. App. 455, 278 P. 873; Ex parte Brown, 66 Cal. App. 534, 226 P. 650; Berger v. Superior Court, 175 Cal. 719, 167 P. 143, 15 A. L. R. 373; and In re Mason, 69 Cal. App. 598, 232 P. 157, a judgment of guilt of contempt of court was upheld upon proof of previous knowledge of the provisions of the order of court, in the absence of proof of service thereof.

[3, 4] Petitioner also cites and relies upon a line of cases holding that a party to an action is entitled to written notice of entry of judgment in order to set in motion the period within which a notice of intention to move for a new trial may be served and filed. Such cases are not in point. The statute requires service of written notice of entry of judgment to set said period in motion. Section 659, Code Civ. Proc. But said notice need not be given to start the running of the period within which an appeal may be taken. Lawson v. Guild (Cal.Sup.) 10 P.(2d) 459.

[5] While the question of whether an order has been served is involved sometimes as a matter of evidence in establishing knowledge of the provisions thereof, except in cases where service is required by order or statute, it becomes unimportant whether such order has or has not been served if knowledge thereof is established otherwise. The object of service of an order being to give knowledge of its contents, ordinarily proof of knowledge of the provisions thereof will suffice for proof of service.

Since the order involved herein did not direct that it be served upon petitioner, but was made effective by its own terms twenty days from its date, we hold that the railroad commission had jurisdiction to adjudge petitioner guilty of contempt upon proof of his previous knowledge of the provisions thereof and of its violation, notwithstanding said order had not been previously served upon him.

We have examined the other points raised by petitioner and find no merit in any of them.

The writ is discharged, and petitioner is remanded to the custody of the sheriff of Fresno county.

125 Cal.App. 120

HAMMOND LUMBER CO. v. GOLDBERG et al.

AMERICAN SYSTEM OF REINFORCING v. SAME.

Civ. 8267.

District Court of Appeal, First District, Division 1, California.

July 27, 1932.

Rehearing Denied Aug. 26, 1932. Hearing Denied by Supreme Court Sept. 22, 1932.

I. Mechanics' liens ⇨252.

"Automobile laundry," consisting of three buildings and appurtenances situated on adjoining lots leased from different owners, *held* single "structure" subject to materialmen's liens without necessity for segregation as to particular buildings or ownership of land for which materials were used (Code Civ. Proc. § 1183).

Filing of single lien claim by each materialman, without segregation of materials with respect to buildings or separate ownership of land, was proper since the buildings were not only connected by concrete flooring and communicating wires,

pipes, and conduits essential to their use, but more especially by the purpose and object for which they were erected and exclusively adapted, and as a group constituted one harmonious and useful development, while considered independently they would lose their usefulness and value, and fail to a large extent to enhance value of land it was sought to improve.

[Ed. Note.—For other definitions of "Structure," see Words and Phrases.]

2. Mechanics' liens ⇐78.

Notice of nonresponsibility by owner of land contract, making no reference to contract, lease, or lessee, *held* insufficient to relieve estate of materialmen's liens, especially where neither land contract nor lease were recorded (Code Civ. Proc. § 1192, as amended by St. 1925, p. 304).

It appeared that person giving notice, who was a purchaser under contract, and had demised the property affected and knew name of lessee, made no mention in notice of any of such facts, notice reciting merely that person giving notice was owner of property.

3. Mechanics' liens ⇐78.

Act or provision by which landowner may escape liability for mechanics' liens must be strictly construed (Code Civ. Proc. § 1192, as amended by St. 1925, p. 304).

4. Mechanics' liens ⇐78.

Tenant's construction of "automobile laundry," composed of separate buildings on adjoining lots, but constituting single "structure" under statute, *held* single "construction," so that beginning of first building on one lot required adjoining landowner to post notice of nonresponsibility within ten days after knowledge thereof (Code Civ. Proc. § 1183, and § 1192 as amended by St. 1925, p. 304).

Since construction of entire "automobile laundry" constituted single "structure" or entity subject to materialmen's liens under Code Civ. Proc. § 1183, adjoining landowner's notice of nonresponsibility, posted and filed within ten days after obtaining knowledge of building operations on his property, but more than ten days after knowledge of building operations on other lot, was not timely in view of fact that section 1192, as amended by St. 1925, p. 304, requiring such notice of nonresponsibility, refers to but one "construction," and must be construed as intending thereby construction of structure on which lien in absence of notice would attach, and as starting the ten-day period from time of obtaining knowledge of construction, not from time of obtaining knowledge of any part or stage thereof.

[Ed. Note.—For other definitions of "Construct; Construction," see Words and Phrases.]

5. Mechanics' liens ⇐75(4).

Adjoining landowners, knowing that properties were leased to be used jointly for "automobile laundry," and that improvements connected therewith were contemplated by lessee, *held* to have constructive knowledge of character and location of improvements with respect to different properties, as regards time for filing notice of nonresponsibility (Code Civ. Proc. § 1192, as amended by St. 1925, p. 304).

6. Mechanics' liens ⇐197.

Where purchaser under contract executed lease authorizing construction of building to which materialmen's liens attached, subsequent delivery of deed by legal owner having no notice of construction *held* not to extinguish liens (Code Civ. Proc. § 1183, and § 1192 as amended by St. 1925, p. 304).

Perfection of purchaser's equitable estate to legal one could not operate to extinguish liens of materialmen which had previously accrued, though legal estate of grantor was not subject to the lien rights of materialmen, since purchaser exercised all of privileges of legal owner, held herself out to be such, and executed lease of premises which authorized construction which gave rise to liens of materialmen.

Appeals from Superior Court, Los Angeles County; William Hazlett, Judge.

Two actions, one by the Hammond Lumber Company, and the other by the American System of Reinforcing, against Sam B. Goldberg, Henry Richardi and wife, and others. From judgments in favor of plaintiffs, defendant Richardi and others appeal.

Affirmed.

Hill, Morgan & Bledsoe, Benjamin F. Bledsoe and George B. Ross, all of Los Angeles, for appellants Henry and Gertrude Richardi.

C. A. Ballreich, G. C. De Garmo, and W. M. Crane, all of Los Angeles, for appellants Elizabeth G. Crowell and Title Guarantee & Trust Co.

Holbrook, Taylor, Tarr & Horton and Joseph K. Horton, all of Los Angeles, for respondent Hammond Lumber Co.

O'Melveny, Tuller & Myers, of Los Angeles, for respondent American System of Reinforcing.

OGDEN, Justice pro tem.

The above actions, consolidated for trial, were instituted by the respondents to foreclose their respective mechanic's liens for the unpaid balance due on account of materi-

als furnished in the construction of certain buildings and improvements constituting an "automobile laundry."

Respondent Hammond Lumber Company was awarded judgment against defendant Sam B. Goldberg in the sum of $7,967.03, and respondent American System of Reinforcing was awarded judgment against the same defendant in the sum of $434.51. Both judgments further decree, in the usual form, that respondents have respective liens on the three lots herein involved for the amount of their judgments and for the foreclosure thereof; said liens extending to the interest and estate of these appellants in and to said property. The defendant Goldberg has not appealed, and the sole question presented is whether the respective estates of these appellants should be held subject to said liens.

The liens involve three adjoining lots situated in the city of Los Angeles and described as lots 1, 7 and 8 of tract 6780. During the time in which the materials were furnished, the legal title to lot 1 stood in the Title Guarantee & Trust Company; appellant Crowell being the owner of a contract to purchase the same. Subsequent to the construction and the filing of the claims of lien, but prior to the trial of the actions, the latter became the legal owner by virtue of a deed executed pursuant to the terms of her contract. Why the defendant Title Guarantee & Trust Company joins in this appeal is not made clear, as it does not appear, nor is it asserted in the briefs, that it has any further interest in the property. During all of the time with which we are here concerned, the appellants Richardi who are husband and wife, were the owners in fee of lots 7 and 8.

Lot 1 is situated on the southeast corner of Beverly boulevard and Juanita avenue, having a frontage of 106 feet on the former and 125 feet on the latter. The easterly boundary line slants westerly so that the southerly boundary line is only approximately 95 feet in length. Lots 7 and 8 lie adjacent to lot 1 on the south, the two together having a frontage of 50 feet on Juanita avenue with a depth of 125 feet.

On May 17, 1927, the appellant Crowell executed a written lease of lot 1 in favor of defendants Goldberg and Rosenfeld for a term of ten years, with the privilege to renew for a like term, together with an option to purchase. By the terms of this lease, the lessees were obligated to commence within thirty, and to complete within ninety, days from the date thereof the erection of a building on the premises, said building to cost not less than $15,000. It was also provided therein that the lessees have the right to erect such other buildings as they might desire, subject only to certain building restrictions. The building which was required by the lease to be erected was to become the property of the lessor, as were any other buildings erected by the lessees, unless the latter were removed prior to the expiration of the lease.

On May 20, 1927, but as the result of independent negotiations, the appellants Richardi likewise, by written instrument, leased for a similar term, and gave an option to purchase therewith, lots 7 and 8 to the same defendants. This lease also obligated the lessees to construct upon the leased premises, within ninety days from the date thereof, a building to cost not less than $5,000, and contained similar authority for the erection of others by the lessees, and provision for the ownership of the building so required to be erected in the lessors upon the termination thereof. Neither lease contained any reference to the other, nor were they recorded.

Subsequent to the execution of both leases, the defendant Goldberg took out in his own name as owner of the property a building permit for a "Class C reinforced auto laundry and service station," and commenced the construction here involved and in connection with which the materials of respondents were furnished. Three separate buildings were erected, all of which were of steel and cement construction. One building, 36 feet by 125 feet in size, was built entirely upon lot 1, across the easterly portion thereof. This building was designed for washing automobiles therein. Through this building and extending beyond it to the south upon lots 7 and 8 ran a movable runway or wash rack resting upon a concrete foundation. Another building, 26 feet by 94 feet in size, adapted for use in greasing and polishing automobiles, and one end as an office, was erected across the westerly portion of lots 7 and 8 and extending into and upon lot one for about 50 feet. The third, designed for use in cleaning automobile chassis and housing the necessary boilers and machinery, extended across the easterly portions of lots 7 and 8, being 50 feet by 29 feet in size. The three buildings were inter-connected by underground air and water pipes and electric conduits required in the operation of the various machinery therein. The ground space between the buildings was entirely covered by a cement pavement and used for driveways and for storage of automobiles not in the actual process of renovation. The materials used in the construction were ordered and purchased by the defendant Goldberg as needed, no segregation being made, either by him or by respondents, with respect to the particular building for which they were used.

Defendants Goldberg and Rosenfeld failed to pay the balance due respondents for materials furnished and used in the construction of the buildings, and each respondent filed a single claim of lien therefor against the entire property, and in due course initiated these foreclosure proceedings. Neither claim

of lien contains any segregation of materials with respect to buildings or separate ownership of the land, the claim of respondent American System of Reinforcing reciting that its materials were furnished for a "two story auto laundry and service station on Lots 1, 7 & 8 of Tract 6780," and the claim of respondent Hammond Lumber Company reciting that its materials were furnished for and used in the construction of "a building" located on said lots.

On June 7, 1927, construction work was started; the initial operations being in connection with the erection of the building first described herein, and situated exclusively upon lot 1. Three days thereafter the appellant Crowell posted on her property and filed for record, pursuant to the provisions of section 1192 of the Code of Civil Procedure, a verified notice by which she attempted to avoid responsibility, but in which notice she recited that she was the owner of the premises, and failed to make any reference to the contract of purchase, lease, or lessee. It appears from the evidence that on July 5, 1927, construction operations were extended to and commenced upon lots 7 and 8, and on that date the appellants Richardi posted on their property and filed for record a notice, in proper form, of nonresponsibility. The trial court held, and we think correctly as will hereinafter appear, both of these notices to be ineffective.

[1] Appellants contend that the trial court erred in allowing single liens upon the two separate parcels of real property, owned by separate owners and by them separately and independently leased, since such decree unjustly renders each parcel liable for improvements placed upon the other, and that, there having been no joint action or authority of the owners for the joint construction, no joint responsibility or liability can result.

The Supreme Court in Harmon Lumber Co. v. Brown, 165 Cal. 193, 131 P. 368, having under consideration a very similar state of facts, decided that such a single lien should be allowed upon both parcels without segregation. The main, if not the only, distinction, except as to the purported notices of nonresponsibility which will be discussed later, between that case and the case at bar, lies in the fact that in the former a single building was involved, whereas here we have a group of buildings.

The trial court here found "that said buildings and structures so erected and the whole of said parcels of real property were to be used by the lessees as an auto laundry, and operated as one business and one structure. Said structure was commenced June 7, 1927."

Section 1183 of the Code of Civil Procedure, at the time with which we are here concerned, provided in part: "Mechanics, materialmen, * * * performing labor upon, * * * or furnishing materials to be used or consumed in * * * the construction, alteration, addition to or repair, either in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, wagon road *or other structure*, shall have a lien upon the property upon which they have bestowed labor or furnished materials for the value of such labor done and materials furnished." (Italics ours.)

The question then which must be first determined is, Do the improvements here involved constitute but one structure within the meaning of the foregoing section? We believe that the trial court was justified in so determining. The three buildings were so situated upon the lots, were so designed and constructed, and were so intended, that the value and usefulness of each was dependent upon the design, location, and use of each of the others. They were connected by a concrete flooring and communicating wires, pipes, and conduits essential to their use, but more by the purpose and object for which they were erected and exclusively adapted. As a group, they constituted one harmonious and useful development. Considered independently, they lose their usefulness and value, and fail to a large extent to enhance the value of the land it was sought to improve. That they were not physically joined together by common walls or roof, made unnecessary solely by virtue of those ideal climatic conditions with which our entire state is blessed, makes them no less a single development and structure within the intent of the section. Such conclusion is amply supported by, and in accord with the authorities of this state.

In Williams v. Mountaineer G. M. Co., 102 Cal. 134, 34 P. 702, 704, 36 P. 388, it was held that a claim of lien for materials furnished for the construction of a mill, tramway, boarding house, and reduction works upon a mining claim should be filed against the claim as a whole, and not against the specific structures. The court there said: "One who has built a chimney in a house, or a porch, or a doorstep, has helped to build a structure, to wit, a chimney, a porch, or doorstep; but he cannot acquire a lien upon these specific structures, and by detached sales destroy the value of the claims depending upon liens upon the whole house. A structure may be a part of another larger structure, and in reference to it constitute but a part of a structure. In such cases it is well settled the lien must cover the entire structure. It was so held in Cox v. Western Pacific R. R., 44 Cal. 28." And: "One contributing labor or materials to a structure must be held to have anticipated its future use. It is necessary to do this in many cases in order to determine what the structure is upon which he is en-

titled to a lien. A drain to a house may be an appurtenance before either is used. I think the statute would cover a thing as an incident which was exclusively adapted to the use of the principal before actually used."

In Hamilton v. Delhi Mining Co., 118 Cal. 148, 50 P. 378, it was held that a single lien should be extended to two adjacent but separately owned mining claims where the respective owners had leased them to the same lessee and were cognizant of the fact that they were to be developed by him as one mine.

In Mendoza v. Central Forest Co., 37 Cal. App. 289, 174 P. 359, 361, it was held that a farm development, consisting of ditches, drains, embankments, and roads, constituted a structure within the meaning of the statute here under consideration, and a single lien upon the entire property was allowed for work done in connection therewith. The court there said: "The farm development here contemplated was a finished piece of work composed of integral parts, some of which the statute expressly designates as structures, and when completed, consisted of ditches, drains, embankments, roads, so correlated as to form one harmonious entity, designed to accomplish a particular object, and constituting a permanent and valuable improvement to the land, and necessary to its highest and most profitable uses. When finished, it stood out as obvious and visible in its usefulness and its purpose as would a house, or barn, or any other of the structures enumerated in the statute. Viewing the statute with that liberality with which we are not only authorized, but by the statute itself we are enjoined, to regard it, we feel no hesitancy in holding with the learned trial court that the work to which plaintiffs contributed, as shown, constituted a structure."

The case of Western Elec. Co., Inc., v. Colley, 79 Cal. App. 770, 251 P. 331, holding that an electric power line, consisting of poles, wires, and other materials necessarily entering into the construction thereof, is such a structure, contains an exhaustive reference to the many authorities upon this subject.

Applying the principles enunciated in the foregoing to the case at bar, it is apparent that the development here, consisting of three buildings and appurtenances, constituted but one structure within the meaning of the statute, and is therefore as a single entity subject to respondents' liens, without necessity for segregation as to the particular buildings, or ownership of land, for which their materials were used.

[2, 3] Turning now our attention to the notices of nonresponsibility, we again must agree with the trial court that neither of them were in sufficient compliance with the statute to exempt the respective appellants from liability.

In 1925 (St. 1925, p. 304) the Legislature amended section 1192 of the Code of Civil Procedure by inserting therein the requirement that the notice shall contain, in addition to a description of the property affected thereby, with the name and nature of the title or interest of the person giving the same, the "name of purchaser under contract, if any, or lessee if known." Notwithstanding that the appellant Crowell was a purchaser under contract, had leased the property affected, and knew the name of the lessees, no mention of any of these facts was contained in her notice; it reciting in this regard merely that she was the owner of the property. It must be assumed that the Legislature considered the inclusion of such information to be material and essential to the notice, with the intent and purpose that any person furnishing labor or material to the occupant of the premises might ascertain therefrom what, if any, title he possessed, and be furnished with the means of obtaining the information in relation thereto. Otherwise the Legislature would not have deemed the amendment worthy of its attention. And the reason for the requirement is particularly applicable here, where the lessees in possession held themselves out to be the owners, and neither the contract of purchase nor the lease appeared of record.

The courts, having adopted a rule of liberal construction relative to mechanic's liens, must follow a strict construction of any act or provision by which the owner of property upon which improvements are made may relieve himself from, or escape, liability therefor. See Pasqualetti v. Hilson, 43 Cal. App. 718, 185 P. 693, where such a notice, otherwise sufficient, was held ineffectual because acknowledged instead of verified.

[4, 5] The notice of the appellants Richardi was posted on July 5, 1927, and filed for record the next day, July 6th. The statute requires the owner, in order to exempt his estate from the operation of the lien, to post and file the notice for record "within ten days after he shall have obtained knowledge of such construction." These appellants contend that, although their notice was not given within ten days after commencement of construction on the Crowell lot, it was in time, since it was given within ten days of the commencement of building operations upon their property. But, by virtue of our conclusion heretofore reached that the entire construction constituted that of one structure, it must follow that such notice was not timely. The statute starts the ten-day period from the time of obtaining knowledge of the construction, not from the time of obtaining knowledge of any part or stage of it. It being but one structure that was under construction, it must be said that its construction commenced on June 7th, and it is immaterial upon which lot operations were first

initiated. The statute refers to but one construction, and must be construed as intending thereby the construction of the structure upon which the lien, in the absence of the notice, would attach.

It therefore becomes pertinent to determine when the appellants obtained knowledge of the construction. It is apparent from the evidence that they all had actual knowledge of the commencement of operations on lot 1, the appellant Crowell at least on June 10th when her notice was posted, and the appellants Richardi at least more than ten days prior to the posting of their notice. The Richardi notice was prepared on and dated June 13, 1927; Mr. Richardi testifying that he kept track of the lots to be prepared to post the notice as soon as work was actually commenced upon his property.

Appellants contend that their knowledge was limited to that of construction upon their own properties as authorized by their respective leases. Both the appellant Crowell and the appellants Richardi knew that their respective properties were leased to the defendants Goldberg and Rosenfeld to be used jointly for purposes of an automobile laundry, and that improvements in connection therewith were contemplated by the lessees. Even though it be true, as they contend, that they had no actual knowledge of the exact character of these improvements nor as to their location with respect to their different properties, such actual knowledge was not essential to liability. They must be held to have had constructive knowledge of these facts.

Appellants' contention in this regard is completely answered in Harmon Lumber Co. v. Brown, supra, which case, in view of our conclusions that the construction here was that of but one structure, is determinative of the case at bar. The facts there were significantly similar to the situation with which we are here concerned. The defendant in that case, Brown, was the owner of a lot in the city and county of San Francisco, having a frontage of 110 feet on Mission street. Adjoining this property to the south was a lot, fronting 50 feet on the same street, owned by the defendant Doran. On July 17, 1906, Brown leased his lot to the defendant Samuels for a term of five years, which was subsequently extended for another eight years. In the lease Samuels covenanted that he would, with all reasonable dispatch, erect building improvements upon the demised premises; it being agreed that all such improvements should, upon the determination of the lease, become the property of the lessor. Samuels, on July 29, 1906, sublet the premises to the defendants Davis by a lease containing the same provisions with reference to improvements. On January 21, 1907, the defendant Doran leased her premises to the same defendants Davis for a term of eight years. By the terms of this lease, the lessees agreed to pay all taxes on the value of all improvements that might be erected upon the premises by them. The lessees were given authority to remove any buildings or other improvements they erected on the land, but, if not removed within a stipulated time, the same were to become the property of the lessor. After the execution of the leases to the defendants Davis, the latter caused the construction of a building occupying all of the Brown lot and the northerly 10 feet of the Doran lot. Neither of the defendants Brown or Doran posted the notice of nonresponsibility contemplated by section 1192 of the Code of Civil Procedure, nor did either have actual knowledge of the construction in time to have done so.

The Supreme Court, through Mr. Justice Sloss, in a well-reasoned opinion, from which it would be but to unduly lengthen this opinion to quote the authorities and logic therein relied upon, held that both the defendants Brown and Doran were chargeable with constructive notice, not only of the construction of improvements upon their respective properties, but of the erection of a single building upon ground comprising both lots, and concluded that the land necessary for the convenient use and occupation of the building was subject, as a whole, and without regard to the separate ownerships, to mechanics' liens arising out of such construction.

It should, perhaps, be here noted that, in order to avoid any possible inequities which might result as a consequence of the above rule, the Legislature has provided that, in a situation such as here exists, the trial court may, where it deems it equitable so to do, distribute the lien equitably as between the several parcels involved. Section 1188, Code Civ. Proc. This provision, however, was not added until the 1929 session (St. 1929, p. 1929, § 2), and did not become effective until after the present lien rights accrued.

[6] There remains undisposed of but one other contention, made by the appellant Crowell. The trial court found that the defendant and appellant Title Guarantee & Trust Company had no notice of the construction until February 6, 1928, when it deeded lot 1 to appellant Crowell pursuant to her compliance with her contract of purchase. She contends that, since the legal estate of the former was not subject to the lien rights of respondents, when she acquired that interest her former interest became merged therein to constitute an estate superior to the liens. We see no merit in this contention. This appellant exercised all of the privileges of the legal owner of the property, held herself out to be such, and executed the lease of the premises which authorized the construction which gave rise to the liens of respondents. That her equitable estate, which was subject to the liens, has

now become perfected into a legal one, cannot operate to extinguish the liens of respondents which had previously accrued.

In Bender v. Palmer, 1 Cal. Unrep. 601, a similar situation was presented. There, one Calderwood, the person in possession and at whose instance the materials were furnished, did not, at the time of the accrual of the lien, have title to the property; the same being then vested in the United States government. It was held that the subsequent acquisition of the legal title from the United States by the successors in interest of Calderwood did not operate to displace the lien which otherwise existed. And the court, appropriately to the case at bar, said: "And especially would this appear to be so, when, as here, the better title has been acquired because and as a consequence of the possession and claim of title held in the first instance."

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

125 Cal.App. 238

GROSS v. CITY OF SAN DIEGO.

Civ. 930.

District Court of Appeal, Fourth District, California.

Aug. 4, 1932.

1. Dedication ⇐19(5).

Delineation of beach land on recorded map of subdivision, as blank space, and conveyance of adjacent lots by reference to map, *held* dedication of beach land to public use (St. 1893, p. 96, § 1, and § 3 as amended by St. 1901, p. 288).

Owner of parcel of real property prepared and recorded a map subdividing the realty into lots and blocks and designating several streets and unnamed alleys. The map delineated a strip of land along the ocean as a blank space without any lot or block number or street name, and such strip did not correspond in shape or dimensions to any lot in subdivision. Subsequently, adjacent lots were sold and conveyed and deeds made describing property by references to the map.

2. Dedication ⇐35(1).

Certificate of common council of town attached to recorded map of subdivision *held* sufficient acceptance of dedication of beach land, whether unnamed alley or extension of named lane (St. 1893, p. 96, § 3 as amended by St. 1901, p. 288).

Certificate of common council of city attached to recorded map of subdivision stated that the common council "hereby accepts on behalf of the public" certain named streets, roads, alleys, and highways and also unnamed alleys shown on the map and plat.

3. Dedication ⇐35(2).

Ordinance declaring strip of beach land open public street *held* not to demonstrate previous nonacceptance of beach as public way (St. 1893, p. 96, § 3, as amended by St. 1901, p. 288).

4. Dedication ⇐38.

Owner cannot withdraw offer of dedication after acceptance thereof.

5. Adverse possession ⇐8(2).
Dedication ⇐63(1).

Public cannot lose right in dedicated street or alley through adverse possession, nor by delay in using or improving property.

6. Dedication ⇐44.

Payment of taxes by former owner *held* not conclusive evidence against prior dedication of beach land.

7. Appeal and error ⇐877(3).

Alleged owner of strip of beach land, where without interest in abutting property, cannot complain of judgment decreeing city to be owner and entitled to possession notwithstanding it only had easement (Pol. Code, § 2631).

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Dorothy Gross, as executrix of the will of Kate Maxwell, deceased, against the City of San Diego. Judgment for the defendant, and the plaintiff appeals.

Affirmed.

John C. Packard, of Los Angeles, for appellant.

M. W. Conkling, City Atty., and H. C. Hopkins, Deputy City Atty., both of San Diego, for respondent.

MARKS, J.

This is an action to quiet title to a strip of beach land in the town of La Jolla which the city of San Diego claimed had been dedicated by the owner, and accepted by the city, as a public way. Judgment was rendered in favor of the city, and plaintiff has taken this appeal therefrom.

In 1900, Kate Maxwell was the owner of a parcel of real property in the northerly portion of Pueblo lot No. 1260 in the city of San Diego, shown on a map of La Jolla Beach. This map was prepared for her, approved by her, and recorded at her request on April 28,

1903. It divided the real estate into lots and blocks and several named streets and unnamed alleys. It was approved by the board of public works of the city of San Diego and bears the following certificate: "City of San Diego, County of San Diego, State of California, ss. The Common Council of the City of San Diego, California, hereby accepts on behalf of the Public, the following named streets, roads, alleys and highways (and also unnamed alleys) shown on this map and plat viz: Marine Ave., Shore Ave., Bluff St., Vine St., Sea Lane, La Jolla Boulevard, Unnamed alleys. April 28th, 1903. By order of the Common Council of the City of San Diego, California. Geo. D. Goldman, City Clerk of the City of San Diego, California, and Ex-officio Clerk of the Common Council of the said City of San Diego." Blocks 4 and 5 form the westerly portion of the subdivided property. On the extreme westerly portion of the map appears what is designated as the Pacific Ocean, with what we assume to be the line of the mean high tide delineated by waving lines drawn generally parallel to and between about twenty and twenty-six feet westerly from the westerly lines of blocks 4 and 5. As the land between the line of the mean high tide and the westerly lines of blocks 4 and 5 constitutes the property in controversy here, we will hereafter refer to it as the "Beach" for want of a better name. It bears no name or number on the map, and does not correspond in shape or dimensions to any lot in the subdivision. Golden Vista street runs in an easterly and westerly direction from the east end of the subdivision to the ocean, its southerly line forming the northerly boundary of block 4. The north line of this block is produced westerly to the ocean forming the southerly line of Golden Vista street, separating it from the Beach. While Golden Vista street is shown on the subdivision map of La Jolla beach, we cannot definitely determine whether the ground it occupies is a portion of the property subdivided by Kate Maxwell or whether the southerly street line forms the northerly boundary line of this property. Marine avenue parallels Golden Vista street and runs from the easterly end of the subdivision to the westerly lines of blocks 4 and 5, separating these blocks. Sea lane parallels the other streets and runs from the east end of the subdivision to the Pacific Ocean, its northerly line forming the southerly lines of the southerly tier of blocks in the subdivision. The southerly line of Sea lane is drawn westerly to the line of the Pacific Ocean. Its north line has its western terminus at the southwest corner of block 5 leaving nothing on the map separating the westerly end of Sea lane from the Beach. The southerly tier of blocks in the subdivision is numbered from west to east, 5, 6, 7 and 8. Unnamed alleys, fifteen feet in width, bisect blocks 6, 7, and 8, running northerly and southerly in block 6 and easterly and westerly in blocks 7 and 8. Block 5 is bounded, northerly by Marine avenue, easterly by Shore avenue, southerly by Sea lane, and westerly by the "Beach." Lots 1 to 8 in block 5 extend from the Beach to Shore avenue. Lot 9 extends from the Beach to the westerly line of lot 13 with fifteen feet of the easterly end of its southerly line touching the northerly end of a blind unnamed alley fifteen feet wide extending northerly seventy-five feet from Sea lane to the southerly line of lot 9. Lots 10, 11, and 12 extend from the Beach to the westerly line of the alley just mentioned. Lots 1 to 12, inclusive, have their greater dimensions from east to west and all, excepting lot 1, are twenty-five feet in width. Lots 13, 14, 15, and 16, in block 5, are each twenty-five by one hundred feet in dimension and front on Sea lane. Lots 9, 10, and 11 in block 5 have no means of ingress or egress except through the fifteen-foot blind alley unless the Beach in front of them and to Sea lane is a public street or alley. It was stipulated that all the lots in blocks 4 and 5 had been sold by Kate Maxwell.

The greater portion of La Jolla Beach, shown on the map in question, lies on land elevated above the ocean. This upland ends on the ocean side in an irregular bluff which descends sharply to the sand. The westerly lines of blocks 4 and 5, for at least part of their lengths, run over the sand westerly from the bluffs. It is impossible for us to determine from the evidence how far the block lines are from the bluffs, or from the actual line of mean high tide. Respondent suggests that the west line of blocks 4 and 5 is the line of mean high tide and that there is no beach between them. If this should be true, all questions here presented would be moot as appellant could not own tidelands extending seaward from the line of mean high tide. Respondent presented no definite or satisfactory evidence on the question and the trial court evidently concluded that there was a beach of an undetermined width between the line of mean high tide and the westerly lines of blocks 4 and 5. Appellant in her testimony described the Beach as follows: "The strip of land in question consists of part beach and part sandstone cliffs worn away a great deal and very rough, worn away by the water. These cliffs come out at different portions; sometimes very high and sometimes lower; but very awkward to get up and down them until, of course, the city built the steps. * * * The water line has remained practically the same. Of course, it varies very much from season to season. I have reference to the season of the tide and the season of the year. At some seasons of the year the water comes up with a different sort of rush and the whole beach is washed out until there is nothing but rocks there and by 'the whole beach' I have reference to the property in

question here." Neither counsel paid any attention to the questions of erosions and accretions suggested by this evidence (26 Cal. Juris. 304, and cases cited), and it did not become an issue in the trial court; the sole question considered and decided being whether or not the Beach was ever dedicated by the owner and accepted by the city of San Diego as a public street or alley. The trial court held such dedication complete and gave judgment for the respondent.

[1] Appellant urges there is no evidence that the owner dedicated the Beach as a public way, and no evidence of an acceptance on behalf of the public of an offer to dedicate it, if one were made. She maintains that the mere delineation on the subdivision map of La Jolla Beach, of the Beach as a blank space without any lot or block number or street name or anything to indicate that it was to be a street or alley, showed no intention on her part to dedicate it to a public use and that the certificate of the common council of San Diego on the map was not an acceptance of the offer to dedicate, if one were made by her.

In Elliott on Streets, § 30, the following general rule is given concerning the interpretation of uncertain offers to dedicate property for public use: "Dedication by maps and plats are sometimes so made as to render it difficult to determine their nature and extent. * * * Naturally the presumption is that one who records a plat, and marks upon it spaces that appear to form no part of any platted lots, dedicated the land represented by the spaces thus excluded to a public use."

The rule in California is summarized in 9 California Jurisprudence, 15, as follows: "Dedication is the joint effect of an offer by the owner to dedicate land and an acceptance of the offer by the public; and to constitute a valid and complete dedication two things must generally concur, to-wit: An intention by the owner, clearly indicated by his words or acts, to dedicate the lands to public use, and an acceptance by the public of the dedication. Whatever the manner in which a dedication is effectuated, the animus dedicandi is paramount. It is the soul of the very act of dedication, and must expressly appear, or be fairly inferable from the donor's acts. It has been said that dedication is, in each case, a question of intention. 'The vital principle of the dedication is the intention to dedicate; and whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has been made.' "

Section 1 of an act regulating the preparation and recordation of maps of subdivisions in effect at the time the map in question was prepared and recorded provided as follows: "Whenever any city, town, or subdivision of land into lots, or any addition to any city, town, or such subdivision, shall be laid out into lots for the purposes of sale, the proprietor or proprietors thereof shall cause to be made out an accurate map or plat thereof, particularly setting forth and describing: First—All the parcels of ground within such city, town, addition, or subdivision, reserved for public purposes, by their boundaries, courses, and extent, whether they be intended for avenues, streets, lanes, alleys, courts, commons, or other public uses; and, Second—All lots intended for sale, either by number or letter, and their precise length and width." Stats. of 1893, p. 96.

Section 3 of the same act as amended, provided in part as follows: "The map or plat so made, acknowledged, and certified shall be presented to the governing body having control of the streets, roads, alleys, and highways in the territory shown on the map or plat, and said governing body shall indorse thereon which streets, roads, alleys, and highways, offered by said map or plat, they accept on behalf of the public, and thereupon such streets, roads, alleys, and highways, only as have been thus accepted, shall be and become dedicated to public use." Stats. of 1901, p. 288.

From a study of these sections it would seem that in the preparation of the map in question the only things which the owner should cause to be shown upon it were: (1) Streets and alleys, and (2) the lots intended for sale with their designating numbers and dimensions. From this it would follow that there is a strong intimation of an intention on the part of the owner to offer to the public for use as a street or alley an unnumbered or unlettered parcel of ground that did not conform in either shape or dimensions to any of the lots or blocks delineated. The fact that no means of ingress or egress was provided the three lots in block 5 of the subdivision other than over the "Beach," except through a narrow blind alley fifteen feet in width and seventy-five feet in length, would indicate that it was the intention of the owner to dedicate the property for use as a public way. "Maps and plats are frequently admitted in evidence in cases involving dedication. When made by the dedicator they are admissible against him and his grantees. * * * Where a recorded map is relied on as showing an intent to dedicate a street, the situation of the strip of land in connection with the contiguous blocks, the conduct of the parties when the map was made or adopted, the recording of it and acting upon it, and references made to it in subsequent conveyances, are all to be weighed and considered, and the court has the undoubted right to draw inferences therefrom." 9 Cal. Juris. 71.

Cases bearing upon the question before us are clearly summarized in 9 California Jurisprudence, 40, as follows: "The dedication of land for streets by the making or adopting and recording of a map by the owner may take place whether or not the land is so des-

ignated on the map. Accordingly, if there is any space corresponding to a street on such a map which does not constitute any part of the platted blocks, it is necessarily dedicated to public use, whether it be lettered as a street or not. (London & S. F. Bank v. City of Oakland, 90 F. 691, 33 C. C. A. 237.) And the delineation of a street on a map by parallel lines running through the blocks, is sufficient for purposes of dedication, though it is not named as a street. This is true even though the space is not a prolongation of any existing street (San Francisco v. Burr, 108 Cal. 460, 41 P. 482; Schmitt v. San Francisco, 100 Cal. 302, 34 P. 961) and even though it is so marked as to form a cul de sac. (City of Los Angeles v. McCollum, 156 Cal. 148, 23 L. R. A. [N. S.] 378, 103 P. 914.) And even where a strip of land dividing two tiers of lots in a subdivision is marked with a lot number, a dedication is shown where representations are made to purchasers of lots fronting on it that it is to be used as a street, and it is in fact improved, known and continuously used as a public way, to the knowledge of the owners of the tract. (City of Venice v. Short Line Beach Land Co., 180 Cal. 447, 181 P. 658.)"

It was stipulated at the trial that Kate Maxwell had sold and conveyed title to all the lots in blocks 4 and 5 and in making her deeds had described the property sold by references to the map. In the case of Larkey v. City of Los Angeles, 70 Cal. App. 635, 233 P. 991, 992, where the effect of such deeds was discussed, the court said: "The mere filing of the map of record, designating certain portions of the tract as streets and alleys, is simply an offer to dedicate the spaces designated on said map as streets and alleys to the public for highway purposes. Elliott v. McIntosh, 41 Cal. App. 763, 766, 183 P. 692. But when the owner, after recording such a map, sells lots designated thereon by reference to said recorded map, he thereby irrevocably dedicates the streets and alleys shown thereon to the use of the public. San Leandro v. Le Breton, 72 Cal. 170, 13 P. 405; Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145, 28 P. 839; Davidow v. Griswold, 23 Cal. App. 188, 137 P. 619; Daly City v. Holbrook, 39 Cal. App. 326, 178 P. 725; Elliott v. McIntosh, 41 Cal. App. 763, 183 P. 692; Berton v. All Persons, etc., 176 Cal. 610, 170 P. 151. Therefore, when the original owners of Arlington heights tract filed for record the map of this tract and sold said lots in said tract according to said map, the streets and alleys designated thereon became dedicated to the public, and no further action was necessary either upon the part of the public authorities or upon the public in the use of said streets and alleys in order to constitute the streets and alleys of said tract public highways. As we have already seen, said map was filed for record on May 19, 1887, and 3 of the lots of said tract abutting on said alleys and lying immediately opposite to, and to the north of, plaintiff's said lot 22 were sold by the original owner by the 10th day of December, 1888. Accordingly said alley became irrevocably dedicated as a public alley on December 10, 1888. Therefore no title to any portion of said alley could be acquired by plaintiff or her predecessors in interest by adverse possession subsequent to said last-named date. As was said by the court in a similar case: 'The property dedicated has become public property, impressed with the use for which it was dedicated, and neither can the public divert it from that use nor can it be lost by adverse possession. Nor is the effect of such dedication impaired by any delay in the use of the land for which it was set apart. Such failure to make use of the land does not authorize the owner to resume possession. The public can thereafter appropriate the land to the use for which it was dedicated whenever convenience or necessity may suggest.' Davidow v. Griswold, supra."

[2] Appellant maintains that there was no acceptance by the public authorities of the city of San Diego of the offer of dedication, if one were made. We think the certificate of the action of the common council on April 28, 1903, attached to the map of the subdivision, if we consider the Beach either an unnamed alley or an extension of Sea lane, either of which would be justified from the map itself, was a sufficient acceptance on behalf of the public of the offer to dedicate. Section 3, Stats. 1901, p. 288.

[3-5] On July 21, 1924, the common council of the city of San Diego passed an ordinance, whereby it declared that the Beach (describing it by metes and bounds) "be and the same is hereby declared to be an open public street of said city, and is hereby named 'Neptune Place'." Appellant maintains that the passage of this ordinance demonstrates that the property had not previously been accepted as a public way. We cannot put such a construction upon its language. The dedication was complete many years before the ordinance was passed. The property became a public way and the city could not divest itself of its easement except by appropriate proceedings taken in accordance with law. An owner cannot withdraw an offer of dedication when it has been completed by acceptance. The public cannot lose its right in a street or alley through adverse possession nor by delay in using or improving the property. Archer v. Salinas City, 93 Cal. 43, 28 P. 839, 16 L. R. A. 145; Fitzgerald v. Smith, 94 Cal. App. 480, 271 P. 507; Daly City v. Holbrook, 39 Cal. App. 326, 178 P. 725.

[6] Kate Maxwell paid taxes upon the property in question from 1917 to 1929. Appellant

urges that this is a strong argument against the theory that the property was ever dedicated and accepted as a street. In Venice v. Short Line, etc., Co., 180 Cal. 447, 181 P. 658, it was held that payment of taxes is not conclusive evidence against the dedication of a street. In this connection it should be observed that Kate Maxwell did not pay taxes upon the property between 1903, when her map was recorded, and 1917. Even though the property were not assessed during this period, this might well indicate the existence of a belief in her mind during these fourteen years that she did not own the property and is a circumstance showing that she intended to dedicate it to public use and that she entertained a belief that it had become free from assessment by reason of the acceptance by the city of San Diego of her offer of dedication.

[7] The judgment decreed that "the City of San Diego is the owner, in possession and entitled to possession" of the property in question, when, as a matter of fact, it owned only an easement over it (section 2631, Pol. Code; 13 Cal. Jur. 364), the fee remaining in the abutting owners. Kate Maxwell sold all abutting property years before the institution of this action. Appellant cannot complain because the judgment gave the city more than that to which it was entitled as she was not injured thereby. The owners of the abutting property are not parties to this action and are not here complaining of the judgment.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

125 Cal.App. 85

MILLER et al. v. SAN FRANCISCO CHURCH EXTENSION SOCIETY OF METHODIST EPISCOPAL CHURCH et al.

Civ. 7904.

District Court of Appeal, First District, Division 2, California.

July 26, 1932.

As Modified on Denial of Rehearing Aug. 25, 1932. Hearing Denied by Supreme Court Sept. 22, 1932.

1. Appeal and error ⇐223.

Defendants not demanding that plaintiffs elect cannot first complain on appeal that judgment was against both agent and principals.

2. Principal and agent ⇐184(2).

Defendants' motion to dismiss as to defendants' agent *held* properly denied; it being for plaintiffs to make election, if required.

3. Contracts ⇐143.

Construing contract *held* error; there being no confusion as to parties thereto or meaning thereof.

4. Appeal and error ⇐1050(1).

Error, if any, in admitting statements antedating contract, *held* harmless where, after execution thereof, discussions arose on same subject.

It appeared that all parties to contract participated in discussions in question, which perhaps operated to modify contract, but did not terminate any liability thereunder, and did not injure any party thereto.

5. Contracts ⇐349(1).

In architects' action for breach of contract, excluding prospective builders' evidence that architects' sketches were not used by architect of building ultimately constructed by other builders *held* not error.

6. Religious societies ⇐29.

Churches, if retaining benefits of architects' services, *held* liable for reasonable value thereof, notwithstanding contract for church building might be ultra vires.

7. Work and labor ⇐14(1).

Prospective builders retaining benefits of architects' services *held* liable therefor if contract, before abandonment, was modified by both parties' acts.

8. Contracts ⇐229(3).

Prospective builders' abandoning contract operated as architects' "discharge," respecting measure of builders' liability.

9. Contracts ⇐229(3).

Measure of prospective builder's liability depends on whether discharge of architect or abandonment of contract is lawful or unlawful.

10. Contracts ⇐229(3).

Contract specifying architects' compensation whether work be executed or abandoned *held* to reserve to prospective builders right to abandon enterprise, and fixed measure of their liability.

11. Contracts ⇐229(3).

Prospective builders' exercising right of abandonment reserved under contract specifying architects' compensation whether work be executed or abandoned *held* not unlawful discharge of architects, respecting measure of liability.

12. Contracts ⇐229(3).

Contracts containing covenants fixing rule for measuring prospective builder's liability to architect on abandoning contract will be enforced by courts as nearly as possible.

13. Contracts ⇐229(3).

Where contract bases architect's fees on cost price and no building is constructed, no cost price exists, and architect is precluded from basing claim on lowest bid.

14. Contracts ⇐229(3).

There being neither cost price nor estimated price on which contract, abandoned by prospective builders, based architects' fees, architects *held* entitled to prove reasonable value of services.

15. Evidence ⇐112.

In determining value of services of architects suing prospective builders who abandoned contract, evidence of cost of building ultimately constructed by other builders *held* inadmissible.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by J. R. Miller and another against the San Francisco Church Extension Society of the Methodist Episcopal Church and others. Judgment for plaintiffs, and defendants appeal.

Reversed.

J. E. White and Walter McGovern, both of San Francisco, for appellants.

Keyes & Erskine, of San Francisco, for respondents.

STURTEVANT, J.

This is an appeal by the defendants from a judgment of damages arising out of a transaction in which the plaintiffs, as architects, were employed. The record is very long. The facts are few and may be briefly stated.

In the conflagration of 1906 in San Francisco many churches were burned, and among others the church buildings then occupied by the congregation of each appellant except San Francisco Church Extension Society of the Methodist Episcopal Church. The latter corporation was an auxiliary organization of the denomination but never conducted a church. The congregation of each church desired the construction of a place of worship that it might call "home." The congregations, as such, and their several members, commenced to discuss ways and means. Later, on December 1, 1925, the several congregations formed a joint organization and appointed members of the Downtown Church Committee, with authority to act, but that it should act through the San Francisco Church Extension Society of the Methodist Episcopal Church as their trustee of the enterprise. Still later the Downtown Church Committee authorized the society to enter into, and it did enter into, a contract with the plaintiffs. In so far as pertinent to this action, said contract provided:

"1. This agreement, made and entered into this 1st day of December, in the year of Our Lord, one thousand nine hundred and twenty-five, by and between the San Francisco Church Extension Society of the Methodist Episcopal Church, a corporation duly organized and existing under and by virtue of the laws of the State of California, hereinafter called the Owner, and J. R. Miller and T. L. Pflueger, doing business under the firm name of Miller and Pflueger, hereinafter called the Architects:

"2. Witnesseth: That whereas, the said Owner intends to erect and construct a church building upon that certain real property situated, lying, and being in the City and County of San Francisco, State of California, and more particularly described as follows:

"3. Commencing at a point of intersection of the Northerly line of McAllister Street with the Westerly line of Leavenworth Street; running thence Westerly along the said Northerly line of McAllister Street, one hundred thirty-seven (137) feet, six (6) inches; thence at right angles Northerly one hundred thirty-seven (137) feet six (6) inches; thence at right angles one hundred thirty-seven (137) feet six (6) inches to the Westerly line of Leavenworth Street; thence Southerly along the said Westerly line of Leavenworth Street, one hundred thirty-seven (137) feet six (6) inches.

"4. Now, therefore, the Owner and the Architects, for and in consideration of the mutual covenants and agreements herein contained, agree as follows:

"5. The said Architects agree to perform for the above named work, professional services as stated herein, and the Owner agrees to pay the Architects at the rate of six per cent (6%) upon the cost prices of the building as hereinafter set forth. * * *

"8. Whether the work be executed or whether its execution be suspended or abandoned in part or in whole, payments to the Architects on their fee are to be made as follows: Upon the completion of the preliminary studies, a sum equal to twenty per cent (20%) of the basic rate of six per cent (6%). Upon completion of specifications and general working drawings, exclusive of details, a sum sufficient to increase payments on the fee to 60% of the rate or rates of commission arising from this agreement, computed upon a reasonable cost estimated on such completed specifications and drawings, or if bids have been received, then computed upon the lowest bona fide bid or bids. * * *

"18. In Witness Whereof, the said parties have executed this agreement the day and year first hereinabove written."

There is no evidence that on December 1, 1925, the exact type of building had been determined on. All agreed that a house of worship was contemplated for the use of each of the said congregations. All else was left to future determination by the duly authorized agents of the interested parties. Mr. Pflueger was a member of one of the associated congregations and also a member of the plaintiff partnership. No fraud is claimed. During the trial there was no claim of corporate double, and there is no evidence thereof.

The society on March 24, 1927, wrote the plaintiffs the contract had been abandoned by the plaintiffs and therefore was abandoned by the society. More correspondence followed in which the plaintiffs stated that they had not abandoned, etc. Nevertheless, nothing more was done by either under the contract. No building of any kind was built by the defendants. However, another corporation, Leavenworth-McAllister Realty Company, was formed which negotiated a lease to the Linnard Company, and then, at a cost of about $1,677,419.69, built the William Taylor Hotel and the church as they now stand on the lot described in the contract in suit.

[1, 2] The defendants assert that a judgment was rendered in favor of the plaintiff and against the principals and their agent and that such a judgment is erroneous. Klinger v. Modesto Fruit Co. (Cal. App.) 286 P. 727; McDevitt v. Corriea, 70 Cal. App. 245, 233 P. 381; Ewing v. Hayward, 50 Cal. App. 708, 195 P. 970. The contention is sound, but no motion was made in the trial court requiring the plaintiffs to elect. The point may not be urged for the first time on appeal. Klinger v. Modesto Fruit Co., supra. True it is that the defendants moved that the case be dismissed as to the society, but it did not rest with the defendants nor with the trial court to select which defendant the plaintiffs should proceed against. The trial court did not err in denying the motion that was made.

[3, 4] It is next contended that the court wrongfully construed the contract. We think it did. No person connected with the transaction was confused as to the meaning of the expression "church building." No one was confused as to who had signed, or who were the parties to the contract. There was nothing to construe. In this connection the defendants object to the large amount of parol evidence introduced by the plaintiffs which brought into the record numerous declarations made prior to December 1, 1925, by numerous members of the different churches as to the opinions of such members as to the kind of a building that should be constructed. That evidence, it may be conceded, was improperly admitted, but it is difficult to see how it was prejudicial, because immediately after December 1, 1925, numerous discussions and debates arose on the same identical subject. Both the plaintiffs, the defendants, and those for whom the defendants were acting participated in those discussions. As will hereinafter appear, such discussions perhaps operated to modify the contract as written. Assuming for the purpose of this decision that they did, as will hereinafter appear, neither the plaintiffs nor the defendants were injured thereby.

As to the instructions that were given, the defendants claim several should not have been given. Many of the attacks are well founded. We will not stop to discuss each one. It will suffice to state that the attacks are but other methods of presenting the points that have been fully treated herein. The same comment may be made on the claim that the trial court refused to give certain other instructions.

[5] The next point made by the defendants is that the court erred in excluding certain evidence which they tendered. They offered to prove that Mr. Hobart, the architect of the William Taylor Hotel, never used any of the sketches or plans made by the plaintiffs. The objections of the plaintiffs were sustained. These defendants were not prejudiced. If the defendants, or any of them, had used the sketches or plans a different question would have been presented. But the offered evidence was not addressed to what these defendants received or used.

[6] Finally, it is asserted that the evidence was insufficient to sustain the judgment for the plaintiffs. The point is sound, and the record discloses no conflict in the evidence. As we see the facts, the point has three different aspects which are not necessarily related.

(1) If, as the defendants assert, the building of a church building with an adjunct of income producing property was ultra vires the defendant corporations, it does not follow that the defendants are entitled to be wholly discharged. They are liable for the reasonable value of the services rendered by the plaintiffs to the extent that the defendants accepted and now retain the benefits of such services. 6a Cal. Jur. 1282. However, the record does not show specifically what those benefits were. The contract was terminated so far as the defendants are concerned on the 24th day of March, 1927. Prior to that date the record discloses that numerous conversations were held, that some sketches, drawings, plans, or models were made, but it does not show what was done prior to that date nor the value thereof.

[7-12] (2) As intimated above, there is evidence that after December 1, 1925, and prior to March 24, 1927, the contract as written was modified by the acts of both parties, and that thereafter the contract was terminated. If it was so modified, the liability of the defendants under such circumstances is settled law. Naylor v. Adams, 15 Cal. App. 548, 556, 115 P.

335. However, for the reasons just stated, the amount of that liability cannot be ascertained from the record before us.

(3) The plaintiffs' complaint contains three counts. The first pleads a written contract according to its legal effect. The second pleads the same contract in hæc verba. The third sets forth a common count in quantum meruit. Allegations are present in each count purporting to plead an unlawful discharge. There was not a particle of evidence that the plaintiffs were wrongfully discharged. The evidence was without conflict that the defendants abandoned the contract. Their act of abandonment operated as a discharge. But in measuring the liability of the defendants there is a great difference between a lawful discharge or abandonment and an unlawful discharge. Paragraph 8 of the contract is as follows: "Whether the work be executed or whether its execution be suspended or abandoned in part or in whole, payments to the Architects on their fee are to be made as follows: Upon the completion of the preliminary studies, a sum equal to twenty per cent (20%) of the basic rate of six per cent (6%). Upon completion of specifications and general working drawings, exclusive of details, a sum sufficient to increase payments on the fee to 60% of the rate or rates of commission arising from this agreement, computed upon a reasonable cost estimated on such completed specifications and drawings, or if bids have been received, then computed upon the lowest bona fide bid or bids." That paragraph reserved to the employer the right to abandon the enterprise and fixed the measure of its liability. When thereafter it exercised its right of abandonment, such act on its part was not an unlawful discharge of the plaintiffs. 39 C. J. 72 and 91; 1 Labatt's Master and Servant, 633; Roberts v. Crowley, 81 Ga. 429, 7 S. E. 740; Harder v. Board of Commissioners of Marion County, 97 Ind. 455; Douglass v. Merchants' Ins. Co., 118 N. Y. 484, 23 N. E. 806, 7 L. R. A. 822; Leonard v. Sparks, 109 La. 543, 33 So. 594; Smith v. Douglass, 4 Daly (N. Y.) 191; Trumbull v. Frey, 71 Neb. 754, 99 N. W. 648; Willis v. Rose, 29 Misc. 111, 60 N. Y. S. 271; Egbert v. Sun Co. (C. C.) 126 F. 568, 571. While the foregoing authorities are applicable to employments generally, the particular rule applicable to architects is the same. That paragraph 8, as quoted, is in legal effect a reservation to the employer of the right to abandon, is clearly supported by the authorities. O'Kain v. Davis, 186 Ky. 184, 216 S. W. 354; Dittoe v. Morgan, 207 Ky. 267, 268 S. W. 1065; Orth v. Board of Public Education, 272 Pa. 411, 116 A. 366, 20 A. L. R. 1352. As stated above, that paragraph also fixed the rule for measuring the employer's liability in the event of an abandonment by it. When one of these contracts contains a covenant on the subject, it is enforced by the courts as nearly as possible according to its terms.

In the case of Orth v. Board of Public Education, supra, the Supreme Court of Pennsylvania had under consideration a case that was closely parallel in its facts. A written contract was before the court. In one paragraph there was a statement of percentages governing the apportionment of the payments to the architect. In another paragraph there was reserved to the owner the right to terminate the contract. When the bids were received, the lowest bid was prohibitory. The enterprise was abandoned. The architects sued for the balance remaining unpaid. There they attempted to recover on the cost as portrayed by the lowest bid. On page 367 of 116 A. the court said: "It was also erroneous to estimate the 3 per cent. on the excessive cost, arising out of the unusual conditions prevailing when the bids were received. As already pointed out, 1 per cent. was due when 'the final preliminary study is adopted,' and an additional 2 per cent. when 'the working drawings and specifications are completed and adopted.' There was then no other 'cost of the building' except the 'estimates of cost of construction,' calculated by plaintiffs themselves, and hence the 3 per cent., if then paid, as the contract provided it should be, necessarily would have had to be computed thereon."

The case of Dittoe v. Morgan, 207 Ky. 267, 268 S. W. 1065, is another case closely parallel in its facts. It involved a business block. The owner was prepared to invest $20,000. The lowest bid was $30,000. On page 1066 of 268 S. W. the Supreme Court of Kentucky said:

"A question arises, upon what amount shall this be based? We think this also reasonably clear. The contract provides that in case the work is abandoned before completion the architects shall be reimbursed for the amount of labor performed prior to such abandonment in accordance with rates established by this contract; 'that until a definite estimate is furnished, the architects' charges shall be based upon the proposed cost of the work.' In this case the work was abandoned and no definite estimate was furnished. The lowest bid cannot be arbitrarily fixed as a definite estimate because it was rejected as being too high. The contract clearly contemplates that under such circumstances the charges shall be based upon the proposed cost of the work. The evidence indicates that this was $20,000, and such was the amount upon which the architects based their first charge.

"Accepting this as a basis, plaintiffs were entitled to recover 4½ per cent. of $20,000, or $900, subject to a credit of $600, and the court should have peremptorily instructed the jury to find a verdict in their favor for $300."

As stated by Judge Dallas in the case of

Egbert v. Sun Co., supra, "The corporation had no justification for its termination of the employment of Egbert when and as it terminated it other than that which it derived from the letter of its president, and it cannot be permitted to take a benefit under that letter, and at the same time disown the obligation it imposed. McHose v. Earnshaw, 5 C. C. A. 210, 55 F. 587." Sustaining the latter proposition, see, also, Hecht v. Brandus, 4 Misc. 58, 23 N. Y. S. 1004; Caulfield v. Yazoo & M. V. R. Co., 170 La. 155, 127 So. 585; McGehee v. Cunningham, 181 Ark. 148, 25 S.W.(2d) 449, 451.

[13, 14] When, however, no building has been constructed, there is no cost price, and the architect may not base his claim on the lowest bid, for that was not the language of the contract. Orth v. Board of Public Education, supra. When the actual cost far exceeds the estimated cost the architect may not claim compensation on the excessive cost, for that was brought about by his error. Edwards v. Hall, 293 Pa. 97, 141 A. 638; Saad v. Bates, 208 Ky. 542, 271 S. W. 568; Headlund v. Daniels, 50 Utah, 381, 167 P. 1170. If the excessive cost is brought about by changes involving extras, the rule is altered by reason of the owner's acts. Blackhall v. Duthie-Strachan, 258 Mass. 551, 155 N. E. 604. In the instant case the building was not constructed, and there was therefore no cost price. As stated above, there was no estimated price. Therefore the courts cannot enforce the covenant contained in paragraph 8 as it is written. Be that as it may, the plaintiffs were entitled to prove by competent witnesses the reasonable value of their services. Shipman v. State, 42 Wis. 377, is in part closely applicable to the instant case. Shipman, an architect, was employed by the building commissioners to make plans and specifications for a hospital to be located at Oshkosh, Wis. The hospital was to be of the same capacity as the one then located at Madison. It was to be composed of several buildings—an administration building, a north wing, a south wing, and some other outbuildings. The commissioners entered into a contract with the plaintiff by the terms of which he was to be paid "* * * the sum of 5% on the cost of construction." The first statute appropriated moneys to build one of the buildings; a subsequent statute appropriated moneys to build another building; finally, moneys were appropriated to build the south wing. Before the latter building was commenced, the plaintiff was lawfully discharged. Before being discharged, he had made plans and specifications for all of the buildings and had superintended the construction of all except the south wing. In suing for compensation, he pleaded his contract as to all except the south wing. As to services rendered in preparing plans on that wing, he sued in quantum meruit. On page 389 of 42 Wis., the Supreme Court of Wisconsin says: "The question is, What is he entitled to recover? So far as the contract was executed, there is no difficulty. The plaintiff can recover the contract price for his plans and specifications and services as superintendent up to the time of his discharge. He may further recover the value of his plans and specifications for that portion of the work which he did not superintend, on a quantum meruit. His discharge was within the lawful authority of the trustees under chapter 176, Laws of 1872. The contract affords no means or data, it is true, by which the relative value of the plans, etc., as distinguished from the value of superintending the work, can be ascertained. If, instead of fixing an entire sum for both services, the contract had stated what was to be paid for all the plans and specifications furnished, and what to be paid as compensation for services as superintendent, the amount of recovery could readily be ascertained. But as it is, the value of the plans, etc., for that part of the work which the plaintiff did not superintend, must be a subject of proof; but in no event would he be permitted to recover more than the contract price for both services."

Counsel have not cited to us, and we have not found any authority at variance with the rule as stated by the Supreme Court of Wisconsin.

[15] As stated above, paragraph 8 of the contract clearly contemplated that at the date of the abandonment, if any, by the defendants, the plaintiffs should be compensated for services rendered prior to that date. In their letter of abandonment on March 24, 1927, the defendant society admitted that liability. The first payment actually payable to the plaintiffs as stated in the contract was "* * * upon the completion of the preliminary studies. * * *" There is evidence that the preliminary studies were prepared; but, except that piece of evidence which will next be discussed, there was no evidence introduced as to the value of the plaintiffs' services. Over the objection of the defendants, the court received in evidence the cost of constructing the William Taylor Hotel as it now stands. That building was built by a different corporation. The evidence was res inter alios. It should not have been received. In asking that the evidence be admitted it was claimed that the evidence cast some light on the value to be set on the services rendered by the plaintiffs. But, as we have shown, it was not admissible for that purpose.

The judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

COUNTY OF SAN BERNARDINO v. STATE INDUSTRIAL ACCIDENT COMMISSION et al.*

Civ. 652.

District Court of Appeal, Fourth District, California.

July 29, 1932.

Rehearing Denied Aug. 19, 1932. Hearing Granted by Supreme Court Sept. 24, 1932.

1. Master and servant ⇐367.

Deputy registrar of voters allowed to follow her own methods and furnish her own transportation in securing registrations and paid at rate of eight cents per capita for registrations secured, *held* "employee" of county and not "independent contractor" (St. 1917, p. 835, § 8(a); Pol. Code § 4237 as amended by St. 1927, p. 1075).

[Ed. Note.—For other definitions of "Employé" and "Independent Contractor," see Words and Phrases.]

2. Master and servant ⇐417(7).

Ordinarily, unless but one inference can reasonably be drawn from facts, question whether workman is employee is for Industrial Commission whose finding is conclusive.

3. Master and servant ⇐416.

Whether injury arose in course of employment is primarily question for Industrial Commission (St. 1917, p. 831, as amended).

4. Master and servant ⇐417(7).

Industrial Commission's findings on question whether injury arose in course of employment will not be disturbed when supported by substantial evidence.

5. Master and servant ⇐375(1).

Employee is in "course of employment" when he does those reasonable things which his contract with employer permits.

[Ed. Note.—For other definitions of "Course of Employment," see Words and Phrases.]

6. Master and servant ⇐375(1).

Deputy registrar of voters, struck by automobile while en route to consult deputy city clerk who had assigned her to duty, sustained injuries in "course of employment" (St. 1917, p. 831, as amended).

7. Master and servant ⇐389.

Right of employer to sue third party, injuring employee, *held* not dependent on making of compensation award by Industrial Commission (St. 1917, p. 854, § 26, as amended by St. 1927, p. 1213).

8. Master and servant ⇐382.

Employee's settlement with third party causing injuries, made without employer's consent or Industrial Commission's approval, *held* invalid as against employer; hence employer was entitled to no part of amount received as credit on its liability (St. 1917, p. 854, § 26, as amended by St. 1927, p. 1213).

9. Master and servant ⇐405(6).

That some medical bills presented had been paid at time of hearing before Industrial Commission *held* legal evidence of reasonableness of charges made therein.

10. Master and servant ⇐417(5).

Power of appellate court, on certiorari, to consider questions respecting allowances for medical expenses in compensation award goes only to determining whether Industrial Commission had jurisdiction, and not whether errors were committed in exercise thereof.

Proceedings under the Workmen's Compensation, Insurance and Safety Act by Sarah D. Allen, employee, opposed by the County of San Bernardino, employer. To review an order of the Industrial Accident Commission awarding compensation, the employer brings certiorari.

Affirmed.

Stanley Mussell, Dist. Atty. of San Bernardino County, and James L. King, Chief Deputy Dist. Atty., both of San Bernardino, for petitioner.

A. I. Townsend, of San Francisco, for respondent Industrial Accident Commission.

Robert M. Bradley, Jr., of Redlands, for respondent Sarah D. Allen.

HARDEN, Justice pro tem.

Some time prior to January 24, 1928, Mrs. Sarah D. Allen was appointed by the county of San Bernardino as deputy registrar of voters of said county. She was of the age of about seventy-five years at that time. Joseph C. P. Hook, deputy city clerk of Redlands in said county, administered the oath of office. No particular term of employment was fixed in her appointment, but it was contemplated that she would act until thirty days prior to the presidential primary election on May 1, 1928. It was stipulated by the parties hereto that the relation existing between Mrs. Allen and the county could have been terminated at any time without liability to either party. While she had the legal right to register any qualified elector in the county, she was assigned by said deputy city clerk to a certain district in the city of Redlands, definitely marked by reference to designated streets, for the purpose of securing registrations. Other persons were engaged by the county to perform similar services in districts assigned to them. Mrs. Allen was not required to work any particular number of hours, nor on any particular days. Aside from the assignment to the particular dis-

*For subsequent opinion see 20 P.2d 673.

trict, the only instructions given her were printed on a pad of registration blanks and covered the law upon the subject of the registration of electors. She had had previous experience in the same work. In securing registrations she followed her own methods and furnished her own transportation. Payment for services rendered was at the rate of eight cents per capita for registrations secured; and up to the time of the accident involved herein she had earned an average of about $1.50 per day for the time devoted to the work, amounting in all to $28. On January 24, 1928, while engaged in securing registrations within her district, a question arose as to whether she should register certain school teachers who resided within the district but were employed at the time at a point beyond the boundaries thereof. Being uncertain as to her rights and duties under the circumstances, Mrs. Allen proceeded toward the office of said deputy city clerk to secure advice and directions from him upon the subject. While walking upon the sidewalk within the boundaries of the district assigned en route to consult said deputy city clerk for said purpose, she was struck by colliding automobiles, with the result that she sustained serious injuries. The county had no connection with either automobile involved in the collision. No action was filed to recover damages for the injuries sustained. On July 20, 1928, Mrs. Allen effected a settlement and was paid $3,500 by an insurance company in behalf of one of the parties involved in the collision, in consideration of which payment she signed a full release of said party from all claims and causes of action on account of injuries sustained by her and damage to her property. The settlement was made without the knowledge or consent of the county; neither did the Industrial Accident Commission nor any court consent thereto.

Pursuant to proceedings instituted by Mrs. Allen before the Industrial Accident Commission on January 10, 1929, for compensation for said injuries, a final decision was rendered by the commission in favor of the petitioner therein on March 7, 1932. It was found by the commission that, at the time of the injury, Mrs. Allen was employed as a deputy registrar of voters by the county of San Bernardino; that the injuries sustained arose out of and in the course of her employment; that the employer was uninsured, and that both employer and employee were subject to the provisions of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831, as amended); that Mrs. Allen was entitled under the provisions of said act to $675.54 for permanent disability and to $2,225.70 for her reasonable medical expenses, making a total of $2,901.24; and an award was made against the county of San Bernardino for that amount, less $75 payable to her attorney. The decision further recites: "The said applicant received the sum of $3,500.00 under a settlement with the third party causing the injury, no part of which sum has been received by the defendant herein, (the County of San Bernardino). Testimony was duly presented to this Commission tending to establish that of the said amount of $3,500.00 the sum of $1,000.00 represented, under agreement of the parties to said settlement, the element of pain and suffering caused by said injury as distinguished from compensable disability and expenses." The commission held, however, that it had no jurisdiction to make a judgment segregating any portion of the amount received in the settlement, nor to grant any credit to the county upon its liability. The county has not paid Mrs. Allen anything as compensation under said act.

[1, 2] The first point raised in this proceeding is that at the time of the injury Mrs. Allen was not an employee within the meaning of that term as defined by the Compensation Act; that, on the contrary, she was an independent contractor. By the terms of section 8(a) of said act (St. 1917, p. 835) the term "employee" is defined to mean: "* * * all elected and appointed paid public officers, * * * but excluding any person whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer." An "independent contractor" within the meaning of said act is held in Fidelity & Casualty Co. v. Industrial Acc. Com., 191 Cal. 404, 407, 216 P. 578, 579, 43 A. L. R. 1304, to be: "One who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only, and not as to the means by which such result is accomplished." There is no claim that Mrs. Allen's employment was casual. We think the language of the statute is a complete answer to the contention that she was not an employee. At that time a deputy registrar of voters of said county was a deputy county clerk and was an appointed, paid public officer. Section 4237, Pol. Code, amended by St. 1927, p. 1075. If more need be said upon this phase of the case, we think that, aside from the fact that an appointed, paid public officer is declared to be an employee, the nature of the relationship existing between Mrs. Allen and the county would prevent a holding that she was an independent contractor. Ordinarily, unless but one inference can reasonably be drawn from the facts, the question whether a workman is an employee within the meaning of the act is one of fact for the commission, upon which its finding is conclusive. Roman Catholic Archbishop v. Industrial Acc. Com., 194 Cal. 660, 230 P. 1. Stress is laid upon the mode of payment adopted as indicating that Mrs. Allen was not an employee. "A workman

who is paid wages by the piece or quantity comes within the provisions of the Workmen's Compensation Act the same as one who is paid by the day. Wages may be measured by time, by the piece, or by any other standard. * * * One of the best tests to determine whether the relation is that of an independent contractor or that of employer and employee is the right of control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent. * * * Coincident with the right of control is the right of either the employer or the employee to terminate the relation without liability. This is but another way of stating the rule, for the right to immediately discharge involves the right of control." Hillen v. Industrial Acc. Com., 199 Cal. 577, 581, 250 P. 570, 571. The mode of payment did not make Mrs. Allen an independent contractor, and the fact that the county retained the right to discharge her at any time was inconsistent with the creation of that relation. The commission has found that she was an employee and not an independent contractor. The finding is proper.

[3-6] The second point raised is that Mrs. Allen was not engaged in the course of her employment at the time she was injured. Whether an injury arose in the course of the employment is primarily a question for the commission to determine, and its findings on such question will not be disturbed when there is substantial evidence to support them. Myers v. Industrial Acc. Com., 191 Cal. 673, 218 P. 11; Crockett v. Industrial Acc. Com., 190 Cal. 583, 213 P. 969. As stated, at the time of the injury Mrs. Allen was within the district assigned her en route to consult the deputy city clerk of Redlands, who had sworn her to the performance of her duties and who had assigned her to duty in her district. It is claimed she had no lawful right to look to Mr. Hook for advice or instructions; that he had no connection with the county of San Bernardino. While no legal relation existed between him and the county of San Bernardino, so far as the record discloses, still Mr. Hook was not a total stranger to the county. The county either authorized or permitted him to assign Mrs. Allen to her district. She might naturally have been expected to look to him for directions under the circumstances. We see nothing in the fact that Mr. Hook was not a county official. There is no claim that Mrs. Allen was loitering along the street when injured. The nature of her employment would naturally take her upon the streets, and it may be assumed that it was within the contemplation of both parties that she would go upon the streets to secure registrations. The risks common to travel upon the streets are recognized as incidental to many kinds of employment. The cases of messengers and solicitors furnish close analogies. Frigidaire Corp. v. Industrial Acc. Com., 103 Cal. App. 27, 283 P. 974; Real Silk Hosiery Mills, Inc., v. Industrial Acc. Com., 86 Cal. App. 189, 260 P. 807; Makins v. Industrial Acc. Com., 198 Cal. 698, 247 P. 202, 49 A. L. R. 411. In the last-mentioned case the district assigned to a carrier of newspapers was held to be the employee's place of employment within the meaning of the Compensation Act. Ordinarily, the purpose of the act of the employee out of which the injury arose, rather than the method of its performance, determines whether he was injured while within the course of his employment, unless the act, even though intended to forward the purpose of the employer, was of such an exceptional and unusual nature that it could not reasonably be said to be within the scope of the employment. Standard L. Co. v. Industrial Acc. Com., 60 Cal. App. 331, 212 P. 720. In this case we may inquire whether the trip undertaken by Mrs. Allen was personal to her or in behalf of her employer. In view of her assignment to a particular district by the deputy city clerk, the restriction thereby put upon her in the matter of registering electors, and the particular question that arose as to the registration of the teachers, we think there was nothing personal about the inquiry she proposed to make of the deputy city clerk and the trip undertaken for that purpose. It had to do only with the employment and was in behalf of the employer. "An employee is in the 'course of his employment' when he does those reasonable things which his contract with his employer expressly or impliedly permits him to do." Hartford A. & I. Co. v. Industrial Acc. Com., 202 Cal. 688, 691, 692, 262 P. 309, 310, 58 A. L. R. 1392. On what we regard as sufficient evidence the commission has determined in effect that the employee was engaged in the performance of an act impliedly permitted by her employer, and has concluded that she was then in the course of her employment. With that decision of the commission we cannot interfere.

[7, 8] The next point made arises from the contention that the county should have been credited by the commission with a portion of the award received by the employee in her settlement. Although the finding thereon is indefinite, seemingly the evidence was sufficient to satisfy the commission that there was an agreement between the parties to the settlement to the effect that the sum of $1,000 was allowed and accepted on account of pain and suffering caused by the injury as distinguished from compensable disability and expenses. The decision of the commission denying the county the credit claimed turns upon the position taken by the commission that, under the facts, viewed in the light of the case of Ansbach v. Dept. Ind.

Rel., 99 Cal. App. 677, 279 P. 224, it had no jurisdiction to grant the credit. Reliance is also placed by the commission upon the cases of Jacobsen v. Industrial Acc. Com., 212 Cal. 441, 299 P. 66, and Zurich, etc., Co. v. Industrial Acc. Com. and Lidberg, 212 Cal. 451, 299 P. 70. The settlement made by Mrs. Allen was invalid for the reason that the county did not consent thereto. Section 26 of the act (as amended by St. 1927, p. 1213) provides: "When any injury or death shall have been suffered by an employee, no release or settlement of any claim for damages by reason of such injury or death and no satisfaction of judgment in such proceedings, shall be valid without the written consent of either both employer and employee, or one of them, together with the consent of the commission or the court in which any such action may be pending, after notice to and opportunity of all parties to the action to be heard by such court."

Inasmuch as the liability to pay compensation is created by statute and not by the award of the commission, the right of an employer to sue for damages is not dependent upon the making of an award by the commission. Moreno v. Los Angeles Transfer Co., 44 Cal. App. 551, 186 P. 800; Sacramento v. Central California Traction Company, 78 Cal. App. 215, 248 P. 307. In Papineau v. Industrial Acc. Com., 45 Cal. App. 181, 187 P. 108, it was held that a settlement with an employee, without the consent of the employer and before the filing of claim with the Industrial Accident Commission, could not prejudice the right of the employer to recover from the third party for liability created on account of the award made by the commission in favor of the injured employee and against such employer. The settlement made herein being invalid, the county may not claim any part of the amount received thereon as a credit upon its liability to pay compensation under the award made by the commission.

[9, 10] The last point raised is that in the making of the award the commission erroneously allowed certain charges made by physicians and nurses for care and treatment of the employee. The commission found that Mrs. Allen was totally temporarily disabled as the result of her injury from January 24, 1928, to and including January 1, 1931. No attack is made upon this finding. Particular objection is made to bills rendered and allowed in connection with the treatment of a malignant condition which developed in the roof of Mrs. Allen's mouth. The contention that there was no proof of any injury to Mrs. Allen's mouth which could necessitate said treatment is without foundation. She testified that at the time of the accident her false teeth punctured her palate and made an incision there. It is also claimed that duplicate charges were made and allowed for nursing. Twenty-three bills were presented and allowed, either in whole or in part, by the commission. As to many of said bills, express approval was given by the district attorney, as the legal representative of the county. As to other bills, objection was made by him upon the ground that the services rendered were too remote from the injury to be the subject of proper charges against the county. Some of the bills presented had been paid at the time of the hearing, and as to said bills, such fact was legal evidence of the reasonableness of the charges made therein. Dewhirst v. Leopold, 194 Cal. 424, 229 P. 30; Townsend v. Keith, 34 Cal. App. 564, 565, 168 P. 402; Latky v. Wolfe, 85 Cal. App. 332, 259 P. 470. Other bills were submitted to the commission by consent for allowance in full or in part in accordance with the schedule of the commission. All of the questions raised as to the amount of the award for medical expenses were for determination by the commission. In the reception and consideration of the evidence the commission was not held to the strict rules applicable in the courts. It is provided in section 60(a) of the Compensation Act (St. 1917, p. 871) that "neither the commission nor any member thereof, nor any referee appointed thereby, shall be bound by the common law or statutory rules of evidence; * * * nor shall any order, award, rule or regulation be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the said common law or statutory rules of evidence and procedure." Western Pipe & Steel Co. v. Industrial Acc. Com., 194 Cal. 379, 381, 228 P. 859; Pacific Gas & Electric Co. v. Industrial Acc. Com., 180 Cal. 497, 181 P. 788. The power of this court on certiorari to consider the questions raised in respect to the amount allowed for medical expenses in the award goes only to the determination of whether or not the commission had jurisdiction, and not as to whether in the exercise of that jurisdiction errors were committed. Maryland Casualty Co. v. Industrial Acc. Com., 178 Cal. 491, 173 P. 993. The commission had jurisdiction to allow all the bills and charges for medical expenses included in the award.

The award is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

125 Cal.App. 132

STAHMER v. STAHMER.

Civ. 8412.

District Court of Appeal, First District, Division 2, California.

July 28, 1932.

1. Escrows ⇐8(2).

Grantor if not intending to part with title, and if deed delivered in escrow was testamentary, had right of revocation.

2. Escrows ⇐8(1).

Written instructions to escrow holder being incomplete, grantor's intention to part with title *held* fact question.

3. Quieting title ⇐44(1).

Whether grantor intended to part with title *held* essential element of grantee's quiet title action, and grantee had burden of proof.

In support of allegation by grantee that deed of gift in question was delivered to third person for grantee's benefit without reservations or exceptions, grantee had burden of proof on question of fact as to whether grantor intended to part with title to realty involved when she delivered deed of gift to third person.

4. Appeal and error ⇐931(3).

Without proof on fact issue constituting essential element of appellant's case, appellate court must assume that findings on such proof would have been against appellant.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by F. A. Stahmer against Herman A. Stahmer. Judgment for defendant, and plaintiff appeals.

Affirmed.

Montgomery Flynn, of Oakland, for appellant.

Owen D. Richardson and Donald B. Richardson, both of San Jose, for respondent.

NOURSE, J.

Plaintiff sued to quiet title to certain real property and defendant had judgment. Plaintiff appeals on typewritten transcripts.

The parties are both sons of Mrs. Auguste Stahmer, deceased, who, in August, 1918, executed her deed of gift conveying her property to plaintiff. This deed she delivered to a third person with written instructions to deliver it to plaintiff upon her death. In October, 1926, the mother executed another deed conveying the same property to defendant in consideration of a written contract wherein defendant undertook to care for his mother during the remainder of her life and to pay a fixed sum monthly to another brother. This deed was recorded on the day of its execution. Mrs. Stahmer died April 15, 1929, and thereafter plaintiff recorded his deed.

When the cause was called for hearing each counsel stated his version of the issues —the plaintiff predicating his case on whether the defendant was an innocent purchaser for value and whether plaintiff was estopped to assert his rights under his deed; the defendant adding that the knowledge of the defendant and the consideration he paid the grantor were also in issue. The trial court found that the plaintiff was estopped to claim any rights under his deed, but failed to find explicitly that the defendant was an innocent purchaser or that the consideration paid was of value.

On this appeal the appellant bases his attack upon the finding of estoppel. In this we are in accord with his contention that the evidence is insufficient to support the finding, and we may assume that respondent is also in accord as he makes no effort to defend the finding. The record is void of any evidence tending to prove any one of the essential elements of an estoppel as defined in section 1962, Code of Civil Procedure. See, generally, vol. 10, Cal. Jur., p. 627.

Appellant also argues that respondent at all times had knowledge of the deed of gift to appellant and that he was not therefore an innocent purchaser. In this respect the evidence is conflicting. The appellant and another witness testified to conversations had with respondent regarding the deed of gift. The respondent denied these conversations in toto. The trial court, having all witnesses before it, had to decide which was entitled to belief, and we do not find in the respondent's testimony such inherent improbability that we could say as a matter of law that his testimony should be rejected. Though the findings are inaptly drawn, it seems to have been the intention to find that respondent executed the contract with his mother in ignorance of the prior deed to appellant; that he faithfully performed his contract with her; and that he was an innocent purchaser for value.

[1-4] The real question on this appeal is whether, in the absence of an estoppel, respondent may have his title quieted upon the showing that he was an innocent purchaser for value. The answer to this question depends upon whether the grantor intended to part with title when she delivered the deed of gift to a third party in 1918. If she did not and that deed was testamentary, she retained the right to revoke it and hence respondent's title is clear. The written instructions to the escrow holder being incomplete, the grantor's intention is a question of fact. Bury v. Young, 98 Cal. 446, 33 P. 338, 35 Am. St. Rep. 186; Williams v. Kidd,

170 Cal. 631, 151 P. 1, Ann. Cas. 1916E, 703; Kimbro v. Kimbro, 199 Cal. 344, 350, 249 P. 180; Manwell v. Board of Home Missions, etc. (Cal. App.) 10 P.(2d) 787. As an issue of fact it was an essential element of plaintiff's case and the burden was upon him to prove it in support of his allegation that the deed of gift was delivered to a third party for his benefit "without reservations or exceptions." No proof having been offered we must assume, in support of the judgment, that, if evidence had been tendered and findings made, these findings would have been adverse to appellant.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

125 Cal.App. 68

DICKEY v. KUHN et ux.

Civ. 8028.

District Court of Appeal, First District, Division 1, California.

July 23, 1932.

Rehearing Denied Aug. 22, 1932. Hearing Denied by Supreme Court Sept. 19, 1932.

1. Trial ⇐140(1).

Credibility of witnesses is question for jury.

2. Evidence ⇐594.

Jury were not bound to find in accordance with testimony of uncontradicted witnesses.

3. Jury ⇐28(17).

Notwithstanding jury has been waived in statutory manner, it is within discretion of trial court to disregard waiver and try case by jury.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by John Dickey against A. Kuhn and wife. From a judgment for defendants, plaintiff appeals.

Affirmed.

Ramsey Probasco and Clarence De Lancey, both of Oakland, for appellant.

Clark, Nichols & Eltse, of Berkeley, for respondents.

PER CURIAM.

The litigation between the above parties, of which this action is a part, arose out of an agreement relating to the sale of a restaurant in Berkeley on or about July 24, 1922. The plaintiff executed to the defendant A. Kuhn (who will be hereinafter referred to as the defendant) the following instrument:

"Sold this day to A. Kuhn the following described property: the certain lease, fixtures and equipment and stock on hand on the date of consummation of sale, located at 2242 Telegraph avenue, Berkeley, California, for $5,000. Terms, $1,500 cash; balance in six months without interest; sale of the above fixtures and lease to be clear of indebtedness and perfectly clear title. Possession to be given July 29, 1922. Six days allowed to take up this option or forfeit the payment of one hundred dollars.

"[Signed] John Dickey."

The defendant accepted the offer contained therein and paid on account the said sum of $100.

On or about July 31, 1922, their agreement was modified as to the terms of sale, pursuant to which defendant, being credited with the sum of $100, paid the sum of $400 in cash, and he and Lilian Kuhn, his wife, who is joined as a defendant in the present action, executed three promissory notes for the balance of the purchase price, one for $500, payable August 10, 1922, the second for the same amount, payable August 20, 1922, and the third for $3,500, payable six months after July 31, 1922. Defendant thereupon took possession of the restaurant and paid the first note when it became due. Before the maturity of the second note defendant brought an action to cancel the remaining notes upon the grounds of fraud and failure of consideration. Plaintiff denied the allegations of the complaint, and cross-complained upon the second note, which was then due. A judgment was entered in favor of the latter, which was affirmed on appeal. Kuhn v. Dickey, 66 Cal. App. 227, 225 P. 867.

Subsequently Dickey brought suit upon the $3,500 note, and defendant Kuhn as a defense alleged the same facts constituting fraud and failure of consideration which were contained in his complaint in the action first mentioned. It was alleged therein as a further ground for the claimed failure of consideration that Dickey failed to procure the written consent of the landlord to the transfer of the lease of the restaurant. Evidence supporting these defensive allegations was admitted over objection, and a jury returned a verdict for defendant Kuhn. Judgment was entered accordingly, but upon appeal, was reversed (Dickey v. Kuhn, 85 Cal. App. 8, 259 P. 93, 95); the Appellate Court holding that upon the allegations of fraud and failure of consideration the judgment in the first action was res adjudicata. On the same appeal the Supreme Court, in denying a petition for a hearing in that court, held that

the former judgment was not res adjudicata as to whether defendant Kuhn "would have had the right to show that upon the due date of the note sued upon herein he had offered or was prepared to pay the same, but that the plaintiff was then unable to procure the assent of the original landlord to a transfer of the lease, and that for that reason the consideration of said note had failed." The Supreme Court further said: "Having, however, abandoned the premises prior to the due date of said note, and having never offered to pay the same upon the above conditions, he was no longer entitled to defend against its payment upon that ground."

The action was again tried, this time by the court, which found that by reason of the abandonment of the restaurant by defendant Kuhn before the due date of the note Dickey was at no time in default; that the only part of the equipment to which Dickey did not have complete title was a certain cash register, but that he was at all times ready, willing, and able to transfer the fixtures and equipment upon payment of the note, which payment had not been made; and "that all matters in relation to the abandonment of said contract, to the formal tender of title and to the formal assignment of the lease from plaintiff to defendant, have been fully adjudicated in the case of Kuhn v. Dickey, 66 Cal. App. 227, [225 P. 867]." A judgment was accordingly entered for the amount of the note with interest and attorney's fees.

From this judgment Kuhn appealed. On this appeal it was held that the judgment in Kuhn v. Dickey, 66 Cal. App. 227, 225 P. 867, did not involve Dickey's obligation upon the final payment under the contract, which was represented by the $3,500 note, and was not res adjudicata on the question of his readiness, willingness, and ability to perform; further, that while under section 1440 of the Civil Code a seller was not required to perform or offer to perform after the purchaser had refused performance, the section did not dispense with the ability of the seller to perform when he sought to enforce the obligation, and that a finding to the effect that Dickey had been ready, able, and willing to perform was not sustained by the evidence. The judgment was accordingly reversed, and a petition to have the case heard by the Supreme Court was denied. Dickey v. Kuhn, 106 Cal. App. 300, 289 P. 242.

The present appeal was taken from a judgment entered upon a verdict in favor of defendant Kuhn. Plaintiff claims that the implied finding that he was not ready, able, and willing to perform is unsupported; that the admission of certain evidence was erroneous, as were several instructions to the jury; further, that defendant was not entitled to a jury trial.

[1, 2] As to the first ground for the appeal, we have examined the testimony and are of the opinion that it was amply sufficient to sustain the finding. The evidence was conflicting in many respects, and the credibility of the witnesses who testified in this regard was a question for the jury, who were not bound to find in accordance with the testimony of even uncontradicted witnesses, as the most positive testimony may contain inherent improbabilities as to its accuracy, or the manner of the witness in testifying may impress the jury with doubts as to his truthfulness. Davis v. Judson, 159 Cal. 121, 113 P. 147; 27 Cal. Jur., Witnesses, § 156, p. 184.

As to the second ground, the evidence complained of was relevant upon the above issue, and its admission was not error.

The instructions to which plaintiff excepts were fair and accurate statements of the law as applied to the evidence and admitted facts of the case. Furthermore, the jury was fully advised by other instructions in these respects, and we find no ground for the complaint that the same were erroneous or prejudicial.

[3] The last contention, namely, that the defendant was not entitled to have the cause tried by a jury, is based upon the following facts: The first trial was by a jury. At the second trial a jury was waived, and the last trial was had before a jury over the objection of the plaintiff, who claimed that by the previous waiver the right to a jury in any subsequent trial was also waived.

The decisions on the question in other jurisdictions are conflicting (35 Cor. Jur., Juries, § 141, p. 223), and no California case has been called to our attention; but whatever the right of a party under such circumstances, it is the rule that notwithstanding a jury has been waived in the statutory manner, it is within the discretion of the trial court to disregard the waiver and try the case by a jury. 2 Bancroft's Code Practice and Remedies, § 1120, p. 1580, and cases there cited; 35 Cor. Jur., Juries, § 139, p. 222; Doll v. Anderson, 27 Cal. 248; Bullock v. Consumers' Lumber Co., 3 Cal. Unrep. 609, 31 P. 367, 369; Harmon v. Hopkins, 116 Cal. App. 184, 2 P.(2d) 540. The court did not abuse its discretion in so doing; and after an examination of the entire record we are convinced that the verdict was fully sustained, and that no error has been shown which can reasonably be said to have resulted in a miscarriage of justice.

The judgment is affirmed.

125 Cal.App. 375

Ex parte BOCK.

Cr. 1661.

District Court of Appeal, First District, Division 2, California.

Aug. 18, 1932.

1. Municipal corporations ⇐122(3).

Court in passing on validity of ordinance can take evidence relating to its purpose and effect, regardless of statement in ordinance itself.

2. Licenses ⇐7(9).

County ordinance licensing dealers in oleomargarine, and requiring $200 annual license tax, *held* void in view of regulation provided by state law (St. 1923, p. 849, § 12½, as added by St. 1931, p. 459, § 8).

The ordinance imposing tax on dealers in oleomargarine, irrespective of amount of sales, was void because clearly excessive and prohibitory, and because tax was apparently imposed either for purpose of revenue or for purpose of indirectly prohibiting sale of oleomargarine, not for purpose of regulation.

Proceedings by H. J. Bock for writ of habeas corpus to be directed to the Sheriff of Marin County.

Petitioner discharged.

Pillsbury, Madison & Sutro, Frank D. Madison, and Marshall P. Madison, all of San Francisco, for petitioner.

George A. Clough and John Curry, both of San Francisco, amici curiæ in support of petition, representing California Cattlemen's Ass'n, Western Cattle Marketing Ass'n, and American National Livestock Ass'n.

Henry E. Greer, Dist. Atty., of San Rafael, and Edson Abel, of San Francisco, for respondents.

SPENCE, J.

Petitioner was arrested upon a charge of violating a county ordinance passed by the supervisors of the county of Marin and known as Ordinance No. 206. He seeks his release upon habeas corpus.

The ordinance was passed on March 15, 1932, and took effect thirty days thereafter. In its entirety it reads as follows:

"Ordinance No. 206.

"An ordinance defining the terms 'Substitute for Butter,' and requiring persons, firms and corporations manufacturing, buying, selling, dealing in or furnishing or having in possession for any purpose other than consumption in his own family a substitute for butter to obtain a license authorizing them to do so and to pay a license fee; and providing penalties for the violation of this ordinance.

"The Board of Supervisors of the County of Marin, State of California, do ordain as follows:

"Section 1. It shall be unlawful for any person, firm or corporation, whether as principal, clerk, servant, agent or employee, outside of the limits of any incorporated city of the County of Marin, to manufacture, buy, sell, deal in, or furnish to his, its or their patrons, or to have in possession for any purpose whatsoever other than for consumption in his own family, or for transportation in case of a common carrier, any oleomargarine or other substitute for butter without first having procured a license so to do as in this ordinance provided.

"Section 2. For the purposes of this ordinance, a substitute for butter is defined as any article, product or compound made wholly or partly out of any fat, oil or oleaginous substance or compound thereof, not produced directly and wholly (except for the addition of small quantities of salt and coloring matter) and at the time of manufacture from unadulterated milk or cream from the same, and the moisture content of which exceeds 2% by weight of finished product.

"Section 3. Such licenses shall be issued by the Tax Collector of the County of Marin, State of California, upon the payment to him of a license fee of two hundred dollars ($200.00) per year, payable in advance. All money received in payment of such license fees shall be paid into the General Fund of the County of Marin by the Tax Collector.

"Section 4. No license issued under this ordinance shall be assignable or transferable, nor shall it authorize any person, firm, or corporation other than the one named in the license to do business, nor shall it authorize the business therein named to be transacted at any place other than is therein mentioned or named without permission of the Tax Collector endorsed on said license; provided, that licensees having more than one place of business shall obtain a license for each of said places of business. Every license issued under this ordinance shall bear on its face in black-faced type at least twice as large as any other type appearing on its face the words 'Dealer in Butter Substitutes.'

"Section 5. Every person, firm or corporation having a license as herein provided for shall keep said license continuously and conspicuously on display in that part of his or its place of business frequented by those buying butter substitute from him or it. Every person, firm or corporation having a license as herein provided for shall also keep the state license to deal in substitutes for butter or cheese continuously and conspicuously

on display in that part of his or its place of business frequented by those buying from him or it. The posting or possession of said state license shall be prima facie evidence of a violation of this ordinance unless the possessor thereof shall have procured a license as in this ordinance provided.

"Section 6. Each separate act in violation of any provision of this ordinance shall constitute a separate offense and every person, firm or corporation violating any of the provisions of this ordinance shall be guilty of a misdemeanor and shall be punished by a fine not exceeding five hundred dollars ($500.-00), or by imprisonment in the County Jail of the County of Marin for not exceeding six months, or by both such fine and imprisonment.

"Section 7. This ordinance is hereby declared to be enacted in the exercise of the police power of the County of Marin, State of California, and for the purpose of preventing fraud in the sale of substitutes for butter. If any section, sentence, clause or phrase of this ordinance shall be declared invalid, such decision shall not affect the validity of the remaining portions of this ordinance. The Board of Supervisors hereby declares that it would have passed this ordinance and each section, sentence, clause and phrase thereof irrespective of the fact that any one or more sections, sentences, clauses or phrases is declared unconstitutional or otherwise invalid.

"Section 8. This ordinance shall take effect thirty (30) days after its passage, and before the expiration of fifteen (15) days from the passage hereof, it shall be published for at least one week in the San Rafael Independent, a newspaper published in the County of Marin."

Petitioner was engaged in the business of selling oleomargarine and had some of the product in his possession for the purpose of sale. He failed to obtain the license referred to in the ordinance and his arrest followed.

In this proceeding petitioner contends that the ordinance is invalid, urging constitutional and other grounds in support of his contention. Most of the legal principles relied upon by petitioner are not disputed by respondent, but the latter contends that these principles have no application here. It is conceded that the ordinance must stand or fall as a regulatory measure for a county can impose a license tax for the purpose of regulation only and cannot impose such tax for the purpose of revenue. Pol. Code, § 3366; County of Plumas v. Wheeler, 149 Cal. 758, 87 P. 909. It is further conceded that an ordinance purporting to prohibit the manufacture or sale of oleomargarine would be unconstitutional (Jelke Co. v. Emery, 193 Wis. 311, 214 N. W. 369, 53 A. L. R. 463; People v. Marx, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34; see, also, Weaver v. Palmer Bros. Co., 270 U. S. 402, 46 S. Ct. 320, 70 L. Ed. 654), and that any ordinance indirectly accomplishing that result by means of imposing a tax in such amount as to be prohibitory would likewise be unconstitutional. In re Dees, 50 Cal. App. 11, 194 P. 717; Merced County v. Fleming, 111 Cal. 46, 43 P. 392.

The foregoing principles have been enunciated in County of Plumas v. Wheeler, supra. At page 762 of 149 Cal., 87 P. 909, 910, the court there said: "The principles affecting the right of legislative bodies in the exercise of what is known as the 'police power,' to place restrictions upon the conduct of lawful pursuits and occupations, are well settled, although there is often great difficulty in applying these principles to a given state of facts. It is within the legislative discretion to place such restrictions upon the use of any property or the conduct of any business as may be reasonably necessary for the public safety, comfort or health. * * * The manner and extent of such regulation are primarily legislative questions, and the courts will not interfere unless it clearly appears that the Legislature has, under the guise of regulation, imposed an arbitrary or unreasonable burden upon the use of property or the pursuit of an occupation. But the legislative determination is not conclusive. As this court said, in Re Smith, 143 Cal. 368, 77 P. 180: 'The law will not allow the rights of property or business to be invaded under the guise of police regulation for the benefit of the public health or good order, when it is manifest that such is not the object or purpose of the enactment or by-law.' 'The question in each case,' says the Supreme Court of the United States, 'is whether the Legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination or the oppression, or spoliation of a particular class.' Holden v. Hardy, 169 U. S. 366, 18 S. Ct. 383, 42 L. Ed. 780."

In Re Dees, supra, the court said at page 16 of 50 Cal. App., 194 P. 717, 719: "Even though the power to license for revenue be upheld, it is not a power to prohibit. The question of whether or not the ordinance is so unreasonable in character as to transcend the proper exercise of the law-making power is one to be determined by the court."

Again, in Merced County v. Fleming, supra, the court said at page 50 of 111 Cal., 43 P. 392, 393: "It is perfectly true that the power to [license and] regulate for the purposes of revenue is not the power to prohibit, and that an attempt to accomplish the latter object under a pretense of regulation cannot be upheld."

In the early case of Ex parte Frank, 52 Cal. 606, 28 Am. Rep. 642, the court expressed the general rule as follows: "An ordinance passed under a general authority of this nature

must be, first, 'reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the State'; second, it must not be oppressive; third, it must be impartial, fair, and general; fourth, it may regulate but must not restrain trade. (Dillon on Municipal Corporations, secs. 253 to 257 inclusive, and authorities there cited.)"

The rule as stated in Ruling Case Law, vol. 26, p. 238, is as follows: "In most of the states, however, it is regarded as the law that an excise upon the performance of an act which the legislature could not constitutionally prohibit must be reasonable in amount, and must not amount to the suppression of any useful or legitimate occupation or the deprivation of any natural and inalienable right. It is generally recognized that among the inalienable and inherent rights guaranteed by our constitution to every law abiding citizen is the right to live and enjoy life, and the right to acquire property; and that these rights necessarily carry with them the right to gain a livelihood and acquire property by following any useful or legitimate occupation, the pursuit of which is not injurious to the public weal. If you deprive a man of the means of livelihood, you necessarily deprive him of the right to live and enjoy his life. Great as is the taxing power, it can never rise superior to the inalienable rights guaranteed by the constitution."

[1] The ordinance in question upon its face purports to be a regulatory measure expressly declaring that it was enacted "for the purpose of preventing fraud in the sale of substitutes for butter" (section 7, supra); but the court is not bound by the face of the ordinance, and it is within its power to take evidence relating to the purpose and effect of the ordinance in order to determine the validity thereof. In re McCoy, 10 Cal. App. 116, 101 P. 419. It was petitioner's main contention that the ordinance was invalid because the license tax prescribed was prohibitory in amount and upon that issue certain evidence was taken before this court to supplement the stipulations of facts entered into by the parties.

[2] Before discussing the facts developed in the stipulations and testimony, we first desire to call attention to section 12½ of the General Dairy Law of the State of California (St. 1931, p. 459, General Laws, Act 1945), in effect at the present time as well as at the time of the passage of said ordinance. A reading of the provisions of the state law, not to mention the federal laws and regulations on the subject, shows that a complete scheme for the regulation of the manufacture and sale of oleomargarine had been provided requiring, among other things, the payment of license taxes. Comparing the ordinance with the provisions of the General Dairy Law it is at once apparent that the ordinance added nothing thereto by way of regulation except to provide that every person engaged in the business in the county of Marin should obtain and post another license and pay therefor another license tax in the sum of $200 per annum. In the case of retailers the county tax provided by the ordinance is forty times as large as the $5 tax imposed by the state law.

Coming to a consideration of the evidence before us, it appears that at the time the ordinance was enacted there were approximately ten persons, firms, or corporations engaged in the sale of oleomargarine in the county of Marin outside the limits of incorporated cities to whom said ordinances would apply; that said number included both wholesalers, distributing to the retail dealers from trucks, and the retail dealers; that there were but four retail dealers in the county outside of the limits of incorporated cities who sold oleomargarine to the general public; that during the twelve months' period before the ordinance took effect three of said four retail dealers sold less than 1,000 pounds each of oleomargarine and the fourth sold approximately 1,200 pounds; that the profit to said retail dealers on said sales was approximately 3½ cents per pound, varying from 2 cents to 4 cents per pound; that certain distributers had no established places of business in Marin county, but sold from trucks in which they visited the retailers and solicited sales; that the entire sales of oleomargarine of one of the larger distributers in the county of Marin in 1931, including sales to retailers within incorporated cities and towns, was 15,600 pounds; that the distributer's profit upon said sales varied from 2 to 3 cents per pound; that since the passage of said ordinance no licenses required thereby have been applied for or issued; that no expense has been incurred by the county by reason of said ordinance except the nominal cost of printing and publishing the same; that none of the county officers has expended or planned to expend any money or to incur any additional expense on behalf of the county by reason of the adoption of said ordinance. It further appears that oleomargarine is a wholesome product having a definite food value; that it is a product of vegetable oils emulsified in ripened skim-milk to which salt is added; that animal fats are sometimes used, but not in the product manufactured in this state; that oleomargarine is used as a substitute for butter and sold as a competitor thereof, selling for approximately one-half the price; that butter and oleomargarine have been selling side by side over a period of time with no appreciable change in the ratio of price and that the sale of butter in the county of Marin and throughout the state of California exceeds the sale of oleomargarine.

With the foregoing facts before us we have no hesitancy in declaring that in our opinion the ordinance in question is invalid. Its title discloses its sole and only purpose, to wit, to require a license and the payment of a license tax. The only semblance of a regulatory provision is the one requiring that the county license as well as the state license be conspicuously displayed. In view of the provisions of section 12½ of the General Dairy Law we cannot but conclude that this purported added regulation was but a pretense inserted in an attempt to justify the imposition of a tax. It was in effect no regulation at all and the prospective cost of enforcing this purported regulation would be negligible. The $200 tax imposed upon every retailer irrespective of the amount of sales is clearly excessive and prohibitory. It cannot be justified upon the theory that it bears any relation to the cost of enforcement of the purported regulation and its effect is to entirely suppress the sale of oleomargarine in the unincorporated territory within the county. The conclusion is inescapable that the tax was imposed either for the purpose of revenue or for the purpose of indirectly prohibiting the sale of oleomargarine. Whatever may have been its purpose, its effect is obvious and the ordinance must fall under the authorities above cited.

In view of the conclusions which we have reached, we deem it unnecessary to discuss petitioner's further contention that the ordinance is inconsistent with section 12½ of the General Dairy Law and therefore unconstitutional under section 11 of article 11 of the Constitution.

It is ordered that the petitioner be discharged.

We concur: NOURSE, P. J.; STURTEVANT, J.

124 Cal.App. 769

KLOPPER v. D. J. & T. SULLIVAN CO. et al.

Civ. 8094.

District Court of Appeal, First District, Division 2, California.

July 19, 1932.

Rehearing Denied Aug. 18, 1932. Hearing Denied by Supreme Court Sept. 16, 1932.

1. Automobiles ⇐253.

General provisions of Vehicle Act relating to ordinary mobile equipment and loads *held* inapplicable to schoolhouse placed on dollies and drawn along street with truck, regulations relating to moving buildings under permit governing (St. 1923, p. 517, as amended).

2. Automobiles ⇐305(1).

In suit by motorist colliding with schoolhouse moved along street, city ordinance and charter provisions relating to permits for moving buildings and permit for moving schoolhouse in question *held* admissible.

Such evidence was properly admitted as showing the obstruction was not unlawful because, in the absence thereof, it might well have been contended that the placing of a building in the street constituted a nuisance within the meaning of Civ. Code § 3479, covering "unlawful obstructions of the free use of public streets."

3. Municipal corporations ⇐703(1).

San Francisco city charter provisions regarding permits for moving buildings through streets *held* not in conflict with or superseded by Vehicle Act (St. 1923, p. 540, § 83, as amended by St. 1929, p. 526, § 29; p. 517, § 7½, added by St. 1927, p. 1421, § 2, as amended by St. 1929, p. 509, § 1).

This is so because it is provided by St. 1923, p. 540, § 83, as amended by St. 1929, p. 526, § 29, that the general provisions limiting the maximum width of vehicles and their loads shall not apply to special mobile equipment, and because under St. 1923, p. 517, § 7½, added by St. 1927, p. 1421, § 2, as amended by St. 1929, p. 509, § 1, dollies used in moving are classified as special mobile equipment.

4. Automobiles ⇐309(2).

In suit by motorist colliding with schoolhouse moved along street, instruction that movers could under permit occupy such portion of street as was necessary to move building *held* proper (St. 1923, p. 517, as amended).

5. Automobiles ⇐309(2).

In suit by motorist colliding with school building moved along street, instruction movers were not negligent if lights maintained on building were visible for sufficient distance to enable persons using street to avoid danger *held* proper.

6. Trial ⇐241.

In suit by motorist colliding with schoolhouse moved along street, court's refusal to read to jury general provisions of Vehicle Act relating to lights and parking of vehicles *held* not error (St. 1923, p. 517, as amended).

7. Automobiles ⇐309(2).

Refusing motorist instruction regarding Vehicle Act violation in placing red lantern between lights of truck before schoolhouse moved along street *held* not error, where alleged violation could not have proximately caused collision (St. 1923, pp. 546, 552, §§ 100,

111, as amended by St. 1929, pp. 531, 536, §§ 39, 42).

8. Trial ⇐243.

In suit by motorist colliding with schoolhouse moved along street, instruction to effect that unlawful obstruction of free use of street was nuisance *held* properly refused as contradictory (Civ. Code, § 3479).

9. Trial ⇐243.

In suit by motorist colliding with school building moved along street, instruction, if movers unlawfully obstructed street, permission by municipal authorities to do so constituted no defense, *held* properly refused as contradictory (Civ. Code, § 3479).

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Frederick Klopper against the D. J. & T. Sullivan Company and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

Vincent W. Hallinan, Michael Riordan, and James J. Roach, all of San Francisco, for appellant.

Daniel W. Burbank, C. F. Laumeister, William M. Abbott, K. W. Cannon, Cyril Appel, and Ivores R. Dains, all of San Francisco, for respondents.

SPENCE, J.

Following a trial by jury, judgment upon the verdict was entered in favor of defendants, from which judgment plaintiff appeals.

The action was brought to recover for personal injuries alleged to have been sustained by plaintiff as a result of negligence upon the part of defendants. The accident occurred at about 1 o'clock on the morning of November 5, 1929, on Mission street near Ocean avenue, in San Francisco. Pursuant to a permit granted by the board of public works, defendants were engaged in moving a schoolhouse twenty-four feet in width along Mission street. At the time in question the schoolhouse was not in motion, but was temporarily standing in the middle of the street. There were lighted red lanterns hanging close to the ground at the four corners of the schoolhouse. Plaintiff collided therewith while operating his automobile in a northerly direction along Mission street. Both negligence and contributory negligence were issues under the pleadings and the trial court gave instructions on these issues.

[1] Appellant contends that the trial court erred in admitting certain evidence and in the giving and refusing of certain instructions. Practically all of appellant's contentions are based upon his theory that the general provisions of the California Vehicle Act (St. 1923, p. 517, as amended) relating to the width of vehicles and their loads, the parking of vehicles, and the required lights on vehicles and their loads, were applicable to this schoolhouse. While it is true that the schoolhouse had been moved to the point where it was situated by placing it on three small dollies and drawing it with a truck, we find nothing in the Vehicle Act which leads to the conclusion that the above-mentioned general provisions relating to ordinary mobile equipment and loads were applicable under the circumstances. On the other hand, we believe that the regulations relating to the moving of buildings under permit governed.

[2, 3] The evidence which appellant claimed was erroneously admitted consisted of article VI, chapter I, section 9, subdivision 1, of the charter of the city and county of San Francisco, giving the board of public works the general control of public streets and specific authority to prescribe rules and grant permits "for the moving of buildings through the streets"; also a certain ordinance of the city and county of San Francisco relating to permits for moving buildings; and also the particular permit issued to the respondent corporation by the board of public works granting permission to move the schoolhouse in question. All of this evidence was properly admitted. In the absence thereof it might well have been contended that the placing of a building in the street constituted a nuisance within the meaning of section 3479 of the Civil Code, which covers the "unlawful obstruction" of the free use of a public street. The evidence was proper to show that obstruction was not unlawful. Appellant's contention that the charter provisions mentioned conflict with and were superseded by section 83 of the California Vehicle Act (as amended by St. 1929, p. 526, § 29) cannot be sustained. It would be sufficient to point out that it is provided by subdivision b of that section that the general provisions of subdivision a limiting "the maximum width of vehicles and their loads shall not apply to * * * special mobile equipment" and that under section 7½ of said act (added by St. 1927, p. 1421, § 2, as amended by St. 1929, p. 509, § 1), dollies are classified as special mobile equipment. But in addition we believe that a reading of said section 83 and other general sections of the act claimed to be applicable shows that these sections were never intended to apply under the circumstances before us. To construe the general provisions of those sections of the act relating to width of ordinary vehicles and their loads, to the parking of ordinary vehicles, and to the lights required on such vehicles and their loads as applicable to a schoolhouse merely because of the fact that

it is in the street mounted upon several units of special mobile equipment, would in our opinion lead to absurd results.

[4-6] From what has been said it follows that the trial court properly instructed the jury that respondents had the right under the permit from the board of public works to occupy such portion of the street as was necessary to move the school building. It further follows that it was proper to give the instruction to the effect that if the jury found that lights were maintained on said building which under the conditions prevailing were visible for a sufficient distance to apprise persons using the street of the presence of the building and enable them to avoid the danger, the respondents were not negligent. The only objection raised by appellant to the last-mentioned instruction is that it ignored the general provisions of the Vehicle Act relating to lights on vehicles and their loads, but as above indicated, those general provisions were inapplicable. The refusal of the trial court to read to the jury the general provisions of the act relating to lights and to parking of vehicles was not error.

[7] It appears that respondents had removed a lighted red lantern from the rear of the truck and placed it between the lighted headlights on the front of the truck which was standing in front of the schoolhouse and facing in the direction from which appellant was approaching. Appellant strenuously insists that this constituted a violation of sections 100 and 111 of the Vehicle Act (as amended by St. 1929, pp. 531, 536, §§ 39, 42), prohibiting more than two headlights and prohibiting driving on the highway with a red light in front. He thereupon contends that his requested instructions relating to these sections should have been given. Assuming, without deciding, that the placing of this red light on the front of the standing truck constituted a violation of the act, it is apparent that there was no error in refusing the proposed instruction, as the violation, if any, could not have been a proximate cause of appellant's colliding with the schoolhouse.

[8, 9] Appellant offered two further instructions which were properly refused. The first contained the provisions of section 3479 of the Civil Code, which declare the unlawful obstruction of the free use of the street to be a nuisance. The second told the jury that if they found that respondent "unlawfully obstructed" the street, then it was no defense that they were permitted to do so by the municipal authorities. These instructions were contradictory within themselves in that the permit issued by the board of public works made lawful the obstruction of the street to the extent necessary to move the building and said section 3479 could have no application.

The instructions given amply covered the remaining proposed instructions of the appellant in so far as said proposed instructions correctly stated the law applicable to the case.

We do not wish to be understood as indicating that none of the provisions of the Vehicle Act are applicable to any type of structure moved upon the highway mounted on any type of mobile equipment. We are nevertheless of the opinion, as above indicated, that none of the general provisions of the act referred to by appellant are applicable under the facts in the present case.

As in our view the judgment must be affirmed for the reasons stated, we deem it unnecessary to discuss respondents' further contention that appellant was guilty of negligence as a matter of law in running into this standing schoolhouse under the conditions existing and damaging one of the lighted red lanterns which was hanging at or about the point of impact.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

125 Cal.App. 387

PEOPLE v. WILLIAMS.

Cr. 2208.

District Court of Appeal, Second District, California.

Aug. 18, 1932.

1. Criminal law ⇐306.

Presumption constitutes species of evidence which, unless controverted, is sufficient proof of existence of fact to which it relates.

2. Criminal law ⇐1202(3).

Introduction of record showing one with defendant's name had pleaded guilty to burglary established prima facie case against defendant with reference to former conviction (Code Civ. Proc. § 1963, subd. 25).

3. Criminal law ⇐1202(3).

Evidence establishing, prima facie, defendant's former conviction of felony authorized introduction of testimony regarding his admission of prior conviction.

4. Criminal law ⇐1200.

That prior conviction was nine years old did not preclude imposition of additional punishment, since facts relating thereto did not constitute essential ingredient of second offense (Pen. Code, § 800).

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Spencer Williams was convicted of forgery, and of prior conviction of burglary, and he appeals.

Affirmed.

William Bronsten, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

HOUSER, J.

By an information defendant was accused of the crime of forgery. Later, by an amended information, defendant was charged with the commission of the identical offense of which he was originally charged, and, in addition thereto, in substance the information contained the allegation that theretofore, in Yuba county, within this state, said defendant had been convicted of the crime of burglary.

From a judgment of "conviction of a felony, to-wit, forgery, and prior conviction on burglary," defendant has appealed to this court.

[1-3] Appellant contends that prejudicial error was committed by the trial court in that, as related solely to the prior conviction of defendant, "the corpus delicti was not proved at the time the admission of the defendant was allowed to go into evidence." In that connection, the record discloses the fact that preceding the introduction of testimony by a witness to the effect that defendant had admitted to him all the facts relevant to the charge of prior conviction, the prosecution introduced in evidence certified copies of the record in the superior court, in and for the county of Yuba, this state, by which it appeared that theretofore in said court a man by the same name as defendant had pleaded guilty to the former commission by him of the crime of burglary; following which he had been granted probation.

Although prior to the reception in evidence of the admission of defendant which is the subject of appellant's present objection, defendant had not been identified as the person who theretofore had been convicted of a felony, it is noted that the name of the defendant who was convicted in Yuba county is identical with that of the defendant in this action. It is a rule of law that identity of person may be presumed from identity of name (subdivision 25, § 1963, Code Civ. Proc.); also that a presumption constitutes a species of evidence which, unless controverted, is sufficient proof of the existence of the fact to which it relates. 10 Cal. Jur. 746, and authorities there cited. It is therefore apparent that, in the circumstances presented by the record which preceded the admission in evidence of testimony in substance that defendant had admitted his prior conviction, at least a prima facie case had been established against him with reference to his former conviction of a felony. In the case of People v. Hettick, 126 Cal. 425, 428, 58 P. 918, 919, where a similar question was presented for the consideration of the appellate tribunal, it was said:

"In support of the charge of previous conviction of grand larceny the prosecution placed in evidence records of the superior court of San Diego county showing the conviction and sentence to one year in the state prison at San Quentin of 'George Hettick' for the crime of grand larceny in having stolen a mare, the personal property of J. C. Pelton. The testimony of Charles Bell, a witness for the prosecution, was to the effect that the defendant had admitted to him that he was sent to state prison at San Quentin for stealing a horse from John C. Pelton. * * *

"There was nothing to contradict or discredit the foregoing evidence, and we deem it sufficient to support the verdict for the people on the charge of a prior conviction of larceny."

In addition to the facts hereinbefore set forth, the record herein discloses the fact that on cross-examination defendant testified that theretofore, in the county of Yuba, he had been convicted of the crime of "larceny." It follows that, with reference to the point under consideration, defendant has no just ground for complaint.

[4] Appellant also contends that, since "the prior conviction charged in the information is nine years old and outlawed by the statute of limitation," in imposing a sentence on defendant for the commission by him of the crime of forgery, the trial court was without authority to judicially indicate any additional punishment to defendant because of the fact that theretofore he had been convicted of a felony.

The gist of appellant's contention is that, according to the information filed against him, the ultimate fact that defendant had suffered a prior conviction of a felony was an inseparable part and parcel of the main offense of forgery of which he was charged; and that, since by the provisions of section 800 of the Penal Code an information against defendant for the commisson by him of an offense of the nature of that here under consideration must be filed within three years "after its commission," it follows that as to the prior conviction of defendant, which occurred nine years preceding the filing of the information herein, defendant was not lawfully subject to criminal prosecution, and consequently that any judgment rendered by the trial court which in any way imposed, or pretended to impose, upon defend-

ant a sentence of imprisonment greater than that which legally might be imposed for the commission of the crime of forgery (without taking into consideration a prior conviction of defendant) would be and was prejudicial of defendant's substantial rights in the premises.

It is obvious that, if for the commission of a criminal offense, the allegation in the indictment or the information therefor of the necessary facts which relate to any prior conviction of the accused person constitutes an essential ingredient of the second offense, the point presented by appellant is not to be dismissed without having given to it serious consideration; and in that connection, certain cases heretofore decided by the appellate tribunals of this state would seem to countenance, if not to lend support to, the position assumed by appellant. Perhaps originating in the case of People v. Chadwick, 4 Cal. App. 63, 73, 87 P. 384, 389, and thereafter cited and generally followed in the decisions by the courts of this state until and including the case of People v. Carrow, 207 Cal. 366, 369, 278 P. 857, the rule was broadly stated that the fact that the defendant had been previously convicted of a felony was a distinct element of the charge made against him in the indictment, and the defendant has the right to insist that the prosecution shall establish the existence of that element by competent evidence before he can be convicted thereof. But on consideration of each of such authorities it becomes clear that the legal principle there announced is inapplicable to the present situation. For example, in the Chadwick Case, as well as in the case of People v. Carrow, the decision was addressed to the question of whether the evidence received on the trial of the action was sufficient to constitute legal proof of the former conviction of the defendant. The language there respectively employed by the Court of Appeal and by the Supreme Court, the facts considered, is not capable of adaptation to a question of whether the fact of a former conviction is a part and parcel of a subsequent offense. It is not impossible that in the framing of an indictment or an information as may relate to particular offenses, the former conviction of a person accused of the commission of a subsequent offense may become an essential element of the pleading and necessary subsequent proof; but even in such a situation it does not follow that the former conviction of the defendant is a fact directly connected with the violation of the substantive law. As an illustration, a person convicted of the crime of petty larceny becomes punishable as though petty larceny were a felony when in the indictment or the information the fact has been pleaded and thereafter proved that such person theretofore has been similarly convicted and "served a term therefor." Section 666, Pen. Code. But it is obvious that the crime, by whomsoever committed, is defined and determined solely by the overt act which constitutes the criminal offense. The individuality of the person who has violated a general criminal statute is of no importance and furnishes no fact that is determinative of, or even relevant to, the question of whether an infraction of the law has occurred. In the prosecution of any general criminal cases of similar nature, irrespective of whether the respective defendants therein have or have not theretofore been convicted of a felony, wherein proper allegations are contained in the respective indictments or the informations therefor, on the trial the corpus delicti of the alleged crime should be established in the one situation identically as it should be established in the other.

In the case of People v. Wallach, 79 Cal. App. 605, 250 P. 578, 579, the defendant was accused of the crime of burglary, a felony (with a prior conviction). At the trial of the action, on motion of the district attorney, the court struck from the indictment that portion thereof which contained the allegation which related to the prior conviction of the defendant. Following his conviction, on appeal the defendant contended that the necessary result of striking said allegation of prior conviction from the indictment was that thereafter the indictment failed to state a cause of action. In ruling upon the point, in part the court said:

"* * * If this last contention be correct, it must be for the reason that the amendment had the effect of changing the offense charged. This would be so only if the fact of former conviction, as originally alleged in the indictment, is an essential part of the offense, in the sense that burglary committed by one who has suffered a former conviction of burglary is an offense different in character from burglary committed by one who has not suffered such former conviction. * * * Under such circumstances the fact of the former conviction does not change the definition or character of the second offense. It affects only the severity of the punishment. 'The object had in view in charging a previous conviction is not for the purpose of evidence as to the commission of the offense upon which the defendant is to be tried, but for the information of the court in determining the punishment to be imposed in case of conviction, as is clearly shown by sections 666 and 667 of the Penal Code.' People v. Thomas, 110 Cal. 41, 42 P. 456. Our view of the question is made yet more clear by section 1158 of the Penal Code, which requires that the jury, if they find a verdict of guilty 'of the offense with which he is charged,' must separately find whether or not the defendant has suf-

fered the alleged previous conviction, and also, by section 1093 of the Penal Code, which provides that in cases where the indictment or information charges a previous conviction, and the defendant has confessed the same, the clerk, in reading the indictment or information at the trial, shall 'omit therefrom all that relates to such previous conviction.' Manifestly the Code would not have so provided if the charge of a previous conviction was, in legal contemplation, a part of the description of the offense for which the defendant is presently on trial."

As announcing the identical principle of law, see Rawlings v. Commonwealth, 191 Ky. 401, 230 S. W. 529; State v. Webb, 36 N. D. 235, 162 N. W. 358; Neece v. State, 62 Tex. Cr. 378, 137 S. W. 919; Howard v. State, 139 Wis. 529, 121 N. W. 133.

It follows that appellant's point with reference to the applicability of the statute of limitations to the alleged fact of the prior conviction of defendant cannot be sustained.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

125 Cal.App. 135

NESS v. TIMM et al.

Civ. 8034.

District Court of Appeal, First District, Division 2, California.

July 28, 1932.

1. Appeal and error ⇐1010(1).

Trial court's findings supported by substantial evidence cannot be disturbed on appeal.

2. Fraud ⇐49.

Plaintiff suing to recover money allegedly paid through fraud and deceit need not prove every item of false representations alleged, but can recover on proof of one.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by P. L. Ness against Ellis T. Timm and J. Jespersen. Judgment for plaintiff, and defendant last named appeals.

Affirmed.

Edward S. Bell, of Oakland, for appellant.

J. W. O'Neill, of Oakland, for respondent.

NOURSE, P. J.

Plaintiff sued to recover money alleged to have been paid to the defendants through fraud and deceit. He had judgment for $2,503.10, and the defendant Jespersen alone has appealed.

The complaint alleged that the money was paid upon the defendants' representations that they would organize a corporation for the manufacture and sale of candy and give plaintiff one-half the stock; that the defendants were then engaged in the candy business in which they represented they had each invested $2,500; that the cash on hand of said business exceeded the liabilities; that said business was equipped to manufacture and sell 600 pounds of candy a day, and had customers ready to buy that amount; and that defendants then had in mind another man who was willing to invest $10,000 in said business. The trial court found that all these representations were untrue, that plaintiff believed and relied upon them to his injury, and that defendants knew that they were untrue.

[1, 2] On this appeal the sole ground urged by appellant is that the evidence is insufficient to support these findings. All the arguments advanced by appellant would be pertinent if addressed to the trial court, but they are of no force here because in each instance the record discloses that there is some substantial evidence in support of the finding made. This point is emphasized when we bear in mind that it is not necessary for the plaintiff to prove every item of false representations alleged but that he can recover upon proof of one. Here the evidence as to the representations relating to the amount of money invested in the business by the defendants and that relating to the financial condition of the business is so clear and so free from substantial conflict that it alone is sufficient to support the judgment.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

In re REYNOLDS' ESTATE.*

Civ. 975.

District Court of Appeal, Fourth District, California.

Aug. 3, 1932.

Rehearing Denied Aug. 29, 1932. Hearing Granted by Supreme Court Sept. 28, 1932.

Wills ⇐292.

In proceedings to probate, as foreign will, one which had been admitted to probate in sister state, exemplified copies of proceedings in sister state being admitted in evidence, rejecting offer to prove that at time of his death in state testator was resident of county wherein he died *held* not error (Probate Code, §§ 301, 360–362).

There was no error since Probate Code, §§ 301, 360–362, require the superior court of the county whereof a testator was a resident at the time of his death to admit his will to probate as a foreign will, upon proof of its validity according to the laws of the place in which testator was domiciled at the time of his death or according to the law of this state and of its prior admission to probate in another state.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Petition for the probate of the will of John R. Reynolds, deceased, as a foreign will, opposed by Maude Gertrude Jones, administratrix with the will annexed of the estate of Delilah B. Reynolds, deceased wife of John R. Reynolds, deceased. From an order admitting the will to probate as a foreign will, the administratrix appeals.

Affirmed.

Ward & Ward, of San Diego, for petitioner and respondent.

C. C. Pease, of San Diego, for contestant and appellant.

HARDEN, Justice pro tem.

John R. Reynolds died testate in San Diego county, Cal., on October 20, 1930, leaving estate therein. His will was admitted to probate in the county court of Knox county, Ill., in August, 1931. A petition for probate of said will as a foreign will was filed in the superior court of San Diego county on September 28, 1931. Objection thereto was filed by Maude Gertrude Jones, administratrix with the will annexed of the estate of Delilah B. Reynolds, deceased wife of said John R. Reynolds, deceased. At the hearing upon the petition, after the reception in evidence of exemplified copies of the proceedings of the Illinois court, said administratrix offered to prove that at the time of his death decedent was a resident of San Diego county. An objection to said offer to prove was sustained, and the will was ordered admitted to probate as a foreign will. Said administratrix has appealed from said order.

The point raised is that it was error to reject said proffered evidence.

No case has been called to our attention which is decisive of the question.

The authority relied upon by appellant is In re Estate of Clark, 148 Cal. 108, 82 P. 760, 1 L. R. A. (N. S.) 996, 113 Am. St. Rep. 197, 7 Ann. Cas. 306. In that case the decedent died in the county of Yolo, Cal., a resident thereof. Thereafter his will was admitted to probate in the state of New Hampshire. Subsequently proceedings were instituted in the superior court of Yolo county for the purpose of admitting said will as a foreign will. The subject was governed by the provisions of the Code of Civil Procedure. Article 3 thereof (sections 1322–1324) was entitled "Probate of Foreign Wills." As a part of said article was section 1322, which read as follows: "All wills duly proved and allowed in any other of the United States, or in any foreign country or state, may be allowed and recorded in the superior court of any county in which the testator shall have left any estate." The court held that said statute applied to foreign wills only and that the will in question could not be admitted as such. In 1911, after the rendition of said decision said section of the Code was amended by adding thereto a concluding clause reading as follows: "* * * Or shall have been a resident, at the time of his death."

Said statute, as amended, was considered in In re Estate of Sankey, 199 Cal. 391, 249 P. 517. In that case the testator died in Texas. His will was admitted to probate in that state, and afterwards ancillary letters were issued thereon as a foreign will by the superior court of Los Angeles county. A petition to revoke the probate thereof as a foreign will on the ground that the testator was a resident of Los Angeles county, Cal., at the time of his death was granted by the trial court. The order was reversed on appeal. There the attack upon the order was collateral, and the court held it not subject thereto. However, the court stated that under the provisions of section 1322, Code of Civil Procedure, upon proper ancillary proceedings, the superior court of Los Angeles county had jurisdiction to admit the will in question as a foreign will, and also remarked that apparently the amendment of said section in 1911 was intended to overcome the effect of the decision in Re Estate of Clark, supra.

Our question is controlled by the provisions of the Probate Code. Section 360 thereof provides: "A will admitted to pro-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 20 P.2d 323.

bate in any other state or country may be offered for probate in the superior court having jurisdiction as determined by section 301 of this code." Section 301 thereof provides: "Wills must be proved, and letters testamentary or of administration granted and administration of estates of decedents had, in the superior court: (1) Of the county of which the decedent was a resident at the time of his death, wherever he may have died; (2) Of the county in which the decedent died, leaving estate therein, he not being a resident of the state. * * *" Section 361 of said Code authorizes the production of an authenticated copy of such a will and covers the procedure of its admission to probate as a foreign will. Section 362 thereof then provides: "If it appears from such authenticated order or decree or otherwise that the will has been admitted to probate in another state or country, and that it was valid according to the law of the place in which the testator was domiciled at the time of his death, or according to the law of this state, it shall be admitted to probate and have the same force and effect as a will first admitted to probate in this state. * * *" No question is raised herein as to the validity of decedent's will.

As applied to this case the provisions of said sections of the Probate Code may not be distinguished from the provisions of section 1322, Code of Civil Procedure, after its amendment in 1911 (St. 1911, p. 88).

Said sections of the Probate Code require the superior court of the county whereof a testator was a resident at the time of his death to admit his will to probate as a foreign will, upon proof of its validity according to the laws of the place in which the testator was domiciled at the time of his death or according to the law of this state and of its prior admission to probate in another state. To hold otherwise would be to disregard the plain provisions of the statute. The evidence offered was immaterial, and it was not error to reject it.

The order is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

125 Cal.App. 353

TASKER v. PHELPS et al.

Civ. 7319.

District Court of Appeal, Second District, Division 1, California.

Aug. 12, 1932.

1. Corporations ⇐237.

Where note was given by corporation in full payment of prior obligation, new liability arose, as regards question of derivative liability of stockholders.

2. Corporations ⇐269(3).

In action on stockholder's statutory liability, evidence warranted finding that defendant received shares in corporation before corporation's note was delivered.

3. Bills and notes ⇐315.

One acquiring note for value before maturity without notice took free of third person's claim under unfulfilled agreement with payee as to assignment.

Appeals from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by Barbara A. Tasker against Harry C. Phelps in which the A. H. Busch Company intervened. Judgment for plaintiff, and defendant and intervener appeals.

Affirmed.

John C. Miles, of Los Angeles, for appellant Phelps.

Young & Young, of Los Angeles, for appellant Busch Co.

Janeway, Beach & Hankey, of Los Angeles, for respondent.

YORK, J.

Both of the appeals really depend upon the objection that there is not sufficient evidence to support the findings. An examination of the evidence shows that, with the exceptions hereinafter noted, each and every of the findings necessary to support the judgment is fully supported by direct evidence. It is true that there was evidence that would support different findings, but the findings of the trial court, under such a record as we have here, are binding upon this appellate tribunal. The exceptions above mentioned are covered by amendments, which are hereby made in order to conform to the evidence, as follows:

Finding II is amended to read as follows: "That on the 12th day of July, 1928, and for some time prior thereto and at all times thereafter, said corporation had subscribed and outstanding a total of 500 shares of its capital stock."

Finding III is amended to read as follows: "That on July 12, 1928, the defendant Harry C. Phelps was a stockholder of said Wilmont Auto Livery, and had 249 shares of its subscribed, issued and outstanding capital stock, and at the time of delivery of the promissory note set out in the complaint, said defendant was the owner of 498 shares of said stock, including said original 249 shares owned by him. That said promissory note, although dated July 12, 1928, was not delivered until on or about August 2, 1928."

Finding V, which sets forth the fact of execution and delivery of said promissory note, is amended by striking out the words, "that for the purpose of evidencing said obligation," and by substituting therefor the words, "that in full payment of said prior obligation."

The judgment appealed from is affirmed.

CONREY, P. J.

I concur in the judgment. The action is brought to recover upon the statutory liability of defendant Phelps as a stockholder, to pay a proportionate part of money due on a promissory note executed by Wilmont Auto Livery, a corporation, in favor of Wilmont Auto Works & Garage Company, a corporation, which note passed by assignment through successive holders, until it came into the hands of the plaintiff. The intervener, claiming prior rights by assignment of the note, seeks to enforce the same obligation.

The note was dated July 12, 1928. At the trial, defendant admitted that on that day he was the owner of 249 shares of the 500 shares of subscribed stock of the maker of the note, and admitted his liability to the extent measured by that ownership. He claimed, however, and it appears to be the fact, that he did not become the owner of the additional 249 shares charged against him, until after the date of the note. He also contends that the note was given only as evidence of prior indebtedness, and that there is no evidence of the amount of stock owned by him at the time when the indebtedness was originally incurred.

[1] The court should have found as a fact that the note was given in full payment of the prior obligation. This is required by the uncontradicted evidence of the two men who represented the corporation in the transaction, one of them being the defendant Phelps himself. Reporter's Transc., pp. 47 and 44. The decisions are to the effect that, "where there is no understanding that a note shall be accepted in payment and satisfaction of the indebtedness, the liability of the corporation upon the original indebtedness and the derivative liability of those who were stockholders at the time of the creation of the original indebtedness continues." Tierney & Lawford, Inc., v. Wilshire Café Co., 209 Cal. 605, 608, 289 P. 621, 622. Inferentially, it would appear that, if there be such an understanding, whereby the first indebtedness is extinguished, then a new liability arises.

[2] The evidence also proves that the note, although dated July 12th, was not delivered until August on a date subsequent to the transfer to the defendant of the aforesaid additional 249 shares. The defendant himself testified that these additional shares were transferred to him on August 1st, and that the note was actually made on or about August 1st and delivered "perhaps the day after."

[3] As between the intervener and the plaintiff, I think that the court was justified in finding in favor of the plaintiff. The note was assigned and delivered for value, and prior to maturity, to plaintiff's assignor and without notice of the adverse claim of the intervener. There is some evidence that, prior to such assignment, there had been an agreement between the intervener and the payee of the note by which agreement the payee had promised to assign and deliver the note to the intervener, but that the intervener never acquired possession of the note. Under these circumstances, the court was justified in holding that the note became the property of the plaintiff. This being so, the incidental stockholder's liability was a liability to the plaintiff and not to the intervener.

I concur: HOUSER, J.

125 Cal.App. 357

GROVE v. LEWIS et al.

Civ. 7486.

District Court of Appeal, Second District, Division 1, California.

Aug. 12, 1932.

1. Brokers ⇐86(5).

Finding that broker procured purchasers ready, able, and willing to purchase vendors' property *held* supported.

2. Appeal and error ⇐1010(1).

Trial court's conclusion supported by substantial evidence cannot be disturbed.

3. Brokers ⇐54.

Vendors entering into contract with purchasers could not, when sued by broker for commission, question purchasers' financial ability.

4. Brokers ⇐60.

Broker procuring purchasers ready, willing, and able to buy *held* entitled to commission notwithstanding actual transfer did not result from agreement between vendors and purchasers.

5. Brokers ⇐80.

That broker waived commission in event certain owner failed to sign deed did not preclude broker from recovering commission where owner on signing authorized delivery of deed only on condition that she would receive certain sum.

6. Appeal and error ⇐891.

Appellants' application to introduce additional evidence in appellate court could not

be granted where evidence would be but cumulative and not determinative of issues presented (Code Civ. Proc. § 956a; Const. art. 6, § 4¾).

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by John J. Grove against Harry L. Lewis and another. Judgment for plaintiff, and defendants appeal and move to take additional evidence.

Judgment affirmed and application to take additional evidence denied.

Mervin Glass, of Los Angeles, for appellants.

Best & Best, of Riverside, for respondent.

HOUSER, J.

Defendants appeal from a judgment rendered by the superior court in favor of plaintiff in an action to recover a commission alleged to have been earned by plaintiff in performing services for defendants in effecting a sale of certain real property.

[1, 2] It is first contended by appellants that the evidence was insufficient "to show that plaintiff procured purchasers ready, able and willing to purchase the property of the defendants." In that connection, stress is laid upon the point that, although plaintiff was present and assisted in the negotiations between the interested parties on each of several occasions, at which times the sale of the property in question was under consideration, he never appeared to be acting in the capacity of agent for defendants, but rather seemed to be a person who was taking merely a friendly interest in the matter. But the record discloses the fact that plaintiff had a written agreement with defendants regarding his agency and the compensation to which he would become entitled in case he were to make a sale of the property, and that at least he materially aided in inducing the purchasers to enter into a contract with defendants to purchase the property. In such circumstances, together with other dependent facts with relation thereto which were before the trial court, it is manifest that the conclusion reached by the trial court thereon was supported by substantial evidence, and hence that such conclusion may not be disturbed by this tribunal.

[3] As an additional objection, appellants direct attention to the asserted fact that the trial was devoid of evidence by which was established the conclusion that the purchasers were financially able to pay the price which they agreed to pay for the property. However, it is admitted that, in writing, defendants agreed to sell the property to the persons produced by plaintiff, and that by the terms of the same instrument those persons agreed to purchase it. In the case of Sobaje v. Schubert, 37 Cal. App. 709, 174 P. 364, it is said (syllabus): "Where an owner of real property accepts the offer therefor made by a person produced by the broker employed to make the sale, he thereby admits the readiness, willingness, and ability of the purchaser to consummate the sale."

In the case of Malmstedt v. Stillwell, 110 Cal. App. 393, 398, 294 P. 41, 42, it is said: "It is urged that there was no evidence that Simonsen and Fleming were able and willing to buy; but, as held in the following cases, where the owner accepts the buyer procured—which the evidence sufficiently shows was true in the present case—he thereby admits the readiness, willingness, and ability of the purchaser to consummate the sale. [Citing authorities.] * * *"

In the case of McNamara v. Steckman, 202 Cal. 569, 572, 262 P. 297, 298, it is held that: "* * * Furthermore the execution by the owner of said contract of sale is conclusive proof that he was satisfied as to the qualifications of the purchaser and his ability to carry out the terms of the contract. * * *"

To the same effect, see Wood & Tatum Co. v. Basler, 37 Cal. App. 381, 384, 173 P. 1109; Johnson v. Krier, 59 Cal. App. 330, 332, 210 P. 966; Freeman v. Creelman, 60 Cal. App. 14, 23, 212 P. 56; Contant v. Wallace, 62 Cal. App. 768, 770, 217 P. 1081; Brooks v. Gross, 106 Cal. App. 277, 281, 288 P. 1089; Vickery v. Valdez, 113 Cal. App. 135, 142, 298 P. 151.

It therefore is manifest that the position assumed by appellants in that particular is not well taken.

[4] The next legal proposition advanced by appellants is that "the evidence does not show that a sale of the defendants' property was ever consummated."

As hereinbefore has been set forth, through the efforts of plaintiff certain persons were induced to agree to purchase from the defendants, and thereupon the defendants agreed to sell to said persons the property which was the subject of the commission contract theretofore entered into between plaintiff and the defendants. Specifically, appellants contend that, because an actual transfer of title to the property from the defendants to the intending purchasers did not result from the agreement which had been executed by the respective parties, plaintiff is not entitled to his commission for effecting a sale of the property. But the law of this state has long since been settled to the contrary. The syllabus in the case of Purcell v. Firth, 175 Cal. 746, 167 P. 379, succinctly states the rule which is here applicable as follows: "Under an agreement to pay a real estate broker the regular commission on a sale of real estate 'when the same is consummated,' the commission is earned when a purchaser ready, willing, and able to buy is produced, regardless of the con-

summation of the sale by the passing and recording of the deed."

And in Turner v. Watkins, 36 Cal. App. 503, 172 P. 620, by the syllabus therein the law is thus declared: "Under an agreement to pay a broker a commission upon the 'consummation' of an exchange of real property within a fixed time, the broker is entitled to his commission where, within the time, he presents the other party to his principal and they enter into an agreement for the exchange, notwithstanding the deal was never completed and deeds did not pass between the parties." See, also, Radich v. Cernokus, 65 Cal. App. 452, 224 P. 124; Phelps v. Prusch, 83 Cal. 626, 23 P. 1111; Wallace v. Zinman, 200 Cal. 585, 254 P. 946, 62 A. L. R. 1341.

[5] It is also urged by appellants "that Mrs. Lewis (one of the defendants) did not sign the deed"; and consequently that no commission for the sale of the property was earned by plaintiff. However, as is shown by the record herein, the deed actually was executed by Mrs. Lewis. But the latter fact considered, appellants contend that, because the agreement by which the defendants agreed to pay a commission to plaintiff contained the provision that "in the event that Mrs. Harry L. Lewis fail to sign the deed to said property, John J. Grove (plaintiff) waives his claim for his commission," an unqualified signature to the deed by Mrs. Lewis was contemplated by the parties; and that, because on signing the deed Mrs. Lewis authorized its delivery on the condition that from the money which might be received from the sale of the property she should be paid the sum of $15,000, it should follow as a matter of law that, since no transfer of title to the property resulted, plaintiff was not entitled to any commission.

The provision in the agreement regarding the waiver by plaintiff of his commission related only to the signature by Mrs. Lewis of the deed without any condition which she might demand or impose as a consideration for her signature. It is apparent that any arrangement between the two defendants as to a division of the proceeds of the sale of the property should not have the effect of depriving plaintiff of his right to a commission to which otherwise under the law he had become entitled.

[6] Assumedly under authorization therefor, as provided by section 4¾ of article 6 of the Constitution, and section 956a of the Code of Civil Procedure, as a claimed right incident to their appeal, appellants have presented herein their application "for leave to produce additional evidence," to the end that this court "may make findings of fact contrary to, or in addition to, those made by the trial court," and thus reverse the judgment rendered by the trial court.

As set forth by appellants in their said application, "material evidence bearing on the issues in the above-entitled action has been discovered and produced * * * subsequent to the trial; * * * that said evidence, as set forth in the supporting affidavits, * * * shows that the appellants were defrauded by respondent John Grove, and that a sale of the real property on which said respondent claims a commission was never authorized or intended by the so-called purchasers thereof; that said respondent is not the real party in interest and was not the procuring cause of a sale of such real property, if any such sale took place."

Under the issues presented by the pleadings in the action, it well may be doubted whether much of the evidence of the nature of that indicated by the language contained in the application would be admissible on the trial of the action; but waiving any such objection, and considering the proposed additional evidence as admissible under the present issues, on consideration of such evidence as is outlined in the application and as is amplified by the "supporting affidavits," it is clear that the effect is identical with a condition which would appear on a motion for a new trial on the ground of "newly-discovered evidence." It is not even suggested by appellants that the evidence which they seek to introduce necessarily would result in findings of fact which would be "contrary to, or in addition to, those made by the trial court." At most, if admitted, in the main the proposed evidence would be but cumulative of that which was received on the trial of the action; and even assuming that it should not be weakened on cross-examination of the witnesses who gave testimony to the effect as indicated by the application herein, or that it would not be absolutely overcome by rebuttal which might be produced by plaintiff, on the issues presented by the pleadings it would still be within the power, authority, and discretion of the court to make findings identical with those already made. In other words, the "newly-discovered evidence" is not, nor would it be, determinative of the issues presented; it is not conclusive. Furthermore, it is offered, not for the purpose of affirming the judgment, but for the purpose of reversing it.

Considering the facts as disclosed both in the record on appeal and in the affidavits filed herein in support of the application of appellants to take said additional evidence, it would appear to be definitely settled by the authority of the appellate tribunals of this state that the resulting situation does not justify an order by this court by which the application by appellants would be granted. Tupman v. Haberkern, 208 Cal. 256, 280 P. 970; In re Estate of Wirt, 207 Cal. 106, 277 P. 118; Davis v. Chipman, 210 Cal. 609, 293 P. 40; Isenberg v. Sherman, 212 Cal. 454, 298 P. 1004; White v. Kretz (Cal. App.) 10 P.(2d) 198; Sminia v. Department of Water and Power (Cal. App.) 6 P.(2d) 561; Clough v. Al-

len, 115 Cal. App. 330, 1 P.(2d) 545; First Nat. Bank of Findlay v. Terry, 103 Cal. App. 501, 285 P. 336.

It is ordered that the judgment be and it is affirmed. Furthermore, that the application to take additional evidence herein be and it is denied.

We concur: CONREY, P. J.; YORK, J.

125 Cal.App. 13

LARSEN et al. v. STATE INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8512.

District Court of Appeal, First District, Division 2, California.

July 20, 1932.

1. Master and servant ⇐419.

Valid award by Industrial Accident Commission may be set aside and new one entered only in statutory manner (St. 1917, p. 850, § 20(d).

2. Master and servant ⇐419.

Amended compensation award made by Industrial Accident Commission, without notice to employer and insurer and opportunity to be heard, *held* void (St. 1917, p. 850, § 20(d).

3. Master and servant ⇐419.

Proceedings by Industrial Accident Commission involving rehearing and affirming of amended award made on last day of two hundred forty-fifth week after injury, where amended award was void, *held* void (St. 1917, p. 850, § 20(d).

St. 1917, p. 850, § 20(d), confers upon the Industrial Accident Commission continuing jurisdiction, but provides that no award of compensation "shall be rescinded, altered or amended after two hundred forty-five weeks from the date of the injury." The amended award was made on the last day of the two hundred forty-fifth week after the date of the injury, and the rehearing of amended award was thereafter had, and such award was affirmed, though it was void.

4. Master and servant ⇐419.

Time for Industrial Accident Commission to modify award is limited to 245 weeks after date of injury (St. 1917, p. 850, § 20(d).

5. Master and servant ⇐414.

Before compensation award may be made against employer and insurer, notice must be given and opportunity for hearing must be had (St. 1917, p. 850, § 20(d).

Certiorari by Nels Larsen and another, copartners, doing business as Larsen & Larsen, and another, to annul an order of the Industrial Accident Commission awarding compensation to Joseph Wellde.

Award annulled.

Barry J. Colding, Theodore Hale, and Carroll B. Crawford, all of San Francisco, for petitioners.

A. I. Townsend, of San Francisco, for respondents.

STURTEVANT, J.

The petitioners have applied for a writ of review to annul an award made by the respondent Commission. The record is very long; however, the facts pertinent to this application are very brief.

On December 23, 1924, while employed by Larsen & Larsen, the respondent Joseph Wellde was injured. At that time the New Amsterdam Casualty Company was the insurance carrier for the employers. Thereafter, on July 27, 1927, the respondent Commission made an award in favor of the employee and on January 31, 1929, it amended its award. By the terms of the last award the liability of the insurance carrier was made as follows: "Award is made in favor of Joseph Wellde, applicant, against New Amsterdam Casualty Company of the sum of $3,974.10, payable at the rate of $20.38 a week, beginning January 31, 1925, and continuing for one hundred ninety-five weeks, until all of said award shall have been paid, less $100 payable to Alex Sheriffs, and less the further sum of $100 heretofore paid to applicant's former attorney, Joseph A. Brown, and it is ordered that the employers herein be dismissed and discharged from liability herein." No attack thereon was made, no application for a rehearing was made, and no further step was taken before the respondent Commission, and the respondent Commission did nothing else until the 3d day of September, 1929. On that date without any motion being made, without notice to the insurance carrier or to any one else, but of its own motion, the respondent Commission entered an award as follows: "Award is made in favor of Joseph Wellde, applicant, against New Amsterdam Casualty Company, defendant, of the sum of $20.38 weekly beginning January 1, 1925, and until two hundred forty weekly payments shall have been paid in the total sum of $4,891.20 and the further sum of $12.54 weekly, thereafter, for the remainder of his natural life." At this point it should be noted that the last-named award was made on the last day of the week, which was the two hundred forty-fifth week after the date of the injury. Claiming that the award last referred to was void, the insurance carrier at once applied for a rehearing; the rehearing was at once

granted and thereafter the award was, by the respondent Commission, affirmed. Thereafter the insurance carrier applied to this court for a writ of review and for a judgment to the effect that the amended award dated September 3, 1929, be annulled.

In support of its petition the insurance carrier asserts that the amended award was void for two reasons: (1) No notice of an intention to make an amended award was given to the insurance carrier and therefore the amended award was void; (2) the statutory term of two hundred forty-five weeks having expired, the respondent Commission had no jurisdiction to entertain the petition for a rehearing on, or to enter any order either affirming or overruling the award made September 3, 1929. The two attacks will be considered together. The petitioners quote section 20, subdivision (d) of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 850) and italicize as follows:

"Sec. 20. * * * (d) The commission shall have continuing jurisdiction over all its orders, decisions and awards made and entered under the provisions of sections six to thirty-one, inclusive, of this act and may at any time, *upon notice, and after opportunity to be heard is given to the parties in interest*, rescind, alter or amend any such order, decision or award made by it upon good cause appearing therefor, such power including the right to review, grant or regrant, diminish, increase or terminate, within the limits prescribed by this act, any compensation awarded, upon the grounds that the disability of the person in whose favor such award was made has either recurred, increased, diminished or terminated; provided, that no award of compensation shall be rescinded, altered or amended after two hundred forty-five weeks from the date of the injury. Any order, decision or award rescinding, altering or amending a prior order, decision or award shall have the same effect as is herein provided for original orders, decisions or awards." Continuing, the petitioners cite Utah Fuel Co. v. Industrial Commission of Utah, 67 Utah, 25, 245 P. 381, 45 A. L. R. 882. The case is not absolutely in point. The statute of Utah is not an exact copy of our statute. Nevertheless, we think the case is very persuasive. In that case Thomas Pelly, Sr., and Thomas Pelly, Jr., were killed while employed by the Utah Fuel Company. The surviving wife of Thomas Pelly, Sr., in behalf of herself and children, at once applied for an award. The application was granted and an award was made in terms as applied for. That award was based on the theory of dependency on Thomas Pelly, Sr. Later Catherine Pelly and her children applied for additional compensation on the theory that they were dependents of Thomas Pelly, Jr. Thereafter the second application was granted. On the hearing on the last application, the commission, of its own motion and without notice to the employer, modified the finding made on the first application. When before the Supreme Court of Utah, the plaintiff contended that the commission exceeded its jurisdiction in modifying the first award without giving notice to the plaintiff and without giving the plaintiff an opportunity to be heard. On page 387 of 245 P., 67 Utah, 25, 45 A. L. R. 882, the court said: "The finding in this case was modified pursuant to the provisions of that section. There is no doubt respecting the continuing jurisdiction of the commission. In making modifications of orders or findings, therefore, the commission does not necessarily act without or in excess of its jurisdiction. It may, nevertheless, act in excess of its powers where, as here, it makes a change in a finding or order, which materially affects the rights of an interested party, without notice to such party, and without an opportunity to be heard. Any material change that is made in a finding of fact, or in an order touching an award, must necessarily depend upon some existing fact or facts. While it is true that the commission may possess what it deems to be ample or even conclusive evidence of such a fact or facts, yet it does not follow that the party interested must agree with the commission's conclusions, or that he may not contest or dispute the facts as claimed by it. Moreover, where the modification or change affects a substantial right of the aggrieved party, it should be given the benefit of a hearing and a right to review the decision of the commission in making the modification or change. We are of the opinion, therefore, that in making the modification in this case without notice to the plaintiff, and without giving it an opportunity to be heard, the commission exceeded its powers."

[1-5] Replying to the petitioners' attacks, the respondent Commission says: "When the commission granted the petition for rehearing in the case at bar, the lack of notice and opportunity to be heard, to which the parties were entitled under section 20 (d) was cured." That remark is not sound. The order of September 3d was void. A void order cannot confer jurisdiction. But on that date the term of two hundred forty-five weeks ended and all power to amend ceased. It necessarily follows that the subsequent order, March 3, 1932, affirming the void order was itself void. The respondent Commission next asserts: "There is a disposition to contend that the commission may rescind, alter or amend a previous decision only within two hundred forty-five weeks after date of injury. With this contention the commission agrees except where the right to petition for a rehearing from any order made within the two hundred forty-five week period itself lies beyond the two hundred forty-five week period. The case at bar is a concrete example. The

final order of September 3, 1929, was made the last day of the two hundred forty-fifth week. Under such circumstances it is submitted that if any aggrieved party petitions for rehearing within twenty days thereafter, the right to rescind, alter or amend is extended for a period of time not exceeding eighty days, twenty days allowed to the parties to file petition for rehearing, thirty days after filing of said petition allowed the commission to consider same, and thirty additional if the time of consideration is extended." The respondent Commission cites no authority supporting any part of the foregoing argument. We know of none. If on the last day of the week of the two hundred forty-five week period an application for an amended award had been made, on notice duly given, and had thereupon been heard and submitted, and if the Commission ruled thereon some day subsequent to the two hundred forty-five week period, the question would be altogether different. Osmont v. All Persons, 165 Cal. 587, 133 P. 480. Again the respondent Commission asserts: "But it is earnestly contended that the failure to give notice and opportunity to be heard on the peculiar facts of this case should not be held to be fatal where the machinery is available to expeditiously and immediately remedy such lack of notice. * * * Unless the court does take this view of the present situation, which we believe is an entirely legal and valid solution of the situation, the result will be a denial of the benefits of the act to a workman who has clearly been totally and permanently disabled as the result of injury." The argument is far from satisfactory. If the award made January 31, 1929, had been void, the respondent Commission could, on its own motion, have set it aside. People v. Davis, 143 Cal. 673, 675, 77 P. 651. As that award was valid it could be set aside and a new one entered only in the manner provided by the statute. Section 20, subd. (d); 34 C. J. 220 and 258. As no notice was given and no hearing was had the order of September 3, 1929, was void. Scamman v. Bonslett, 118 Cal. 93, 99, 50 P. 272, 62 Am. St. Rep. 226; McConville v. Superior Court, 78 Cal. App. 203, 208, 248 P. 553. As that award was void the subsequent proceedings predicated thereon were also void. Woodruff v. Matheney, 55 Ill. App. 350; Kelley, Maus & Co. v. Heath & Milligan Mfg. Co., 66 Ill. App. 528. Moreover, if the award made January 31, 1929, was wrong, that error on the part of the Commission cannot be cured, and should not be cured, by another wrong decision on its part approved by a wrong decision on the part of this court. The reasoning that would support such an amended award in favor of the claimant will support an amended award terminating every award in favor of every claimant who is now receiving payments under the statute. It will suffice to remark that the time for the respondent Commission to modify an award is by the statute limited to 245 weeks, and furthermore, that before an award may be made notice must be given and an opportunity for a hearing must be had. Sec. 20, subd. (d), Workmen's Compensation, Insurance and Safety Act. The terms of that statute are clearly based on the provisions of section 473 of the Code of Civil Procedure. The latter statute limits the powers not only of courts of law but of courts of equity. Those courts may not amend their judgments in matters of substance except on motion made after notice given and hearing had. 14 Cal. Jur. 1007; Scamman v. Bonslett, supra; Herd v. Tuohy, 133 Cal. 55, 58, 59, 65 P. 139; Lauchere v. Lambert, 210 Cal. 274, 278, 291 P. 412. If greater power was given to the respondent Commission than has been given to our courts, we would expect to find it expressed in clear terms in the statute. It is not so expressed or expressed at all.

The award is annulled.

We concur: NOURSE, P. J.; SPENCE, J.

125 Cal.App. 147

TROENDLE v. CLINCH et al.

Civ. 7388.

District Court of Appeal, Second District, Division 1, California.

July 29, 1932.

1. Brokers ⇐8(3).

In action against brokers for damages resulting from fraudulent misrepresentations, evidence sustained finding that brokers, who exchanged leasehold for plaintiff's property, acted as plaintiff's agents from time leasehold was acquired.

2. Appeal and error ⇐1010(1).

Reviewing court may not refuse to accept finding unless there is complete absence of substantial evidence in support thereof.

3. Brokers ⇐8(3).

Written authorization to brokers *held* unnecessary to establish agency, where customer ratified acts in execution of agency by executing exchange agreement.

4. Brokers ⇐34.

Brokers, who, acting as agents, induced principal to exchange property for leasehold, are guilty of fraud in concealing true value of leasehold.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

5. Brokers ⇐38(4).

Evidence sustained finding that brokers induced principal's exchange of property for lease by false representations and concealment.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Isabel M. Troendle against Mostyn C. H. Clinch and others. Judgment for plaintiff, except as against defendant Frank Weadon, and defendants, except defendant Weadon, appeal.

Affirmed.

Leonard Wilson, of Los Angeles, for appellants.

Phil S. Gibson, of Los Angeles, for respondent.

TAPPAAN, Justice pro tem.

Plaintiff and respondent here recovered a judgment as against defendants and appellants Clinch & Thurtle, real estate brokers and copartners, and one Donnell, the mother-in-law of defendant Clinch. No judgment was had as against defendant Weadon.

The evidence as presented upon this appeal discloses the following facts: Plaintiff for some years prior to the transactions here involved was the owner of a certain house and lot in the city of Los Angeles and had attempted to sell or trade the same. She had at different times listed this property with various real estate agents for sale. Plaintiff was directed to defendants Clinch and Thurtle by a real estate firm with whom she had had some business transaction, some time between the 1st and 10th of April, 1927. On April 12, 1927, defendant Clinch first learned that a fifty-year lease of certain property situated upon Western avenue in the city of Los Angeles could be secured for the sum of $6,500, though Clinch did not succeed in contacting the owner of this lease until April 19, 1927. On April 12, 1927, the day he first learned that the Western avenue lease could be purchased, defendant Clinch called plaintiff to his office and informed her that a very rich man, who had been recently married, wished to purchase a nice home; that this man specialized in leases and wished to trade for a home a lease he had upon Western avenue; that this lease could be exchanged for her property. Plaintiff told defendant Clinch at this time, and at subsequent interviews, that she would have to rely upon him to advise her in the matter of the exchange. On April 14th defendant Clinch brought defendants Weadon and Donnell to plaintiff's home and introduced them to her as Mr. and Mrs. Weadon, and showed them the house and told plaintiff that Weadon was the owner of the Western avenue lease he had told her about. The next day Clinch told plaintiff he was mistaken about Weadon being married, but that he was engaged to Mrs. Donnell. On April 22d Clinch secured a listing of the Western avenue lease from the owner at the stated price of $6,500. On the same day, April 22d, Clinch told plaintiff that Weadon was willing to make the exchange. On April 23d at Clinch's direction plaintiff made from other persons inquiries as to the value of the lease, but was informed by them that they knew nothing as to its value and that she would have to rely upon her agent, Clinch, as to the exchange. Of this fact she informed Clinch. In the afternoon of the same day, at defendants Clinch and Thurtle's office, there being present defendant Clinch, plaintiff, and another agent who took no important part in the transaction, the exchange agreement was signed by plaintiff. Clinch read parts of the agreement to plaintiff, but it would appear, plaintiff never read, nor was the whole agreement read to her at this time. The agreement was the usual form of exchange agreement and called for the exchange of plaintiff's property for the lease. Defendant Clinch never informed plaintiff of the true value of the lease or who was the true owner, and at all times represented to her that it was of the value of $35,000, which was the valuation plaintiff placed upon her property. Clinch told plaintiff that Weadon was the owner of the lease. It is true that defendant Clinch in his testimony denied many of the statements made by plaintiff as to the transaction, though the testimony of the other witnesses who testified at the trial did not, as to the material parts of her testimony, tend to contradict her testimony. At the time of the signing of the exchange agreement plaintiff and the other agent present at the time testified that Clinch borrowed from plaintiff the sum of $2,850 and agreed to return to her $3,000 at the close of the escrow. Defendant Clinch testified that this sum was merely deposited as a proof of good faith on the part of plaintiff and that the sum of $150 returned to her in the escrow in addition to the $2,850 was in fact a reduction of his commission.

Weadon's name appears in the escrow, but it was signed by defendant Clinch in all instances. Clinch also signed Weadon's name in the acceptance of the exchange agreement. Weadon testified that he had no personal knowledge as to these matters. The evidence shows that defendant Clinch secured a loan from a bank of the sum of $5,500, which, taken with the funds secured from plaintiff, enabled him to purchase the lease of the Western avenue property from the owner and close this part of the escrow. This loan from the bank was secured by an order as against funds to be obtained from a mortgage to be

secured upon plaintiff's property. In the escrow the title to plaintiff's property was directed to be taken in the name of defendant Donnell, defendant Clinch explaining to plaintiff that Weadon was making a wedding gift to Mrs. Donnell. Before the close of the escrow a loan of $12,500 was secured upon plaintiff's property. Plaintiff noticed that the assignment of the lease was from one Yanow and not Weadon. This Clinch explained was due to the fact that Weadon did not have his papers straight and that he (Clinch) had had them fixed to protect plaintiff. From the escrow, plaintiff in addition to the assignment of the lease, received $3,000 and the firm of Clinch and Thurtle the sum of $8,863.03; that latter amount being the sum remaining after deducting commissions paid to another agent and escrow and title charges. Out of the sum paid to Clinch and Thurtle was repaid the loan of $5,500 made by the bank.

On July 11, 1927, defendant Donnell sold the property she had acquired from plaintiff through the escrow for the sum of $20,000. In fixing the sum to which it found plaintiff was entitled the trial court, it would appear, deducted from the $20,000 which was obtained for the property secured from plaintiff, the sum of $6,500 paid for the lease of the Western avenue property and $875 paid in commissions to another agent, and in escrow and other charges and gave judgment for the difference, $12,625. From this judgment defendants against whom it was awarded appeal. At the trial appellants introduced testimony to the effect that some five years before the transaction here involved occurred, defendant Donnell placed in the care of defendant Clinch, her son-in-law, a sum of about $2,000 and that sum at the time of the escrow mentioned here, together with accumulations amounted to some $2,700; that this said sum was used in the acquiring of the Western avenue lease; that Mrs. Donnell and Weadon were engaged to be married, but that at some time during the transaction in which plaintiff became involved they changed their intention as to acquiring a home; that Mrs. Donnell acted in good faith throughout the transaction, and from the funds secured through the escrow at a later date purchased property of a value in excess of $10,000. The evidence as to this phase of the case as contained in the bill of exceptions is not of a very convincing nature when read as a whole, and in some instances it would appear that the testimony given by the witnesses at the time of trial differed materially from that given upon deposition prior to trial. It would seem somewhat extraordinary that a sum of $2,000 under the control of defendant Clinch required some five years to increase to $2,700, while in a few months, at most, and under the same control, and just at the time plaintiff came in contact with all of the parties, this $2,700 became something over $10,000.

[1, 2] Appellants' first contention is that there is no evidence to support the finding made by the trial court that defendants Clinch and Thurtle acted as agents for plaintiff at the time the leasehold was acquired and that their agency must be deemed to have been created as of April 23d, the day the exchange agreement was signed by plaintiff. This contention on the part of appellants is without merit. The evidence at best but shows a conflict and to any unbiased reader must clearly show a well-conceived plan on the part of defendants Clinch and Thurtle from the time of their first contact with plaintiff in reference to the lease, to represent her as her agents, in this transaction. The signing of the exchange agreement was the culmination of this representation of her by these defendants rather than the initiation of this agency relationship. As in all cases of this character, the evidence is of a more or less circumstantial nature, but it cannot be said that there is no evidence to support the findings nor that it is not of a substantial nature. "Insufficiency of the evidence, before it will justify a court of appeal in refusing to accept and follow a finding of fact, must amount to a complete absence of any substantial evidence in support of the finding. A common statement of the rule on appeal is that if the evidence is conflicting, the finding will not be disturbed." City of San Diego v. Cuyamaca Water Co., 209 Cal. 152, 167, 287 P. 496.

[3, 4] Under the circumstances present in the instant case a written authorization was not necessary to establish the agency relationship. "Wherever an agent, imperfectly authorized in the first place, performs acts in execution of the agency which are ratified by the principal, the principal is entitled to enforce his demands against the agent for anything for which the agent has received on his account." McBride v. McCartney, 53 Cal. App. 707, 709, 200 P. 756, 757. That there was a duty upon the agents Clinch and Thurtle to disclose the true value of the leasehold to their principal, the plaintiff here, and that their concealment of this material fact amounted to a fraud, are facts so well established in our law as to render it unnecessary to support them by an extended citation of authorities. McPhetridge v. Smith, 101 Cal. App. 122, 139, 140, 281 P. 419.

[5] Appellants next attack certain findings made by the trial court that defendants Clinch and Thurtle in effect made to plaintiff false representations of fact and that they concealed from her material matters, on the ground that there is no evidence to support such findings. With this contention we cannot agree. There is ample and substantial evidence to support these findings. "There is contained in the record here competent and persuasive evidence in support of the findings and judgment. As might be anticipated in a case

of this character, the testimony is in conflict as to whether defendants made the representations charged against them, but there is nevertheless sufficient evidence of a tangible character to uphold the conclusions of the trial court, to meet the requirements as to the degree of proof required to support findings of fraud, and to establish the misrepresentations found by the court to have actually been made. *Discussion with respect to certain immaterial findings is unnecessary.*" (Italics ours.) Neff v. Engler, 205 Cal. 484, 490, 271 P. 744, 747. What has already been said herein as to certain findings attacked by appellants applies with equal force to the attack made upon the findings that defendants Clinch and Thurtle, while representing themselves as her agents to plaintiff, were in fact acting as principals, and that defendant Donnell was in fact a "dummy" employed by her codefendants in the transaction. An examination of the other specifications of error made by appellants fails to disclose anything that would justify this court in reversing the judgment made and entered herein.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

125 Cal.App. 106

PEOPLE v. DAY.

Cr. 2190.

District Court of Appeal, Second District, Division 1, California.

July 26, 1932.

Rehearing Denied Aug. 9, 1932.

Hearing Denied by Supreme Court Aug. 25, 1932.

1. Criminal law ⇐531(3).

Evidence *held* to establish that confession obtained while defendant was in custody of investigators was not free and voluntary, rendering confession inadmissible.

2. Criminal law ⇐1169(12).

Admitting confession which was not free and voluntary *held* prejudicial to defendant's substantial rights, in view of other testimony, warranting reversal of conviction.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Olive Clark Day was convicted of contributing to the delinquency of a minor, and she appeals

Judgment and order reversed.

Lorrin Andrews and Edward Moran, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy O. Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

HOUSER, J.

From a judgment of conviction of the crime of contributing to the delinquency of a minor, and from an order by which her motion for a new trial was denied, defendant appeals to this court.

Although appellant's brief on appeal contains several different specifications of error, upon each of which she relies for a reversal of the judgment, it is deemed necessary that but one of such assignments of error should occupy the attention of this court. It relates to the admissibility on the trial of the action of the alleged confession of defendant.

[1] With reference only to the question submitted to the trial court which related to the admissibility of such confession, it appears that on the part of defendant many facts were admitted in evidence which tended to show that the alleged confession of defendant was not made either freely or voluntarily, or without hope of immunity being extended to defendant, either by the district attorney or by the trial court. But as to such facts as were contradicted by evidence submitted by the people, in the decision herein none of them should be, nor is, taken into consideration by this court. However, the record herein discloses the following undisputed facts: At the home of defendant, in the nighttime, or "late in the evening," on February 25, 1931, without a warrant of arrest, but by means of showing their "credentials," which consisted of a "badge" worn by each of two so-called "investigators" from the office of the district attorney, against the wishes of defendant and over her objection thereto, she was "taken into custody" but "not arrested." From her home she was taken by the "investigators" to the office of the district attorney, where she was questioned. Without any criminal charge being first filed or made by any person against defendant, she was then taken to a room in a hotel where she was kept "in custody" from February 25 to March 2, under constant guard by two women "investigators" from the office of the district attorney, during which time, not only by her guards but as well by other "investigators" connected with the office of the district attorney, she was questioned "at intervals," or "from time to time," not only relative to the offense of which she was subsequently charged and convicted, but also

in connection with her knowledge of facts which were presumed to be material to the prosecution of another person on a charge which was similar to the charge which a considerable time later was made against defendant. On one occasion during her confinement in the hotel, accompanied by a guard, defendant was permitted to keep an appointment with the individual to whom reference has just been had, for the purpose of obtaining evidence intended to be used on the trial of a criminal action against that individual. On another occasion, under similar restraint, she was permitted to go to her home for the purpose of obtaining for her use some personal wearing apparel. One of the "investigators" testified that "she (defendant) cried on one or two occasions a little bit."

Relative to the question of whether the confession by defendant was made freely and voluntarily, a part of the testimony given by defendant, which in no way was contradicted by any witness, included the following: "* * * I couldn't even, without permission, I couldn't go any place that I wanted to. I had my car in Long Beach, and I was forbidden to go for my car. * * * I was never alone; I was always with Miss Fairchild or Miss Six. * * * They finally let me 'phone the place where I worked, so I could tell them why I wasn't showing up to work. * * * She (one of the guards) said the district attorney's office was paying them (the hotel bills); and they would take care of me for six months, if necessary, until they got through with me as a witness; that she had had the Pringle girl there, and that it was their general place to keep witnesses. * * * Well, of course, I was scared to death. I had been there by that time, for days, and they had been after me all the time—when one of them wasn't, the other one was. One was always with me, and trying to tell me what I should do; and if I didn't do it, what was going to happen to me; and I was just scared to death. * * * Mr. White (an investigator) and I talked for a while about different things, and then he said, 'Well Kiddy, it is time we were getting down to brass tacks; we can't keep you any longer. If you don't make a statement, I have got to turn you over to the authorities. You have been in here for days, and you are either going to make this statement, or you are not.' He said, 'Of course, you know when the time comes I am going to have to say that I didn't promise you any immunity, but you can read between the lines * * *.' * * * I was scared to death; I thought they had me in their power, and all they had to do was to say the word and I would go to the federal penitentiary. I thought that, anyway. They said they had. * * * I think the ten days I spent in the district attorney's custody was the horror of my life. * * * I wanted to see one (a lawyer) the very first day I was there, but they told me not to see one; that I was going to be a witness, and that I should not see an attorney. And later on a lawyer came up and spoke to me in the court room, and Miss Fairchild (one of the guards) said (to him), 'You don't need to talk to Mrs. Day; she don't need an attorney.'"

It also appears from uncontradicted testimony given by defendant that besides the two guards, on one evening after defendant was taken to the hotel, for a considerable length of time four other persons were in the room where defendant was kept in custody, one of whom was also an "investigator" and two of the others were persons who likewise were either under arrest or who theretofore had been charged with a criminal offense in some manner connected with the particular offense of which defendant later was convicted. The defendant also testified that at no time before she made her statement or confession was she informed that any statement made by her would be used against her; that she was "very nervous and upset, and particularly worried about this federal thing"; that she was practically "beside herself" in making the statement.

In the cases of People v. Loper, 159 Cal. 6, 112 P. 720, 37 L. R. A. (N. S.) 934, Ann. Cas. 1912B, 1193; People v. Borello, 161 Cal. 367, 119 P. 500, 137 L. R. A. (N. S.) 434; People v. Clark, 55 Cal. App. 42, 203 P. 781; People v. Quan Gim Gow, 23 Cal. App. 507, 138 P. 918; and Bram v. United States, 168 U. S. 532, 18 S. Ct. 183, 42 L. Ed. 568, 578, many former adjudicated cases are reviewed, and the law is restated which relates generally to the admissibility of confessions of a defendant in a criminal action, and particularly with reference to situations which are analogous to that portrayed by the facts hereinbefore set forth. In principle, the authorities are in complete harmony one with the other that, in circumstances describing a situation even less powerful in its probable effect upon the free will of a defendant than appears prevailed in the instant case, the confession of guilt by a defendant should never be admitted in evidence. The research of industrious counsel for the people has failed to disclose any authority which would indicate that a rule to the contrary has ever obtained within either the jurisdiction of this state or of any other state in the Union. The case of People v. Dye (Cal. App.) 6 P. (2d) 313, contains the latest expression of opinion on the subject either by the Supreme Court or the Court of Appeal of this state. Therein may be found a fairly complete résumé of legal principles, accompanied by judicial precedent, which pertain to a proper discussion of such questions as may be here involved; and it is deemed unnecessary to herein restate such principles. It is enough

to assert that by all authority a confession of a defendant obtained as was shown even by the uncontradicted and undisputed evidence hereinbefore set forth is inadmissible in evidence.

[2] Concerning the probable effect which the confession of guilt of defendant had upon the verdict of the jury, it is to be noted that on the part of the prosecution, aside from the testimony of the complaining witness, who was of the age of seventeen years, and whose alleged delinquency formed the foundation of the complaint against defendant, no supporting evidence of any kind or character, other than the confession of defendant, was adduced on the trial of the action. Also that the testimony of the complaining witness was not there given by such witness personally, but on an assumedly proper showing by the prosecution to the effect that, after diligent search had been made for such witness, she could not be found, nor produced at the trial, her testimony given at the preliminary examination of defendant was read in evidence. It also appeared that, like the defendant herein, preceding the giving of her testimony, the prosecuting witness had not been "arrested," but that she had been "in custody" of "investigators of the office of the district attorney," in a room in a hotel, for a period of five months, during all of which time she had paid neither board nor hotel bills, nor had she ever been requested so to do; to the contrary, that all such bills were paid by the "investigators" who had the prosecuting witness in custody. Furthermore, that during the period of her detention her custodians took her to the theater and to the movies "once in a while"; took her out riding in automobiles; and occasionally took her to the office of the district attorney.

Considering the recognized possibility of inaccuracy or falsehood in testimony relating to offenses of the character of that of which defendant was charged, in connection with the facts hereinbefore set forth which immediately preceded the date when the prosecuting witness gave her testimony, with the consequent inherent doubt regarding the truth of such testimony, it cannot be said that the confession of guilt by defendant of her criminal participation in the alleged delinquency of the prosecuting witness did not influence the jury in the rendition of its verdict; and, since it appears that on the trial of the action, by permitting the jury to consider in evidence the confession of defendant, she was prejudiced in her substantial rights in the premises, it follows that the judgment and the order by which her motion for a new trial was denied should be reversed. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

125 Cal.App. 296

GILL et al. v. JOHNSON, State Treasurer.*

Civ. 468.

District Court of Appeal, Fourth District, California.

Aug. 6, 1932.

Rehearing Denied Aug. 29, 1932. Hearing Denied by Supreme Court Oct. 3, 1932.

1. Parties ⇐84(6).

In action to recover value of land improperly registered under Torrens Act, demurrer asserting nonjoinder of parties defendant *held* sufficient to raise question of nonjoinder (St. 1915, p. 1932; p. 1949, § 105, subd. 2).

In points and authorities filed in support of demurrer, it was stated that, according to allegations of complaint, detriment suffered by plaintiffs had been caused by fraud and that person guilty thereof was necessary party defendant, and it was contended that demurrer was insufficient because it did not name such person. It appeared, however, that complaint named this person, charged him with fraud, and alleged that as direct result of his fraud, superior court had been led to order registration of land involved, which made it possible for plaintiffs to be defrauded.

2. Fraud ⇐6.

To maintain action for deceit, no contractual relation need exist between plaintiff and defendant.

3. Parties ⇐29.

Question of whether third person was "necessary party defendant" *held* to depend on whether plaintiffs had cause of action against him.

[Ed. Note.—For other definitions of "Necessary Parties," see Words and Phrases.]

4. Parties ⇐84(4).

Question of who are necessary parties defendant, when raised by demurrer, should ordinarily be determined by reference to complaint.

5. Appeal and error ⇐863.

Where, after demurrer asserting defect of parties defendant appearing on face of complaint, case proceeds to judgment, appellate court, in ascertaining whether such defect exists, may consider complaint and also evidence.

6. Parties ⇐29.

Landowner fraudulently obtaining judgment canceling trust deed and ordering registration of land under Torrens Act *held* "necessary party defendant" in subpurchasers' action against state treasurer to recover value of land from assurance fund (Civ. Code, § 1711; Code Civ. Proc. § 1963, subds. 2, 3; St. 1915, p. 1949, § 105, subd. 2).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Rehearing denied 14 P.(2d) 1017.

It appeared that landowner, by virtue of false showing of service of summons on holder of trust deed in question, obtained cancellation thereof and registration of land under Torrens Land Transfer Act (St. 1915, p. 1932); that he thereafter sold land to a purchaser, to whom registrar's certificate of title was issued; that such purchaser later sold land to subpurchasers; and that validity of trust deed was subsequently established in suit to which subpurchasers were made parties defendant.

7. Fraud ⇐28.

Landowner fraudulently obtaining registration of land under Torrens Act owed to public duty to refrain from crime and fraud (Civ. Code, § 1711; St. 1915, p. 1932).

8. Negligence ⇐56(1).

"Proximate cause" is efficient cause, or one that necessarily sets other causes in operation.

"Proximate cause" may also be defined as that which, in natural and continuous sequence, unbroken by any new, independent cause, produces particular event, and without which that event would not have occurred.

[Ed. Note.—For other definitions of "Proximate Cause," see Words and Phrases.]

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action by Thomas Edwin Gill and another against C. G. Johnson, as State Treasurer. Judgment for plaintiffs, and defendant appeals.

Reversed.

See, also, 110 Cal. App. 442, 294 P. 405.

U. S. Webb, Atty. Gen., and L. G. Campbell and James S. Howie, Deputy Attys. Gen., for appellant.

Barker & Keithly and Barker, Smiley & Keithly, all of Los Angeles, for respondents.

HARDEN, Justice pro tem.

This action was brought by plaintiffs Thomas Edwin Gill and Myla Ritzinger Gill to recover from the Torrens title assurance fund in the custody of the state treasurer the value of certain land in Imperial county described in the complaint and registered pursuant to the act commonly known as the Torrens Land Transfer Act (St. 1915, p. 1932), under the claim that plaintiffs purchased said land in reliance upon a certificate of title issued by the registrar of titles of Imperial county.

On January 1, 1916, Friend J. Austin and Lettie M. Austin, his wife, were the owners of the land in question. On that day they executed and subsequently delivered to the Delta Land & Water Company, a Nevada corporation, a trust deed thereon to secure payment of $55,000 which they owed that company at that time. The trust deed was recorded in the office of the county recorder of Imperial county on March 30, 1916. On October 2, 1917, said Friend J. Austin and his wife filed in the superior court of Imperial county their petition setting forth that said trust deed had been fraudulently obtained by said Delta Land & Water Company, and praying the court to enter its decree to that effect and to order the registrar of titles of Imperial county to register the said land under said Torrens Land Transfer Act. The default of the said Delta Land & Water Company was entered therein on December 5, 1917. On December 7, 1917, said court entered its judgment canceling said trust deed and ordering the registration of said land under said act. The registrar's certificate of title was issued on December 13, 1917, to Austin and wife in accordance with said order. Said default and judgment thereon were the result of fraud practiced by Austin in that he made a false showing of service of summons upon said Delta Land & Water Company. Said company was not served with process in said action. Transfer of the land was made by Austin and wife to Jasper Thomason; and on December 14, 1917, the registrar's certificate of title was issued to Thomason.

On February 8, 1918, the plaintiffs and Thomason entered into a contract which resulted in the sale of said property to plaintiffs. On February 13, 1918, the registrar's certificate of title on the land in question was issued to plaintiffs, showing them to be the owners thereof.

Suit was instituted by the Frances Investment Company, as assignee of the Delta Land & Water Company, in the United States District Court on February 15, 1918, to establish the validity of said trust deed for $55,000. Plaintiffs herein were made parties defendant in said action. Judgment was rendered therein sustaining the validity of said trust deed, which judgment was affirmed on appeal.

On August 10, 1928, plaintiffs brought this action pursuant to the provisions of said Torrens Land Transfer Act, upon the theory that they had been damaged through the operation of the provisions of said act. Judgment was entered herein in favor of plaintiffs and against defendant for the sum of $31,400, payable out of said Torrens title assurance fund. The defendant has appealed from said judgment.

Subdivision 2 of section 105 of said act (Stats. 1915, pp. 1932, 1949) provides: "Any person who, without fraud or negligence on his part, is deprived of any interest or estate in land through the operation of any provision of

this act or by reason of the fraud, forgery, negligence, omission, mistake or misfeasance of any person, and who is precluded from recovering such interest or estate, may commence an action in the superior court of the county in which the land or a part thereof is situated, to recover not over the fair market value of the interest or estate of which he has been so deprived. * * * If such deprivation has been caused either wholly or in part by any person or persons other than such registrar or deputy registrar, while acting in the official performance of duty as such, such person or persons shall be joined as defendants with said state treasurer. In any such action said court shall have jurisdiction, * * * to determine the reason of such deprivation and to render judgment therein accordingly, either against said state treasurer alone or against him and all or any of the other defendants. In any action where there are defendants other than said state treasurer against whom judgment has been rendered, execution shall first issue against such other defendants and upon the return of such execution unsatisfied, either in whole or in part and upon it appearing to the satisfaction of the court that said execution cannot be satisfied out of the property belonging to such judgment creditors [debtors] other than said state treasurer, * * * said court shall make its order directing the payment of the amount due out of the assurance fund. * * *"

[1] One ground of demurrer to the complaint was that there was a defect and nonjoinder of parties defendant. In points and authorities filed in support thereof it was pointed out that, according to the allegations of the complaint, the detriment suffered by plaintiffs had been caused by fraud and that the person guilty thereof was a necessary party defendant. The demurrer was overruled. Respondents contend that the demurrer was insufficient to raise the question of a defect of parties defendant for the reason that it did not name Austin. The complaint names him and charges him with fraud, in that he filed a false showing of service of summons upon the Delta Land & Water Company, and alleges that as a direct result thereof the superior court of Imperial county was led to enter the judgment canceling the trust deed and ordering the registration of the land. The demurrer refers to him as the person guilty of the fraud. The demurrer was sufficient to raise the question of a defect of parties defendant.

[2] It is contended further by plaintiffs that Austin was not a necessary party for the reason that plaintiffs entered into no contract with him; that plaintiffs' only dealings were directly with Thomason. It is not essential to the maintenance of an action for deceit that there should have been a contractual relation between the plaintiff and the defendant. 27 Cor. Jur. 16, citing cases. Pasley v. Freeman, 3 T. R. 51, 100 Reprint, 450, is a leading case upon the subject. Plaintiffs' present position obliges them to defend Austin and is inconsistent with the allegations of the complaint.

[3-6] The question of whether Austin was a necessary party defendant depends upon whether the plaintiffs had a cause of action against him. Where the question of who are necessary parties defendant is raised by demurrer, it is to be determined ordinarily by reference to the allegations of the complaint. However, where, as here, after the filing of a demurrer to the complaint on the ground of a defect of parties defendant appearing on the face of the complaint, the case has proceeded to trial and judgment, we may properly consider not only the allegations of the complaint but also the evidence to ascertain whether, by reason of any defect in parties defendant, the judgment is against law. In this case the evidence follows the allegations of the complaint in respect to the fraud of Austin; but it goes farther and establishes that Austin's fraud was the basis for all the grounds of complaint which plaintiffs possess.

It is provided by section 1711, Civil Code, as follows: "One who practices a deceit with intent to defraud the public, or a particular class of persons, is deemed to have intended to defraud every individual in that class, who is actually misled by the deceit."

[7] Certainly Austin owed to the public the duty to refrain from crime and fraud. If Thomason and Austin acted in concert with the intention of defrauding plaintiffs, Austin would be answerable to plaintiffs for damage proximately resulting therefrom; and if Austin's intention was to defraud Thomason or the public generally, he would be answerable to any member of the public who was actually defrauded as a proximate result of his wrongdoing. It is presumed that an unlawful act was done with an unlawful intent; and that a person intends the ordinary consequences of his own voluntary acts. Section 1963, subds. 2, 3, Code Civ. Proc. We think plaintiffs' damage was a natural and probable consequence of the wrong.

[8] Considering the proximate cause of an event to be "the efficient cause, the one that necessarily sets the other causes in operation" (Ætna Ins. Co. v. Boon, 95 U. S. 117, 130, 24 L. Ed. 395), or "that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces that event, and without which that event would not have occurred" (Baillargeon v. Myers, 180 Cal. 504, 182 P. 37, Williams v. San Francisco, etc., Ry. Co., 6 Cal. App. 715, 93 P. 122, 127), we have no hesitancy in holding that the fraud on the part of Austin complained of in the complaint is shown to have been the efficient cause of the damage suffered. The allegations of the complaint and the evidence establish that it continued in an unbroken sequence to produce the

event, and without which that event would not have occurred. The action of the court in entering the default judgment, in canceling the trust deed, and in ordering the registration of the land under the provisions of the Torrens Land Transfer Act, and the official acts of the registrar of titles in issuing certificates of title, first to Thomason and then to plaintiffs, were the results of Austin's initial fraud. Such acts were not new, independent causes which intervened to break the effect of the original wrong; they were harmonious consequences thereof. The false showing of service of summons and the records entered pursuant thereto constituted a continuous assertion by Austin to the public and to plaintiffs of that which was not true.

Without pursuing the question further, we hold that, according to the allegations of the complaint and the whole record, Austin owed the public and plaintiffs, as members thereof, the duty to refrain from fraud in respect to matters mentioned herein; that said duty was violated; that as a proximate result thereof plaintiffs were damaged; and that plaintiffs had a cause of action against Austin therefor. He was a necessary party defendant.

In some instances the failure to join a person as a party defendant in a suit would cause no prejudice to other defendants. Such is not the case here, where resort must be had to Austin for payment of any judgment to which plaintiffs are entitled before the assurance fund is properly chargeable with payment thereof. The record shows the judgment to be against law, for the reasons stated. The error in overruling the demurrer requires a reversal of the judgment.

The other points raised by appellant do not appear to us to be sustained. Owing to the decision reached, it is not necessary to consider them here in detail.

The judgment is reversed.

We concur: BARNARD, P. J.; MARKS, J.

125 Cal.App. 77

PEOPLE v. RADOVICH.

Cr. 2191.

District Court of Appeal, Second District, Division 2, California.

July 25, 1932.

1. Criminal law ⇐717.

Generally, it is improper for counsel to read from law books in addressing jury.

2. Criminal law ⇐717.

In robbery prosecution, refusing to permit defendant's counsel to read from cited cases, if matter was discretionary, *held* not abuse of discretion.

3. Criminal law ⇐655(5).

In robbery prosecution, trial judge's statements upon refusal to permit defendant's counsel to read to jury from cited cases *held* not prejudicial, especially in view of instruction.

> Statements of trial judge to effect that defendant's counsel would not be allowed to read certain statements from cited cases to jury and that his continued reference to such cases after the court had ruled against him was contemptuous, and that, if counsel stated one more word not addressed to jury on the facts, court would adjudge him guilty of contempt, were not prejudicial, especially in view of instruction to effect that no prejudice should be held against defendant or against his counsel because of incident.

4. Criminal law ⇐799.

Statement of court in instruction, relating to lawyers as a class, *held* not prejudicial to defendant, whose counsel was refused permission by the court to read to jury from cited cases.

> Court stated in instruction that lawyers often feel that they want to do their full duty, and they advance arguments which they probably themselves recognize as not proper legitimate argument in any case in which the jury should only be addressed as to the facts in that case.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Nick Radovich was convicted of robbery, and he appeals.

Affirmed.

Thomas Wade Cochran, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

WORKS, P. J.

Defendant was convicted of robbery. He appeals from the judgment and from an order of the trial court denying his motion for a new trial.

The case, on the evidence, was one merely of conflict, the quarrel being between evidence tending to show an identification of appellant as a participant in the crime charged, several having been concerned in it, and evidence tending to prove an alibi.

While counsel for appellant at the trial—not the one now before us—was engaged in presenting his argument to the jury, something occurred which impelled him to call

for the court reporter; that functionary not being in attendance at the time. When the reporter appeared, the following record was made:

"Mr. Parsons: I refer to the case of People v. Molina, 126 Cal. 505, and I am reading from page 508, 59 P. 34, 35.

"The Court: No, you are not reading from it at all; you are referring to the case.

"Mr. Parsons: May I quote a paragraph of law?

"The Court: You may not; the court will attend to all of the law in this case.

"Mr. Parsons: I appreciate that, and I desire to refer to certain cases, People v. Preston and People v. Law, and other matters in which conversations have been had on evidence, and where it was later established that those people were innocent. I wish to go into those cases and describe them to the jury.

"The Court: You will not be allowed to do so, and your continued reference to those cases after the court has ruled is contemptuous. You should know that you should confine your argument to the jury in any case to the facts, and not refer to—

"Mr. Parsons: I have.

"The Court: Are you going to argue the facts in this case or are you trying to force the court—

"Mr. Parsons: Not at all; I am trying to eliminate—

"The Court: Mr. Parsons, if there is one more word from you that is not addressed to the jury on the facts I will adjudge you guilty of contempt of court."

[1, 2] The trial judge was justified in preventing the course which counsel was endeavoring to pursue. It is generally improper for counsel to read from law books in addressing a jury (People v. Godwin, 123 Cal. 374, 55 P. 1059), although some of the authorities admit the possibility of such a course in particular cases within the discretion of the trial judge. If the point here presented may be said to resolve itself merely into a matter of discretion, we are satisfied that the discretion was not abused.

[3] The judge spoke more forcibly and dictatorially in presenting his views to counsel than was necessary, but his language was drawn out, somewhat, by the attitude of counsel. On the whole, we doubt whether what the judge said damaged appellant.

If his language was harmful to appellant, we think the injury was undone by an instruction which he gave to the jury thus: "There is one thing I want to say to you all. During the course of Mr. Parsons' argument the court had occasion to make a ruling against him regarding an incident in which counsel in his zeal on behalf of his client was attempting to argue certain matters which had no relation to the facts in this case. I don't want any of you to have the slightest feeling of prejudice against the defendant or against Mr. Parsons because of that incident. Mr. Parsons is a lawyer of unquestioned integrity, and I know he had no slightest intention of doing anything improper. Lawyers often feel that they want to do their full duty, and they advance arguments which they probably themselves recognize as not proper legitimate argument in any case in which the jury should only be addressed as to the facts in that case; but I don't want any of you to think that the court has any lack of confidence in Mr. Parsons as a lawyer or an officer of this court, or that you should in any way regard that incident as even in a slight degree prejudicial to Mr. Parsons or the client he represents. I would not have any of you think that for the world."

[4] However, there are two passages in this instruction to which appellant takes exception and upon which he bases a second charge of misconduct upon the part of the judge. One of these passages is the one in which the judge said that counsel "was attempting to argue certain matters which had no relation to the facts in this case." The second passage reads: "Lawyers often feel that they want to do their full duty, and they advance arguments which they probably themselves recognize as not proper legitimate argument in any case in which the jury should only be addressed as to the facts in that case." We think the first passage was not unjust. The second was not harmful to appellant; its only vice being that it was an unjust and gratuitous arraignment of the entire bar.

Judgment and order affirmed.

We concur: IRA F. THOMPSON, J.; STEPHENS, Justice pro tem.

125 Cal.App. 329

STUBBLEFIELD et ux. v. LONG et al.

Civ. 7120.

District Court of Appeal, Second District, Division 1, California.

Aug. 11, 1932.

Dismissal and nonsuit ⇐60(1).

Granting motion to dismiss action for want of prosecution *held* reversible error, in absence of proof that plaintiffs had received five days' notice of trial (Code Civ. Proc. § 594).

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by William H. Stubblefield and wife against Jess LeRoy Long and others. From a judgment of dismissal for want of prosecution, plaintiffs appeal.

Reversed.

Charles J. Kelly, of Los Angeles, for appellants.

Macfarlane, Schaefer, Haun & Mulford and C. S. Tinsman, all of Los Angeles, for respondents.

YORK, J.

This is an appeal from a judgment of dismissal entered pursuant to motion of defendants for lack of prosecution.

The action was brought to recover damages for personal injuries sustained on September 6, 1927. Complaint was filed November 29, 1927, defendant demurred thereto, demurrer was overruled, and answer was filed January 28, 1929.

On February 18, 1929, plaintiffs, pursuant to rule 1 of said court, served and filed in the action a memorandum to the effect that motion would be made in department 34 of said court on the 4th day of March, 1929, to set said cause for trial on the ground that the case was at issue. Pursuant to rule 2 of said court, the cause was by the clerk of said court placed on the civil active list, and thereafter on the 1st day of April, 1929, in the absence of the parties thereto and their respective counsel, the said cause was, pursuant to rule 3 of said court, under the supervision of the presiding judge thereof, set for trial in department 43 of said court on the 13th day of May, 1929, at the hour of 9:30 a. m.

On the 13th day of May, 1929, the cause was called for trial in the department named, defendants appearing by counsel, and no one appearing on behalf of the plaintiffs or either of them, whereupon the said counsel for defendants moved the court that said action be dismissed for lack of prosecution, which said motion was granted and the action ordered dismissed.

Plaintiffs appeal from the judgment of dismissal on the ground that the court erred in granting defendants' motion without proof being first made that plaintiffs had received five days' notice of the time of trial, as required by section 594 of the Code of Civil Procedure.

Upon the authority of the case of Hurley v. Lake County, 113 Cal. App. 291, 298 P. 123, the judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.

125 Cal.App. 203

GRAY v. GRAY.

Civ. 486.

District Court of Appeal, Fourth District, California.

July 30, 1932.

1. Divorce ⇐177.

Order denying motion for new trial following granting of interlocutory divorce decree is not appealable.

2. Divorce ⇐131.

Evidence warranted finding of husband's failure to provide for over one year before wife instituted divorce action.

Evidence disclosed that earnings of wife, due to absences from her employment caused by poor health, were insufficient to furnish her with common necessaries of life; that she was forced to borrow money from friends and call on them for food and shelter; and that during this time husband had income from which he could have provided her money which, with her earnings, would have supplied her with common necessaries of life.

3. Divorce ⇐37(22).

Where wife leaves family home because of husband's wrongful infliction on her of grievous mental suffering constituting extreme cruelty, husband is guilty of "desertion" (Civ. Code, §§ 94, 98).

[Ed. Note.—For other definitions of "Desertion (In Divorce Law)," see Words and Phrases.]

4. Divorce ⇐37(22).

That husband's drunkenness caused wife grievous mental suffering constituting extreme cruelty justified her in leaving family home, making husband guilty of "desertion" and responsible for such support as would furnish her with common necessaries of life (Civ. Code, §§ 94, 98).

5. Divorce ⇐184(6).

Judge's province in divorce action is to pass on witnesses' credibility and weight and sufficiency of evidence.

6. Divorce ⇐184(10).

Appellate court cannot upset judge's finding or reverse judgment supported by competent testimony in divorce action merely because of conflict in evidence.

7. Divorce ⇐184(12).

Divorce being properly granted on ground stated in one cause of action, judgment will not be reversed because of error involving separate cause of action.

Appeal from Superior Court, San Diego County; V. N. Thompson, Judge.

Divorce action by Margaret E. Gray against Alexander J. Gray, Jr., who filed a cross-complaint. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals.

Judgment affirmed, and appeal from the order denying a motion for a new trial dismissed.

A. T. Procopio, of San Diego, for appellant.

Neal E. Dow and Spalding & Myers, both of Los Angeles, for respondent.

MARKS, J.

[1] Respondent instituted this action seeking a divorce and maintenance from appellant. He answered and filed a cross-complaint in which he sought a divorce. The complaint alleged willful neglect and failure to provide in one cause of action, and desertion in another. The trial court granted respondent an interlocutory decree of divorce on both grounds and awarded her $40 per month. Appellant is here attacking the decree as being unsupported by and contrary to the evidence, and has attempted to appeal from the order denying his motion for new trial, which is not an appealable order.

The parties were married July 2, 1921, and separated March 28, 1927. From about July, 1927, to about May, 1928, appellant gave respondent $125 per month for her support. When these payments were discontinued respondent had appellant arrested for failure to provide. He furnished a bond guaranteeing the payment of $50 per month for one year beginning July 3, 1928. Twelve payments were made, with the possible exception of one. The action for divorce was instituted within one year from the time the last fifty-dollar payment was made.

[2] Appellant complains of the judgment granting the divorce for failure to provide, contending his willful neglect and failure to provide had not continued for one full year before the institution of this action. We could not agree with this contention, even if appellant had made the payments of $50 per month voluntarily.

The evidence shows that for more than a year prior to the commencement of this action respondent lived in the city of Riverside, Cal. She was in poor health. This caused her to lose several days each month from her employment which resulted in a loss of wages and bills for medical attention. Her earnings were not sufficient to furnish her with the common necessaries of life and she was forced to borrow money from her friends and call upon their charity for food and shelter. During all of this time appellant had an income out of which he could have provided her sufficient money, which, with her earnings, would have supplied her the common necessaries of life. The portions of the findings and judgment under attack find support in the evidence.

[3] Appellant further contends that respondent deserted him and that therefore he was not responsible for her support and could not be guilty of failure to provide. Section 94 of the Civil Code defines "extreme cruelty" as "the wrongful infliction of grievous bodily injury, or grievous mental suffering, upon the other by one party to the marriage." Section 98 of the same Code provides in part: "Departure or absence of one party from the family dwelling-place, caused by cruelty * * * is desertion by the other party." Where a wife leaves the family home because of the wrongful infliction upon her by her husband of grievous mental suffering amounting to extreme cruelty, he is guilty of desertion. Brandt v. Brandt, 178 Cal. 548, 174 P. 55.

[4] The evidence discloses that appellant used intoxicating liquors to excess during practically all of the time from marriage to separation; that he drank so excessively in public that on occasion he became unconscious; that on many and frequent occasions he was not able to undress and go to bed; that respondent tried to prevail upon him to cease such excessive drinking; that his drinking to excess and drunkenness, especially in public, caused respondent great humiliation and grievous mental suffering amounting to extreme cruelty. Under these circumstances respondent was justified in leaving the family home, if she did leave it before her husband, which put upon appellant the burden of the desertion and made him responsible for such support as would furnish her with the common necessaries of life; he having the ability to provide them.

[5, 6] The trial court found that appellant left, deserted, and abandoned respondent.

The evidence is conflicting and from a reading of the record it might seem that its weight is contrary to the finding. However, there is competent and material testimony supporting it. The trial judge had the witnesses before him and it was his province to pass upon their credibility and the weight and sufficiency of the evidence. We cannot upset a finding or reverse a judgment because of a conflict in the evidence.

[7] Appellant complains of the findings and that portion of the interlocutory decree of divorce wherein he is found guilty of desertion principally because of what he maintains is a variance between the pleadings and the proof. We are satisfied that the divorce was properly granted on the ground of willful neglect and failure to provide. Therefore, the judgment will not be reversed because of error, if any, committed in connection with another and separate cause of action. It becomes unnecessary to discuss these other alleged errors here.

Judgment affirmed. The appeal from the order denying motion for new trial dismissed.

We concur: BARNARD, P. J.; HARDEN, Justice pro tem.

125 Cal.App. 224

BOULEVARD LAND CO. v. KING et al.

Civ. 7389.

District Court of Appeal, Second District, Division 1, California.

Aug. 4, 1932.

Rehearing Denied Aug. 29, 1932.

Hearing Denied by Supreme Court Oct. 3, 1932.

1. Appeal and error ⇐1012(1).

Weight of evidence was for trial court, and, where there was substantial evidence tending to prove fraud, trial court's finding of fraud was final.

2. Fraud ⇐58(1).

Evidence sustained court's finding of vendor's fraud in promising to resell property at profit.

3. Fraud ⇐12.

Vendor's fraudulent promise to resell property *held* actionable, where relied on as statement of fact.

4. Evidence ⇐434(11).

Although sales contract was in writing, parol evidence was admissible to show vendor's fraudulent promise to resell property.

5. Vendor and purchaser ⇐310.

Where vendor suing for unpaid purchase price had fraudulently promised to sell property, purchaser filing cross-complaint for moneys paid and loss of profits need not give formal notice of rescission or offer to restore consideration.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by the Boulevard Land Company against Lillian B. King and another, in which defendant named filed a cross-complaint. From a judgment entered on the cross-complaint in defendant's favor, plaintiff appeals.

Affirmed.

Walter C. Durst, of Los Angeles, for appellant.

Walter M. Campbell, of Los Angeles, for respondent.

TAPPAAN, Justice pro tem.

Plaintiff Boulevard Land Company instituted an action to recover certain payments alleged to be due it under the terms of a contract for the sale of real property. The contract provided for payment in monthly installments. During the trial, a supplemental complaint was filed which prayed for judgment for the entire balance remaining unpaid of the purchase price stipulated in this contract. Defendant King filed an answer to the complaint and a cross-complaint alleging fraud on the part of plaintiff and praying judgment for damages for moneys paid and loss of profits. The cross-complaint also contained a second count alleging a cause of action for moneys had and received. The trial court found against plaintiff upon the complaint and for the defendant upon the cross-complaint. From the judgment entered upon the cross-complaint in defendant's favor, plaintiff appeals.

[1, 2] Appellant's first specification of error is: "The evidence is insufficient to sustain the findings of the court." The finding to which appellant addresses this attack and parts of which are quoted in its brief set forth in effect that appellant, as vendor of a parcel of real property, as an inducement to respondent to purchase said property, agreed to resell the same for respondent within one year from date of purchase at a profit of not less than $3,000, and that this promise was made without any intention upon the part of appellant of performing the same. For a clear understanding of the point involved it is necessary to briefly summarize the evidence as contained in the record here. Defendant testified: "I told them if they could assure me of making about $3,000 which I needed, and promised it, why, I would take the lot." To which she stated plaintiff's salesman replied: "If you will take this lot, I can practically guarantee you that the lot will be sold and relieve your necessity. And

he knew he could readily sell it and make me $3,000.00." On the subject of the resale of the lot "there was no doubt that in a short time * * * this was in August * * * he said January 1st, he was to be the salesman in charge. * * *" The agent of appellant who made the sale to respondent, and was a witness on appellant's behalf, testified: "Q. Did you make any statements to Dr. King (respondent) that the Boulevard Land Company (appellant) would resell the property? A. I don't recall whether I did or not. I have told that, because I had been told to tell it; that when the time was right they would have a resale office at Girard the same as they have at Walnut Acres or West Adams after it was sold out. She (respondent) said she wanted to make some money and I told her if she would hold it a reasonable length of time she would make some money; good property. I believe I answered that when I said that when the time was right we would put in the resales office and sell their property." In reference to respondent's testimony that she had to have $3,000, this witness testified: "She may have made it but I don't recall it." The record discloses more testimony similar in effect to that quoted. There is no evidence that appellant at any time attempted to resell the lot. There is evidence that some three years after the sale of the lot to respondent, and prior to the filing of this action, respondent offered to quitclaim the lot in question to appellant. There is also some evidence that respondent attempted to contact the agent of appellant who sold her that lot through appellant and that the agent was not informed of this by appellant. There is evidence in the record to support the finding attacked by appellant, though in some instance there may be present a conflict in the testimony given, a question of fact is presented, and the finding of the trial court cannot be questioned here. "So in civil cases tried without a jury where fraud is an issue, it is for the trial court to determine the weight of the evidence, and, while it cannot find fraud upon a mere suspicion, yet if there is any substantial evidence tending to prove fraud, it is for the trial court to determine whether such evidence outweighs or preponderates over that adduced in opposition thereto, and when the trial court has found that such evidence does so preponderate, its decision thereon is final, and an appellate court has no right or authority to disturb such a finding, even though the appellate court may be of a contrary opinion as to the weight of such evidence." Noll v. Baida, 202 Cal. 98, 101, 259 P. 433, 434.

[3] In the case at bar there is evidence of a substantial nature to sustain the finding of fraud and the conflicting evidence to be found in the record is not sufficient to warrant this court in holding that, under the circumstances here present, the evidence as a whole is not "clear and satisfactory." Appellant's contention that the promise to resell amounted to a mere opinion, and therefore is not actionable, is without merit when all the facts of the case are considered. The isolated statement might be so considered, but, when read in conjunction with the testimony as a whole, it is clear that the statement was made and relied upon as one of fact not opinion. The finding made by the court "said promise was made * * * without any intention upon its part of fulfilling and keeping the same" is one that as a rule cannot be supported by literal proof, but must be sustained by evidence of a circumstantial nature. In Holiday v. Tolosano, 39 Cal. App. 151, 153, 178 P. 170, 171, the court makes this statement: "It is also true that there is no direct evidence in the record before us that at the time of making the contract here involved there was any preconceived secret intention on the part of Tolosano not to perform it; but in this connection the record, in our opinion, discloses sufficient evidence from which it may be justly inferred that at the time of entering into the contract Tolosano had in fact no intention of performing his obligations thereunder. 'What a person's intent in such a matter may be is often a difficult thing to determine. It usually must be ascertained from his future conduct and speech, and the fact as to such intent is one peculiarly to be deduced by process of reasoning from the facts in evidence by the trial judge.'" The evidence in the instant case, when measured by the rule as stated in the above quotation, is ample to sustain the finding as made by the court in that regard. The court found the contract worthless and valueless to defendant. The evidence shows conclusively that in entering into the contract the respondent had a specific and disclosed reason, the securing for her necessities of the sum of $3,000. This reason, and this reason only, induced her to make the contract. She failed in the securing of the sum contemplated, and through the change in attitude of appellant was subjected to suit for a large alleged balance due it. The considerations which induced respondent to enter upon the transaction wholly failed and became valueless through appellant's dereliction.

Appellant's second specification of error, that the promise to resell was not such a promise as would constitute fraud, has been already commented upon and the view expressed that the statement was one of fact. The authorities cited by appellant, when considered in the light of the evidence existing in the instant case, fail to sustain appellant's position. 12 Cal. Jur. p. 730, where many illustrations of the rule are cited.

[4] Appellant next assigns as error the fact that the trial court admitted evidence of the

alleged agreement on the part of appellant to resell the property in question for respondent's benefit. Appellant in support of this contention relies upon the so-called best evidence rule prohibiting oral testimony to vary the terms of a written contract. Though this rule is without doubt one established both by statutory enactment and judicial decision there exists to it certain well-recognized exceptions among which is the rule that parol evidence is admissible to show fraud, since it does not in fact vary or contradict the contract, but shows that no binding contract was legally made. Wiberg v. Barnum, 99 Cal. App. 323, 325, 278 P. 871. The court having found that fraud existed and that respondent entered into the contract under its influence, the instant case falls squarely within the exception just stated. What has been said in reference to the contract applies with equal force to the so-called "rider" or separate agreement attached to the contract at some time during the transaction.

[5] It is next urged that "the judgment of the court is against the law," in that the remedy sought by respondent is rescission for fraud, and that no notice of rescission was given nor was there any offer of restitution made. Under the circumstance of the instant case, formal notice and offer to restore the consideration received was unnecessary. Respondent did not institute the action, but merely asserted this right when sued by appellant. "The institution of the suit or the allowance of the amendment was sufficient notice of rescission in a case such as this. Zeller v. Milligan, 71 Cal. App. 617, 236 P. 349. This is especially true in equity, where fraud is the basis of the claim, and no legal prejudice to the defendants could have resulted." Rosemead Co. v. Shipley Co., 207 Cal. 414, 422, 278 P. 1038, 1042. The evidence shows that respondent had offered to restore the property even before appellant instituted this action. The measure of damages adopted by the court, though not as favorable to respondent as some rules of damages indicated in the cases cited, nevertheless is sustained by the evidence, and is the usual rule adopted where judgment is entered under pleadings such as are contained in the second count of the cross-complaint herein. It should be noted that the evidence here presented is sufficient to sustain the allegation of this count as well as the first count.

The judgment appealed from is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

125 Cal.App. 5[illegible]

PEOPLE v. SHAWN.

Cr. 2197.

District Court of Appeal, Second District, Division 1, California.

July 22, 1932.

Rehearing Denied Aug. 4, 1932.

Hearing Denied by Supreme Court Aug. 19, 1932.

1. Conspiracy ⇐28.

Phrase "to be charged," as used in statute defining "criminal conspiracy," refers to the formal charging by complaint or information (Pen. Code, § 182, subd. 2).

[Ed. Note.—For other definitions of "To be Charged," see Words and Phrases.]

2. Conspiracy ⇐47.

Evidence *held* insufficient to support conviction for criminal conspiracy to procure the arrest of another for resorting and drunkenness (Pen. Code, § 182, subd. 2).

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Connor Michael Shawn was convicted of criminal conspiracy, and he appeals.

Reversed.

Stephen Ward Sullivan, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Alberta Belford, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

TAPPAAN, Justice pro tem.

Appellant was charged by an indictment, tried before a jury, and found guilty of the crime of criminal conspiracy, in that he, together with others, conspired falsely and maliciously to procure one Walkup to be charged and arrested for the crime of resorting, a violation of a city ordinance of the city of Los Angeles, and for the crime of drunkenness, also a violation of a city ordinance of the same city. Appellant appeals from the order of the court denying his motion for a new trial and also from the judgment as against him. The indictment charged appellant with "criminal conspiracy" as defined by subdivision 2 of section 182 of the Penal Code, which reads as follows: "Criminal conspiracy defined. If two or more persons conspire: * * * 2. Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime. * * *"

Appellant's first specifications of error are that the evidence produced at the trial was insufficient to establish the essential elements of the crime as charged and that aside from the testimony of Helen Lee, an admitted accomplice, there is no evidence to connect appellant with the crime charged; there being a lack of evidence to corroborate her testimony. In the consideration of these assignments, it becomes necessary to examine the testimony produced before the trial court. We shall here summarize the testimony as presented in the record. In making this summary no attempt has been made to quote the exact language used, except where it appears within quotation marks. The evidence shows that appellant, at the time the alleged transactions were had which it is contended constituted the criminal conspiracy, was employed by the Yellow Cab Company as safety director. Helen Lee, the admitted accomplice of appellant and to whom immunity had been granted prior to appellant's trial, had been employed by the cab company as an investigator. The only direct evidence tending to connect appellant with the alleged crime is found in the testimony of Miss Lee. She testified that on the day she had completed her work for the cab company she was approached by appellant and told by him that if she would move to the Philben Hotel he would give her a case to work upon. She thereupon moved to the indicated hotel, and on the same day appellant called upon her there and left with her a hand bag of some kind. Appellant instructed her to become acquainted with a man named Walkup who then resided at the Philben Hotel. She further testified that after she had made the acquaintance of Walkup she was instructed by appellant to invite Walkup to her room for the purpose of getting him in a drunken condition. At one time she was instructed to get Walkup in a "compromising position." The reason for this as appears from her testimony was as follows:

"Q. And was anything said during that period of time as to why you wanted to get him (Walkup) drunk or in a compromising position? A. He (appellant) said these people wanted to control him.

"Q. And that was the reason why you were to get him in that position, was simply because the people he represented wanted to control him? A. The people Mr. Shawn represented wanted to control the Major.

"Q. And that was your understanding all along, that that was why you were to get him in that condition? Is that correct? A. So they could take pictures of him, and that would embarrass him and force him to do as they wanted.

"Q. That was the reason they wanted this information, to force him to do as they wanted? A. That was my understanding."

Miss Lee also testified that appellant furnished to her a bottle of wine and told her that a private detective would be one of the persons who would take the pictures of Walkup. Her testimony also shows that at appellant's direction she removed to the Leeward Apartments and from there she called Walkup over the telephone and invited him to have dinner there with her, but that he refused but told her to meet him at the Elks' Club, which she did.

The private detective, Sandel, and his employer testified that appellant attempted to secure the services of Sandel in the "closing of a case," but that he refused to tell them what the case was. Neither Miss Lee's name nor Walkup's name was mentioned, though Miss Lee later told Sandel's employer she was engaged on a case with appellant.

Another witness testified that he knew both appellant and Walkup. That one week after Miss Lee came to live at the Philben Hotel appellant asked him to point out to him Walkup, appellant at the time telling him that Walkup "had witnessed an accident for us over at the Yellow Cab Company."

Walkup testified that he was a police commissioner and had had "casual" meetings with Miss Lee, one at the Elks' Club. He did not mention or refer to appellant in any way.

One Patterson, a fellow employee of appellant's with the cab company, testified that he knew both appellant and Miss Lee. That appellant had introduced Miss Lee to him and that he had seen them together a number of times. That appellant asked him to drive his car to the Elks' Club to meet Miss Lee. That he did this, appellant telling him that he thought Miss Lee was "stepping out on him." That at appellant's request he, together with appellant, followed Miss Lee from the Elks' Club to her apartment house. That they saw her come from the apartment house and enter a drug store. That at the time he left appellant and at his request again followed Miss Lee down town, where he met her and dróve her to Echo Park, where they met appellant. They later went to witness' home, met his wife, had dinner together and played golf, and then drove Miss Lee to a point near her home.

A police officer who it would appear from the record was detailed to watch Miss Lee testified that he engaged the room next to Miss Lee's room in the Philben Hotel, made her acquaintance, conversed and played cards with her, and from his room in the hotel overheard a conversation between Miss Lee and a woman friend in which Miss Lee said, "Mike is getting awfully mad because I seemed to be slow," and the friend replied, "I hope the Major does not get it in the neck too hard, because he seems to be an awfully nice old man." It appears from the record that at the time of the meeting of Walkup

and Miss Lee at the Elks' Club there were also present some five or six police officers, both male and female; that some of them followed Miss Lee from the club, while others followed appellant and Patterson. They testified to the facts as already narrated and in addition testified that Miss Lee handed a slip of paper to a cab driver, which appellant afterwards secured, and that Miss Lee on her trip downtown met a man and talked with him until Patterson came for her.

Other witnesses testified that Miss Lee talked to Walkup in the lobby of the hotel and that she met appellant and talked to him in Echo Park, another woman being present at the time who was identified as the other woman in the room at the time the conversation was overheard by the police officer next door. The foregoing contains, in brief, all the material evidence offered at the trial.

[1, 2] Appellant contends that: "The evidence is legally insufficient to sustain the verdict of guilty, as it does not establish the essentials of the crime charged." As has been hereinbefore noted, appellant was indicted under the provisions of section 182, subdivision 2, of the Penal Code. This subdivision became a part of our laws as section 102 of the Crimes and Punishment Act (St. 1850, p. 242), the section then reading: "If two or more persons shall conspire to commit any *offense;* or falsely and maliciously to indict another for any *offense;* or to procure another to be charged or arrested for any *such offense* * * *." This section was enacted as a part of the Penal Code in 1872, the only changes in so far as the subdivision being the substitution, as indicated by the italics, of the word "crime" for "offense" and the deleting of "such." This part of the section has not been amended since it was so enacted. Prior to the adoption of the Constitution of 1879 (article 1, § 8), certain crimes could only be prosecuted by indictment. People v. Vierra, 67 Cal. 231, 232. This was also true as to the procedure in the state of New York, our section 182 of the Penal Code being based upon the New York Penal Code, Field's Draft. When this fact is considered the reason for the somewhat particular phraseology of subdivision 2 of section 182 is obvious. Provision was made for offenses indictable and also those that could be prosecuted by complaint and information.

The indictment upon which appellant was tried and convicted alleges that appellant conspired to procure one Walkup to be *charged* and *arrested* for the crime of *resorting* and for the crime of *drunkenness*. The only evidence offered by the people at the trial as to the motive or reason for the alleged conspiracy is, as has been heretofore pointed out, an alleged desire upon the part of those engaged in the plot to embarrass Walkup and so "control him" and "force him to do as they wanted." There is no evidence that the arrest of Walkup was contemplated, and it would seem that any arrest would have tended to defeat the alleged sinister design. The sufficiency of the evidence, as measured by the terms of the indictment and the section of the Penal Code under which it was drawn, must, therefore, rest upon the construction to be placed upon the words "to be charged" as found in both the indictment and Code. Respondent contends that "to be charged" as used in the Code has no special legal significance, but should be deemed as synonymous with "to be accused." In the more than eighty years that the statute in question has been upon our statute books the courts of the state have not been called upon to construe the language just quoted, and the industry of counsel has failed to disclose, in other jurisdictions, authority of a convincing nature. In view of the history of section 182, that the part of the section containing the words in question were originally incorporated in the enactment to cover a procedural condition then existing, the limited class of crimes in which other than prosecution by indictment was authorized, it would seem highly improbable that the words "to be charged" were used in other than a strict and limited legal significance. The context, "to be charged or arrested," is illustrative of this construction in that "to be charged" referred to the formal charging by complaint or information, while the latter part "or arrested" without doubt was incorporated to cover those instances where the formality of a written "charge" was unnecessary or not complied with. In the case of People v. Garnett, 129 Cal. 364, 61 P. 1114, 1115, our Supreme Court in construing section 32 of the Penal Code, a section having a history identical as to origin and enactment with that of section 182 of the Penal Code, said: "Again, the word 'charged,' as used in the section, means a formal complaint, information, or indictment filed against the criminal, or possibly an arrest without warrant might be sufficient. Mere general rumors and common talk that a party has committed a felony are wholly insufficient to fill the measure required by the word 'charged.'"

In People v. Leporl, 35 Cal. App. 60, 63, 169 P. 692, 694, the court said: "Charged may mean a 'formal complaint, information, or indictment' (People v. Garnett, 129 Cal. 366, 61 P. 1114), and, as here used, cannot mean anything more or different than information." Respondent has cited a number of cases from other jurisdictions, but upon examination it is evident that they are not controlling in the instant case, arising as they do under circumstances at variance with those here presented and in some instances under statutes differing in nature to our Code.

The evidence produced at the trial fails to support the material allegations of the indictment under which appellant was convict-

ed, in that there cannot be found in the record any evidence whatsoever tending to prove that appellant intended or conspired "to charge" Walkup in any complaint or information with the alleged crimes or to cause his arrest therefor. Inasmuch as for the reasons indicated herein the judgment below must be reversed, the consideration of the other points specified by appellant in his briefs is unnecessary here.

The judgment and order appealed from are reversed.

We concur: CONREY, P. J.; YORK, J.

125 Cal.App. 261

TOBY v. HUBBARD et al.

Civ. 937.

District Court of Appeal, Fourth District, California.

Aug. 5, 1932.

1. Negligence ⇐136(9).

Plaintiff can be held contributorily negligent as matter of law only when evidence supports no other legitimate inference.

2. Automobiles ⇐245(79).

Whether motorist, who, on observing another automobile approaching on wrong side of highway, slowed down so that he could not take shoulder of road, was contributorily negligent, *held* question of fact for trial court.

3. Appeal and error ⇐533(1).

Opinion of trial judge is not part of record, and is not conclusive on appeal.

4. Automobiles ⇐244(59).

Trial court's implied conclusion that motorist, struck by another driving on wrong side of highway, did not have last clear chance to avoid accident, *held* supported.

5. Appeal and error ⇐931(1).

On appeal every inference and intendment must be taken in support of judgment.

6. Negligence ⇐12.

One placed, without his fault, in position of peril may not be held strictly accountable if it finally appears that some other course might have been wiser than one he instinctively followed.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by George E. Toby against W. B. Hubbard and others, copartners, doing business under the fictitious name of Greenman & Sons. Judgment for plaintiff, and defendants appeal.

Affirmed.

Harry P. Sweet, of San Diego, for appellants.

Fitzgerald & Selleck, of San Diego, for respondent.

BARNARD, P. J.

This is an appeal by the defendant from a judgment in favor of the plaintiff in an action for damages growing out of a collision between two automobiles. As the respondent was driving his machine along his own right-hand side of a paved highway, having recently entered the same, he observed another automobile, driven by the appellant Hubbard and owned by the other appellants, approaching on its left-hand side of the highway and apparently passing another car. The respondent slowed down, apparently almost to a stop, to allow the approaching car to cross over to its proper side of the highway, but, instead of so crossing over, that car maintained its course on its extreme left-hand side of the road and struck the respondent's car head-on.

The principal point raised by appellants is that the respondent was guilty of contributory negligence, as a matter of law. In support of their contention they rely entirely upon the respondent's own testimony, which they thus summarize: "On the 24th day of April, 1930, he had a collision with another automobile on the southerly edge of the Town of Fallbrook, when he had come from Live Oak Park; that he entered the paved highway at the intersection known as the Live Oak intersection after he had made a boulevard stop; that he very cautiously approached the intersection from the east going west; that this intersection is a blind intersection, and is slightly down grade and in his opinion a very dangerous one for traffic that might be coming onto the highway from the Live Oak Road; that his car was in low gear; that he continued in low gear and turned north onto the highway and shifted into intermediate when he saw two cars coming; that the cars in his judgment were some four hundred or more feet from the intersection; that both cars were going south, one being on his side of the highway and nothing to obstruct that car from coming across to its own side of the highway; that he stepped his gear up with intentions of going into high; that he continued to watch the car and saw that it continued, even though it had gone considerably ahead of the other car on plaintiff's side of the highway. He took his foot off the accelerator, slowed down and then realized that this automobile was going to hit him; that he had slowed his car down at that time to such a slow speed that he could not take the

shoulder of the road; all that he had time to do was to put his foot on the clutch and the brake and wait for the shock."

Appellants also set forth in their brief the testimony of the respondent as given upon cross-examination, which adds nothing to the above summary, so far as the question before us is concerned. The respondent also testified that he saw these two cars approaching, the appellants' car being on his side of the highway "seemingly as though" it had passed the other car, both cars being far enough away, the appellants' car being in advance of the other, and there being nothing to obstruct its driver from going across to his own side of the highway.

[1] The general rule as to when a question of contributory negligence is one of fact and when one of law is thoroughly established and is thus stated in Moss v. Boynton Co., 44 Cal. App. 474, 186 P. 631, 632: "Contributory negligence 'is a question of law only when the evidence is of such a character that it will support no other legitimate inference than that in the one case the plaintiff was guilty of contributing negligence. * * * When the evidence is such that the court is impelled to say that it is not in conflict on the facts, and that from those facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his own injury, then, and only then, does the law step in and forbid plaintiff a recovery. * * * Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury.' "

[2] We think the application of this rule to the facts of this case leads inevitably to the conclusion that the question of contributory negligence was one of fact for the court. It can hardly be said that from these facts reasonable men could draw but one inference and that pointing unerringly to the negligence of the respondent contributing to his own injury. On the other hand, it would appear entirely reasonable that this respondent, seeing the other car apparently passing another automobile, with plenty of room to return to its own side of the road, might naturally expect this to be done and rely upon it, and that in slowing down almost to a stop, thus giving the other car additional opportunity to cross to the other side of the road, the respondent did all that could be expected of a reasonable man under such circumstances. It would also seem, with the other car coming at 40 miles an hour, as shown by the evidence, that the period of time available to the respondent to get out of the way, after it became apparent that the other car was not going to change its course, must have been extremely short and such as might very easily have made it impossible for the respondent to get off the highway. The question was therefore one of fact for the trial court, which by its judgment placed the blame on the party who, without excuse, was traveling on the wrong side of the road.

[3-6] The only other point raised is that the court erred in disregarding the testimony of both parties and "deciding the case on a theory of his own." The argument made is that the court disregarded the testimony as to how far the respondent could see along the road, and, as a result, refused to consider the defense that the respondent had the last clear chance to avoid the collision in question. Reliance is placed upon the opinion of the trial judge upon deciding the case. It has frequently been pointed out that such an opinion is not a part of the record and is in no way conclusive upon the appeal. Even at that, the appellants rely upon only a portion of that opinion, taken apart from its context. While expressing doubt as to whether the respondent actually was able to see for a distance of 400 feet along the highway at the time he was making the turn from the intersecting street, the court stated that he might well have been able to see for that distance after he had driven upon the pavement. The court then went on to point out a number of respects in which the evidence indicated that after the respondent realized his danger he had no opportunity to avoid the collision. In effect, the court held that the respondent did not have the last clear chance to avoid the accident, and the evidence strongly supports that conclusion. Every inference and intendment must be taken in support of the judgment; and the court could have well invoked another rule of law to the effect that, when a person is placed, without his fault, in a position of peril, he may not be held strictly accountable if, in the light of full deliberation, it finally appears that some other course might have been wiser than the one he instinctively followed. Were the reasoning of the trial court in this case to be considered, it fully supports the judgment rendered and contains nothing conflicting therewith.

For the reasons given, the judgment is affirmed.

We concur: MARKS, J.; HARDEN, Justice pro tem.

125 Cal.App. 112

W. J. LACHFORD CO. v. SOUTHERN CALIFORNIA GAS CO.

Civ. 7213.

District Court of Appeal, Second District, Division 2, California.

July 26, 1932.

1. Evidence ⇐434(8).

Parol evidence is admissible to prove fraudulent negotiations in procurement of contract.

2. Evidence ⇐434(11).

Natural gas buyer could not recover on ground that seller's agent procured purchase contract through misrepresentations, where contract provided that no representation of agent should be binding except as expressed in contract.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by the W. J. Lachford Company against the Southern California Gas Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

Evans, Pearce & Campbell and Earl Oakley, all of Los Angeles, for appellant.

Thos. J. Reynolds and L. T. Rice, both of Los Angeles, for respondent.

CRAIG, J.

In an action upon a contract pursuant to which fuel was alleged to have been furnished at a rate in excess of the schedule price chargeable in such cases, judgment was rendered in favor of the defendant upon the pleadings. The plaintiff appealed.

The appellant's contract required, and it paid for some years, at the rate of 26 cents for natural gas furnished by the respondent. The complaint alleged that the respondent represented through its agent, who was clothed with authority to act for his principal, that the buyer was not entitled to nor eligible for a lower rate, and that a lower rate could not and would not be allowed; that said representations were false, were known to the defendant to have been made by said agent, and that they were known to be false and fraudulent, and were made with intent to deceive and defraud the plaintiff; that the plaintiff was entitled to the lower rate; and that the defendant knew that the latter rate was available to the plaintiff. Judgment was demanded for the difference between the alleged proper rate and the amount which had been paid. By the terms of said contract it was agreed: "All terms and stipulations heretofore made and agreed to by the parties in relation to said fuel service are merged in this contract, and no representation of any agent or employee shall be binding upon the company, except as expressed herein." At the time set for trial the plaintiff was permitted to file an amendment to its complaint, and to allege that the defendant falsely and fraudulently and with intent to defraud the plaintiff, represented "through the defendant's agents, representatives and employees," "who were clothed with authority to act for the defendant in soliciting contracts," that the plaintiff was not eligible for the lower rate for fuel and could not write a contract therefor; that such representations were knowingly and intentionally false. It was stated in behalf of the plaintiff that it would prove that it was entitled to a lower rate during the entire period of time covered by its contracts, "which the agent of the defendant secured through his misrepresentations to the plaintiff," and which the plaintiff "was induced to enter into by false and fraudulent representations by his agent."

[1, 2] It is contended by the appellant as a ground for reversal that the trial court erred in declining to permit the introduction of evidence tending to prove the allegations of fraud contained in its complaint and as indicated by its offer of proof; and authorities holding that the exemption clause as to agents "does not preclude proof of fraudulent representations by which the defendant was induced to execute the agreement and the promissory note" given upon subscription for stock, etc., are cited. It is well established that parol evidence is always admissible to prove fraudulent negotiations in the procurement of a contract. But in each of the cases upon which the appellant relies it appeared that the principal had acquiesced in the agent's acts or representations, or facts peculiar to the transaction there considered do not preclude the application of such doctrine. However, as stated by our Supreme Court in Gridley v. Tilson, 202 Cal. 748, 262 P. 322, 323: "A well-settled exception, however, is the case where the party seeking to rely on fraudulent representations of an agent had notice of the limitation on the agent's authority to make representations. Therefore a principal is bound only by the representations embodied in the written contract, where a provision in the contract notified the prospective purchaser that the agent's authority went no further. Fidelity & Casualty Co. of New York v. Fresno Flume & Irrigation Co., 161 Cal. 466, 119 P. 646, 37 L. R. A. (N. S.) 322; Pease v. Fitzgerald, 31 Cal. App. 727, 161 P. 506; Tockstein v. Pac. Kissel Kar Branch, 33 Cal. App. 262, 164 P. 906; Munn v. Anthony, 36 Cal. App. 312, 171 P. 1082; Schuster v. N. A. Hotel Co., 106 Neb. 672, 184 N. W. 136, 186 N. W. 87; Northern Assurance Co. v. Grand View Building Ass'n, 183 U. S. 308, 22 S. Ct. 133, 46 L.

Ed. 213. In the case of Pease v. Fitzgerald, supra, the rule was applied under circumstances almost identical with the circumstances in the present case. Defendant, however, attempts to escape the effect of the settled rule of these cases by testifying that he did not have his glasses with him at the time he signed the subscription contract and gave the notes and therefore he did not read the contract nor the provision referred to. But this cannot afford him an excuse in the absence of a showing that he was prevented by the agent from reading the limiting clause or was otherwise tricked into signing the document without reading it. He made no request to have the contract read to him. In addition it was in evidence that he had previously signed similar contracts with the same company in subscribing for 3000 shares of its stock." No semblance of fraud other than representations of an agent which were capable of verification by the appellant from published schedules is asserted in the instant case, though it continued to accept the respondent's service over a period of more than two years.

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

124 Cal.App. 462

INDERBITZEN et al. v. LANE HOSPITAL et al.

Civ. 8018.

Supreme Court of California.

Aug. 22, 1932.

Appeal and error ⇐241.

Judgment granting nonsuit will be upheld if justifiable on any ground, whether made ground of motion or not.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

On petition for hearing, after judgment in the District Court of Appeal, 12 P.(2d) 744, which superseded 7 P.(2d) 1049.

Petition denied.

Keyes & Erskine, of San Francisco (Lionel Browne, of San Francisco, of counsel), for appellants.

Redman, Alexander & Bacon, and Herbert Chamberlin, all of San Francisco, for respondents.

PER CURIAM.

The petition for hearing is denied. In denying a hearing, however, we withhold our approval from that part of the opinion which seems to suggest that a nonsuit cannot be sustained on appeal except upon the grounds set forth in support of the motion. The correct rule, as we have heretofore held, is that when a motion for nonsuit has been granted, the judgment will be upheld if it can be justified on any ground, whether made a ground of the motion or not. Anchester v. Keck (Cal. Sup.) 4 P.(2d) 934; Miller v. Wade, 87 Cal. 410, 25 P. 487; Bailey v. Brown, 4 Cal. App. 515, 88 P. 518.

216 Cal. 266

FRANKFIELD et ux. v. FREIBERGER.

FREIBERGER v. FRANKFIELD et ux.

S. F. 13963, 14276.

Supreme Court of California.

Aug. 29, 1932.

Rehearing Denied Sept. 26, 1932.

1. Compromise and settlement ⇐17(1).

Purchaser who, being sued by vendors, offered compromise whereby settlement was reached, *held* bound thereby, if valid.

2. Compromise and settlement ⇐8(3).

Where purchaser, after court announced intention of giving judgment to vendors, signed compromise and accepted money thereunder, finding that agreement was voluntarily made and executed *held* warranted.

It appeared that purchaser, having paid $4,100 in escrow, demanded return of money; that vendors brought action for escrow money and specific performance; that court announced intention of giving judgment to vendors, whereupon purchaser's attorney submitted offer of compromise; that settlement was reached whereby, on payment of $1,500 to vendors and balance to purchaser, action was to be dismissed; and that such agreement was embodied in stipulation, signed by parties and their attorneys, under which money was accepted by purchaser, who apparently remained satisfied therewith for about nine months.

In Bank.

Appeals from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Louis Frankfield and wife against Rae Freiberger, who filed a counterclaim and brought a separate action against the first-named party and wife. From an adverse judgment in each case, the last-named party appeals, and the appeals were consolidated.

Judgments affirmed.

Rae Freiberger, in pro. per.

Colbourn & De Avila, of Oakland, for respondents.

PER CURIAM.

The above-entitled actions arose out of a dispute over an agreement of sale of certain real property. Appellant Freiberger agreed to buy, and respondents agreed to sell, an apartment house for the sum of $16,500. The buyer was to pay $4,100 down, and the payment of the balance was to be secured by two mortgages or deeds of trust. Appellant paid the said sum of $4,100 in escrow to Alameda County Title Insurance Company. Subsequently she demanded the return of the money from the escrow holder, and served notice of rescission upon respondents, chiefly on the grounds of defective title and fraud. The demand was refused. Thereafter the respondents brought an action against the title company and the appellant for the $4,100 down payment and for specific performance. Appellant engaged counsel, and the action was tried, the money being meanwhile paid into court. At the conclusion of the action the trial court announced its intention of giving judgment to the sellers. Before findings were prepared, however, Miss Freiberger's counsel submitted an offer of compromise. After considerable discussion, a settlement

was reached, by the terms of which the Frankfields were to take the sum of $1,500, and the balance of the money was to be returned to Miss Freiberger. This agreement was embodied in a stipulation which provided that, upon payment of these sums, the action might be dismissed. It was signed by the parties and their attorneys. Immediately thereafter the court made an order for the payment of the money in accordance with its terms, and this was done. A dismissal of the action was prepared and signed by the attorneys, but was not filed until some time later.

About nine months after the settlement, appellant Freiberger, having dismissed her counsel, filed a claim of lien against the property which was the subject of the agreement of sale. Respondents brought an action (the first of the above-entitled actions) to quiet title. Appellant, appearing in propria persona, filed an answer and counterclaim. Thereafter appellant brought an action against respondents (the second of the above-entitled actions) seeking affirmative relief. These actions were tried, and each was decided in favor of respondents. Appellant appealed from both judgments, and the appeals were consolidated.

The theory of appellant may be summarized as follows: The original agreement of sale was procured by fraudulent representations of the sellers, and their title was defective; consequently appellant was entitled to rescind, and did so; she then became entitled to the return of her down payment of $4,100; no final judgment was ever rendered against her in the first action; and the purported compromise agreement was void because procured by fraud, duress, and menace on the part of respondents, their attorneys, and her own attorney.

[1, 2] It is apparent that, if the compromise agreement is valid, these appeals are determined by that fact alone. Appellant claims that she was threatened with harm if she refused to sign the stipulation, and that her own attorney told her he was working against her interest, and would use his influence with the judge to cause her injury. There is no evidence save the testimony of appellant herself to support these statements and all of the other witnesses testified to the contrary. Moreover, it is not denied that appellant, accompanied by the other parties and both attorneys, walked down to the courtroom where the judge made the order for payment of the money, and thereafter proceeded to the office of the county treasurer, where she personally secured the money.

The situation is, then, as follows: Appellant was about to lose $4,100 and costs as a result of an announced decision against her. Her attorney arranged a settlement for $1,500. She signed the agreement, took the money, and was apparently satisfied for a period of nine months.

From these facts it necessarily follows that the trial court was justified in making its finding that this agreement was freely and voluntarily entered into and carried out by all parties. This disposes of the appeals, and the judgments are therefore affirmed.

216 Cal. 113

Ex parte TAYLOR.

Cr. 3533.

Supreme Court of California.

July 29, 1932.

1. Pardon ⇐9.

Prisoner on parole is constructively prisoner of state in legal custody.

2. Prisons ⇐15.

Prisoner is not entitled as of right to credits, but credit must be earned and allowed by affirmative action of prison board.

3. Prisons ⇐15.

Prison board's forfeiture of prisoner's credits, for parole violation occurring prior to expiration of sentence, *held* authorized, though board's order was made after expiration of term as reduced by credits (Pen. Code, § 1168).

4. Prisons ⇐15.

State should not interfere with decision of state prison board, unless it clearly appears that board exceeded its powers or substantial injustice was done.

In Bank.

Proceeding by Earl W. Taylor for writ of habeas corpus to be directed to the Warden of Folsom prison.

Application denied and writ discharged.

Superseding opinion in 7 P.(2d) 717.

A. J. Harder, of Sacramento, for petitioner.

U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., and Neil R. McAllister, Dist. Atty., and Guy P. Johnson, Asst. Dist. Atty., both of Sacramento, for respondent.

SEAWELL, J.

Alleging that he is illegally confined and restrained of his liberty by the warden of Folsom prison, petitioner seeks by this application for a writ of habeas corpus to secure his release and discharge.

Petitioner was convicted in Los Angeles county on three counts of grand theft. He was received at San Quentin on August 18, 1928, and thereafter his term was fixed at four years for the first offense and two years each for two subsequent offenses, the sentences to run concurrently, so that his maximum sentence would be four years. With full allowance of credits on this term, petitioner would be entitled to his release on August 18, 1931 (section 1168, Pen. Code). Prior to August 18, 1931, and on October 27, 1929, he was released on parole. On July 24, 1931, which was prior to the expiration of his term as reduced by a full allowance of credits, petitioner was sent to Folsom for violating his parole. On July 25–26 the state board of prison directors ordered that the parole theretofore granted to petitioner "be suspended and revoked pending investigation of the complaint filed" against the petitioner. On July 31, 1931, petitioner was given the required notice of hearing of the charge of parole violation, and the hearing thereon was set for August 1, 1931. On that date the hearing was continued, apparently without objection of petitioner, to August 8th and 9th, when the matter was partially heard, and then continued to August 14th, and after that to August 26, 1931, when the hearing was concluded, and upon the oral and documentary evidence before it the prison board determined "that due proof had been made that the prisoner has with evil intent violated the rules and regulations of the prison, was guilty of the offense specified in the complaint, and should be punished therefor * * * by a forfeiture of such time credits as he had heretofore earned, or may hereafter earn." The propriety of this type of order was upheld in In re Sanders, 47 Cal. App. 368, 190 P. 647.

Petitioner contends that on August 26, 1931, when the order of forfeiture of credits was made, the prison board was without jurisdiction to make such order, for the reason that his time (with full allowance of credits) had expired. This contention is based on the theory that at the time of his parole violation he had admittedly earned, and been allowed, a reduction of eight months on his time, and in addition thereto had been allowed an additional four months' reduction by virtue of resolution of the board of prison directors dated July 1, 1931. This resolution purported to allow in advance, upon the recommendation of the warden, all credits earned by prisoners during the interim between the semiannual meetings of the board. Petitioner contends that with the allowance of these credits his term expired on August 18, 1931, which was prior to the date his parole was formally suspended, and the order made revoking all credits theretofore earned or thereafter to be earned by him.

[1] A prisoner on parole is constructively a prisoner of the state in the legal custody and under the control of the state board of prison directors. In re Heckman, 90 Cal. App. 700, 266 P. 585. Rules and regulations for the conduct of a paroled prisoner are rules and regulations of the prison. See Matter of Stanton, 169 Cal. 607, 147 P. 264. Upon hearing and trial, the petitioner was found guilty of having "with evil intent violated the rules and regulations of the prison," and as punishment therefor the prison board forfeited all good time theretofore earned or thereafter to be earned. This the statute empowered it to do. Section 1168, Pen. Code.

[2] It is well settled that a prisoner is not entitled as of right to credits (In re Thompson, 54 Cal. App. 177, 201 P. 473; Pareses v. Board of Prison Directors, 208 Cal. 353, 281 P. 394), nor may they be accorded automatically by operation of law, but, in addition to being earned, must be allowed by affirmative action of the prison board (In re Mann, 192 Cal. 165, 219 P. 71).

[3] Assuming that the petitioner had earned all the credits allowed by section 1168 of the Penal Code, a point we need not now decide, there can be no doubt that the prison board had authority to revoke and forfeit those credits for any infraction of the rules or for parole violation occurring prior to the expiration of petitioner's sentence. That is all that was done in this case, and it is immaterial that the order forfeiting the credits was made at a time subsequent to the expiration of the alleged "reduced" term. By the order forfeiting the credits, the so-called "reduced" term disappears from the case, and the petitioner is required to serve the full four years originally imposed on him, which term has not at this time expired. In reaching this conclusion, we regard as unimportant the fact that the parole violation for which petitioner's credits were subsequently revoked occurred prior to the expiration of the asserted "reduced" term. Likewise, notice of the hearing for revocation of parole and forfeiture of credits was served on petitioner and several hearings had prior to August 18, 1931. The mere fact that, by reason of such continuances, the order revoking and forfeiting petitioner's credits was made subsequent to August 18, 1931, is, in our opinion, immaterial.

We conclude, therefore, that the petitioner was not entitled to discharge on August 18, 1931, and that the prison board's jurisdiction over the petitioner continued up to the time of the making of the order of August 26, 1931, forfeiting all credits theretofore earned or thereafter to be earned. Such order was therefore properly made.

[4] This matter seriously affects the disciplinary and administrative policies which

the state evidently intended should be placed as far as possible in the hands of the state board of prison directors and those charged with administrative details under said board, and this court should not interfere with its decision, unless it clearly appears that it has exceeded its powers, or that substantial injustice has been done. As an aid to administration, we see no objection to credits being allowed by the board upon the recommendation of the warden on the condition that the prisoner's conduct and work continues to be meritorious up to the date that his discharge is due.

The application is denied, and the writ is discharged.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; TYLER, Justice pro tem.; LANGDON, J.

216 Cal. 274

YOLO et al. v. MODESTO IRR. DIST.

Sac. 4538.

Supreme Court of California.

Sept. 1, 1932.

Rehearing Denied Sept. 28, 1932.

1. Waters and water courses ⊂=228¾.

Irrigation district operating power lines under statutory authority for selling electricity within and beyond its territory *held* liable in tort for negligent maintenance of electric power line (St. 1877–78, p. 820; St. 1919, p. 778, as amended).

Irrigation district, although, when created by St. 1877–78, p. 820, it had been operating as public or state agency performing governmental function, had availed itself of St. 1919, p. 778, as amended, pursuant to which it constructed power houses and transmission lines for manufacture, distribution, and sale of electric power, light, and energy throughout its territory and also beyond its boundary lines, competing with a public service corporation and using only about 25 per cent. of power generated and transmitted by it for pumping, drainage, and other necessary irrigation district activities, and by engaging in such activities had become a quasi municipal corporation liable for torts of its agents when acting in proprietary capacity.

2. Waters and water courses ⊂=228¾.

Irrigation district *held* liable for death of boy if caused by negligent maintenance of power line maintained as proprietary enterprise, even if at time of accident wire was carrying power for irrigation purposes (St. 1877–78, p. 820; St. 1919, p. 778, as amended).

It was immaterial what particular use was being made at the time in question of power conveyed over broken wire so long as wire was constructed and maintained as part of, and for advancement of, proprietary enterprise.

In Bank.

Appeal from Superior Court, Stanislaus County; J. T. B. Warne, Judge.

Action by E. Yolo and another against the Modesto Irrigation District. From a judgment of nonsuit, plaintiffs appeal.

Reversed.

For prior opinion, see 4 P.(2d) 967.

Philip M. Carey and Marvin B. Sherwin, both of Oakland, and Joseph D. Malloy, of Stockton, for appellants.

L. J. Maddux, of Modesto, for respondent.

W. Coburn Cook and Samuel V. Cornell, both of Turlock, David F. Bush, of Oakdale, and Hawkins & Hawkins, of Modesto, amici curiæ.

PRESTON, J.

Appeal from judgment of nonsuit in favor of defendant in an action to recover damages for the alleged wrongful death of plaintiffs' minor child on April 7, 1926. The boy was electrocuted on the farm where he was working while crawling through a fence, the wires of which had become charged with electricity when one of the transmission wires of defendant's power line broke during a high wind, from rubbing against the branches of a tree or other cause, and contacted the wire strands of an adjoining fence.

The power wires, at the place where the break occurred, passed through a line of trees, the branches of which had not been trimmed for some time prior to the accident, and evidence was received in support of and against the charge that the boy's death was due to the negligence of defendant in failing to properly construct and maintain the said power line and in failing to take due precautions to trim the limbs of the trees so that no injury could be caused to the wires by overhanging or swaying branches. At the conclusion of the testimony, the court granted a nonsuit upon the ground that an action in tort against defendant irrigation district, based upon the negligence of its officers or employees, could not be maintained. Plaintiffs appealed. This question, therefore, confronts us: May an irrigation district, organized and operating as is defendant, be held liable in tort by reason of its negligent maintenance of an electric power line in connection with its irrigation system? If so, the judgment of nonsuit was improperly granted.

Preliminarily it may be said that, in numerous cases dealing with tort liability, this court has distinguished between two species of public corporations. In the one class have been placed incorporated cities, towns, and similar organizations, denominated "municipal corporations," which may be held liable for torts of their agents committed while acting in a proprietary capacity. Chafor v. Long Beach, 174 Cal. 478, 163 P. 670, L. R. A. 1917E, 685, Ann. Cas. 1918D, 106; Davoust v. Alameda, 149 Cal. 69, 84 P. 760, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847; Morrison v. Smith Bros., 211 Cal. 36, 293 P. 53. In the other class have been placed irrigation, reclamation, drainage, and similar organizations, variously denominated "public corporations," for "governmental purposes," "agents or representatives of the state in the particular locality in which they exist," "public agencies," etc., which (with certain exceptions such as liability created by statute) are not generally liable for torts of their agents because they are held to be state agencies performing governmental functions. Whiteman v. Anderson-Cottonwood, etc., 60 Cal. App. 234, 212 P. 706; Nissen v. Cordua Irr. Dist., 204 Cal. 542, 269 P. 171; Morrison v. Smith Bros., supra. The case last cited also recognizes a third classification, corporations such as a district organized under the Municipal Utility District Act (Stats. 1921, p. 245), denominated "quasi municipal corporations" or public corporations of a quasi municipal character, more nearly resembling municipal corporations proper than state agencies and subject, so far as liability for tort is concerned, to the rules governing municipal corporations, that is, being generally liable for torts committed by their agents while acting in a proprietary capacity. For a full discussion of this subject see Morrison v. Smith Bros., supra.

[1] We shall now discuss the organization and operations of this defendant to determine under which classification it should come and whether it is subject to the general rule governing tort liability or to the exception thereto which excludes state agencies.

Defendant, the Modesto Irrigation District, was created by legislative enactment (Stats. 1877–78, p. 820), and, operating under this legislation as an irrigation district, it was, within the classification of a public or state agency performing a governmental function, exempt from liability for the torts of its agents. However, defendant subsequently availed itself of the provisions of the statute of 1919, and subsequent amendments (Stats. 1919, p. 778; Stats. 1921, pp. 829, 1083; Stats. 1923, p. 629), pursuant to which it constructed power houses and transmission lines for the manufacture, distribution, and sale of electric power, light, and energy throughout its territory and also outside of its boundary lines, competing with a public service corporation, and, in fact, using only about 25 per cent. of the power generated and transmitted by it for pumping, drainage, and other necessary irrigation district activities. Appellants contend that, by so engaging in these latter activities, defendant stepped beyond the character and out of the classification of purely an irrigation district or state agency, and assumed in part at least the role of a municipal or quasi municipal corporation. In other words, appellants claim that, although cloaked with the name and form of an irrigation district, defendant, so far as its operations under said statute are concerned, more closely resembles a municipal corporation proper than it does a state agency, and it may properly be termed an organization coming within the classification of a quasi municipal corporation, liable for the torts of its agents when acting in a proprietary capacity. These contentions must be sustained.

This is so because of the language of the act itself, which in so many words extends the scope of the organization beyond that of an irrigation district, enlarges its powers. For instance, the act states that any irrigation district "may provide for the construction, acquisition, operation, leasing and control of plants for the generation, distribution, sale and lease of electrical energy, including sale to municipalities, corporations, public utility districts, or individuals, of electrical power so generated;" that "the officers, agents and employees of such districts shall have the same powers, duties and liabilities respecting such power and the construction, acquisition, repair, maintenance, management and control thereof as they now have or may hereafter have respecting such irrigation or such irrigation districts;" that "the California irrigation district act shall be so construed, applied and enforced as to apply to such power as well as such irrigation, except that nothing in said act shall be so construed as to prevent the sale of power by any district for use outside of the boundaries of such district or to require the distribution of such power in accordance with any assessments levied by such district." St. 1919, p. 778, § 1, as amended by St. 1923, p. 629. In particular the exception noted in the clause last quoted has the undeniable effect of extending the powers of the corporation beyond those authorized by the Irrigation Act and requiring it to assume characteristics more nearly partaking of the nature of a municipal corporation than of a state agency.

[2] The maintenance and operation of an electric plant used to supply the public with power has been directly held to be the exercise, not of a governmental function, but of a proprietary and private right. Davoust v. City of Alameda, supra. It is immaterial in this case what particular use was being made at the time in question of the power conveyed

over the broken wire—whether it was carrying power for irrigation purposes or for sale or for other purposes—so long as said wire was constructed and maintained as a part of, and for the advancement of, the proprietary enterprise. The said act, pursuant to which defendant was operating, is determinative of its nature as a quasi municipal corporation, and it follows that it may be held liable, when acting in a proprietary capacity, for the torts of its agents. In other words, while we can conceive that a governmental agency might be organized and authorized to operate a power plant for governmental purposes only, and thus be free from tort liability, this could not be true of a corporation organized pursuant to the above statute, which specifically opens the door to the conducting of a proprietary enterprise by authorizing the sale of power outside of the boundaries of a district—such corporation, therefore, being free to act in a proprietary capacity, must be held liable for torts committed by its agents in conducting the proprietary enterprise. Recognizing this fact, the complaint here specifically alleges that said defendant was on said day and now is "engaged in a purely proprietary enterprise additional to and not necessary for irrigation purposes, to-wit: in the business of transmitting, transporting, distributing and selling electric current and power to consumers thereof in and near the City of Modesto. * * *"

The above holding is foreshadowed in some of the cases upon which defendant mainly relies. For example, in the case of Whiteman v. Irrigation District, supra, 60 Cal. App. 234, 241, 242, 212 P. 706, 709, the court says: "It is manifest that to uphold the complaint herein as stating a cause of action against the corporation we must take the position that the district is concerned in its operations only with private matters. This follows for the reason that the complaint does not specify for what purpose the cement was to be used. If it could be legally devoted by the district to any public purpose, it would be necessary to negative that condition by alleging facts showing that the district was promoting a proprietary right in the use of the cement at the time of the accident. There is no such allegation."

This distinction is also noted in the case of Nissen v. Cordua Irrigation District, supra, 204 Cal. 545, 269 P. 171. Again in Morrison v. Smith Bros., supra, 211 Cal. at page 45, 293 P. 53, 56, it is said: "The rule excluding state agencies from liability for tort is an exception to the general rule which we are not inclined to extend."

The justice of this ruling is apparent. As stated by counsel, a practical situation is presented. The inhabitants of Modesto and outlying districts desired to operate an electrical distribution system under public ownership. Had this end been accomplished through the city itself, a municipal corporation, it would have been liable for all torts committed by it in conducting such a proprietary enterprise (Davoust v. City of Alameda, supra; Ruppe v. City of Los Angeles, 186 Cal. 400, 199 P. 496; Sincerney v. City of Los Angeles, 53 Cal. App. 440, 200 P. 380); had it been accomplished through a public utility district, such district might also have been liable (In re Orosi Public Utility District, 196 Cal. 43, 235 P. 1004); the same is true of a municipal utility district (Morrison v. Smith Bros., supra). What real reason then could there be for making a distinction in favor of an organization operating under the said act of 1919, as amended? None exists; hence our conclusion that such a corporation, when acting in its proprietary capacity, may be held liable for the torts of its agents.

The judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; TYLER, Justice pro tem.; SEAWELL, J.

216 Cal. 251

BERTE v. LUSE et al.

L. A. 12241.

Supreme Court of California.

Aug. 23, 1932.

1. Quieting title ⇐44(4).

Plaintiff suing to quiet title sufficiently proved title by introducing deed to herself, where defendants asserted claim solely through conveyance from plaintiff.

2. Quieting title ⇐44(2).

In action by grantor to quiet title, evidence *held* admissible to show deed was at most a mortgage and was without consideration.

In Bank.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by Genevieve Berte against A. F. Luse, Western States Land & Mortgage Company, and another. Judgment for plaintiff, and defendants named appeal.

Affirmed.

James R. Jaffray and Le Roy Reames, both of Los Angeles, for appellants.

Koenig & Brunton, of Los Angeles, for respondent.

PER CURIAM.

This appeal is taken from a judgment quieting title in favor of plaintiff. The complaint is in the form usually employed in such an action. The defendant Clara H. Bergmeier ad-

mitted that title and possession of the property was in plaintiff, but alleged that she and her trustees, A. F. Luse and Western States Land & Mortgage Company, claim an interest in the property by virtue of a deed from plaintiff to this defendant, which deed was intended as security for a $10,000 loan alleged to have been made by this defendant to plaintiff. Defendants A. F. Luse, Mary E. Luse, and the Western States Land & Mortgage Company filed a separate answer, generally denying the allegations of the complaint. The other defendants either defaulted or filed disclaimers.

The only evidence introduced by plaintiff at the time of the trial in reference to her title was the deed by which she received title to the lots in question. The remainder of plaintiff's case was devoted to proving that the claim of defendants was without merit. On evidence substantially in conflict the trial court found that on June 5, 1924, at a time when plaintiff owned the property, plaintiff and her mother entered into an agreement with defendant Clara H. Bergmeier whereby said defendant agreed to advance to plaintiff and her mother the sum of $10,000, and to take as security a deed to the lots in question; that in pursuance to this agreement a deed to the lots was executed and delivered to Clara H. Bergmeier; that thereafter and within a few days the contracting parties agreed to rescind the loan agreement and to enter into a partnership. As part of this new agreement it was agreed that the deed should be redelivered to plaintiff. The evidence is ample to support the finding that the loan agreement was canceled by mutual consent, and that defendant Bergmeier at no time loaned any money to plaintiff.

The evidence shows, and the trial court found, that after the loan agreement was canceled the plaintiff and her mother frequently demanded the return of the deed, but for one reason or another were unable to secure a redelivery. Conditions remained in this state for approximately three years when defendant Bergmeier caused the deed to herself to be recorded. She then executed a deed to the premises to defendant A. F. Luse, in exchange for some apparently worthless oil and gas leases in Texas. The court found on conflicting evidence, and appellants do not attack the finding, that Luse at all times had actual knowledge of the claims of plaintiff to the property. Luse thereafter deeded the property to the Western States Land & Mortgage Company, of which he was president. This corporation likewise had actual knowledge of the plaintiff's claims to the property.

On this state of the evidence, as already stated, the trial court quieted plaintiff's title against the claims of defendants. A. F. Luse and Western States Land & Mortgage Company alone appeal.

The briefs filed on behalf of appellants and respondent indicate that neither counsel has shown the diligence in the preparation thereof or the regard for the rules of court expected of counsel in causes pending in this court. In the interest of justice, however, we will consider the appeal on its merits.

[1] Appellants in their opening brief in no way attack the sufficiency of the evidence to support the findings above set forth, but solely contend that it was error for the trial court to quiet plaintiff's title for the reason that plaintiff failed to trace her record title back to the original patentee, or to a grantor in possession. It will be remembered that plaintiff's only evidence tending to show title in herself was the deed by which she received title. Of course, the rule is elementary that in a quiet title action the plaintiff must recover on the strength of her own title and not on the weakness of the defendant's. Under ordinary circumstances it would follow that since the plaintiff failed to prove her chain of title, and admitted she was not in possession, the judgment herein should be reversed. However, the instant case comes within a well-settled exception to the rule that a plaintiff in a quiet title suit must trace title back to an original patentee. It is to be noted that the sole claim of the appellants is based on the deed from plaintiff to defendant Bergmeier. It is well settled that when the sole claim of the defendants is necessarily predicated on the theory that the plaintiff has good title, as where defendants claim through a conveyance from plaintiff, it is sufficient proof of title in the plaintiff to introduce into evidence the deed conveying the property to plaintiff. This is so because in such a case when defendants are claiming through the plaintiff they must necessarily admit the validity of plaintiff's title at the time their claim arose. Strange v. Strange, 23 Cal. App. 281, 137 P. 1104; Denning v. Green, 88 Cal. App. 379, 263 P. 819; Willard George Hotel Company v. Warden, 99 Cal. App. 401, 278 P. 898; Tannahill v. Greening, 85 Cal. App. 714, 259 P. 1017; Thiele v. Security Trust & Savings Bank, 202 Cal. 758, 262 P. 308. It follows that plaintiff's proof was sufficient.

[2] In a supplemental opening brief appellants contend that certain evidence was improperly admitted by the trial court, either because it was improper impeachment, or on the ground it was incompetent, irrelevant, and immaterial. The impeaching testimony was properly admitted, as was likewise all the evidence tending to show that the Bergmeier deed was at most a mortgage and that no consideration was given therefor. The appellants in no way attack the material findings on these issues. There was no error in the admission of evidence.

The judgment appealed from is affirmed.

216 Cal. 187

CITY AND COUNTY OF SAN FRANCISCO v. COLLINS, Registrar of Voters.

S. F. 14738.

Supreme Court of California.

Aug. 8, 1932.

1. Evidence ⇐5(2).

Extraordinary number of people in need because of current economic depression is matter of such common knowledge that court may take judicial notice thereof.

2. Paupers ⇐1.

Statutes providing for poor relief by cities and counties *held* applicable to persons becoming indigent through unemployment because of economic depression (Pol. Code, § 4041.16, as added by St. 1929, p. 1458, § 17; Deering's Gen. Laws 1931, Act 5814, § 1).

3. Counties ⇐173(1).

Counties may issue bonds for relief of poor (Pol. Code, § 4088, and § 4041.16, as added by St. 1929, p. 1458, § 17).

4. Municipal corporations ⇐39.

Functions performed by officers of city and county in particular case determine whether it shall be viewed as city or as county in determining legality of their acts.

5. Paupers ⇐3.

Statutory duty to relieve indigent is matter of state-wide interest, in which city and county of San Francisco is governed by general law and acts as county (Pol. Code, § 4041.16, as added by St. 1929, p. 1458, § 17; Deering's Gen. Laws 1931, Act 5814, § 1).

6. Municipal corporations ⇐39.

Performance of county functions by city and county of San Francisco cannot be limited by inconsistent provisions in municipal charter.

7. Municipal corporations ⇐39.

Provision of San Francisco municipal charter, incorporating general law on creation of bonded indebtedness of municipalities, does not prevent creation of such indebtedness for county purposes (San Francisco Charter, §§ 2, 101).

8. Counties ⇐178.

Specification of maximum legal rate of interest on poor relief bonds in ordinance calling special election on proposition of issuance thereof by city and county *held* proper (Pol. Code, § 4088).

9. Counties ⇐178.

Calling of special election on proposition of issuing county poor relief bonds on same date with same precincts as primary election *held* proper; elections being distinct and separate (Pol. Code, § 4088; Deering's Gen. Laws 1931, Act 2264, § 1).

The ordinance calling the election made separate provision for inspectors, judges, and clerks, provided for use of ballots thereat, instead of voting machines as at primary election, and provided for separate canvassing of returns.

10. Counties ⇐153½.
Municipal corporations ⇐871.
States ⇐119.

Expenditure of public money in pursuance of public purpose, such as poor relief, is not within constitutional prohibition of gifts thereof to individuals (Const. art. 4, § 31).

11. Counties ⇐173(1).

City and county of San Francisco *held* authorized to issue bonds, through its board of supervisors, for care and maintenance of persons made indigent as result of current economic depression (Pol. Code, § 4088, and § 4041.16, as added by St. 1929, p. 1458, § 17; Deering's Gen. Laws 1931, Act 5814, § 1).

In Bank.

Application by the City and County of San Francisco, a municipal corporation, for a writ of mandate compelling C. J. Collins, as Registrar of Voters of such city and county, to place a proposition for the issuance of poor relief bonds on the ballot for the August primary election.

Writ granted.

John J. O'Toole, City Atty., and Dion R. Holm, Asst. City Atty., both of San Francisco, for petitioner.

Orrick, Palmer & Dahlquist, of San Francisco, for respondent.

Louis Heilbron, of San Francisco, for Associated Charities of San Francisco, amicus curiæ in support of petitioner.

LANGDON, J.

This is a petition for a writ of mandate.

On July 11, 1932, the board of supervisors of the city and county of San Francisco adopted a resolution, declaring that due to world-wide economic conditions, the public interest and necessity demand that provision be made for the care and maintenance of the indigent sick and dependent poor of said city and county; that the estimated cost for such care during the fiscal year 1932–1933 is $6,500,000; that no part of said sum can be paid out of the ordinary annual income of the city and county in addition to other necessary expenses; and that consequently a bond issue is required to raise the money. This resolution was approved by the mayor on July 12, 1932, and published on July 13, 1932. On July 22, 1932, Ordinance No. 19.0711 was passed and approved by the mayor, calling for a special election to be held on August 30, 1932, to submit to the electors of the

city and county the proposition of incurring a bonded debt for the said purpose and in the said sum. The ordinance sets forth the necessary details of the procedure in handling the election, and the form, denomination, interest rate and time of payment, and retirement of the bonds.

A certified copy of this ordinance was forwarded on July 22, 1932, to respondent Collins, registrar of voters of the city and county, who immediately gave notice of his refusal to place the proposition on the ballot. It is his contention that the proposed bond issue is unlawful, both for lack of authority to issue bonds under the circumstances, and by reason of improper procedure in the calling of the election. The present petition seeks to compel respondent to submit the proposition to the voters.

The petition states the foregoing facts, and further alleges that the investigations of committees appointed by the mayor, who have reported to the board of supervisors, show that San Francisco is now supplying food and other necessities of life to between 40,000 and 50,000 persons; and that during the coming winter it is estimated that between 40,000 and 60,000 *families* will need such assistance. It is further alleged that to raise the necessary money by taxation would require an additional tax of $1 on each $100 valuation of assessable property, which, in view of existing conditions, would cause such widespread default among taxpayers as to leave the city and county without funds to perform its ordinary functions.

[1] The grave and immediate necessity of some salutary measures to care for persons made indigent as a result of the current economic depression is established by the allegations of the petition. The extraordinary number of people in need is a matter of such common knowledge that we may take judicial notice of it. See People v. Tossetti, 107 Cal. App. 7, 289 P. 881. But the method adopted by petitioner to meet this situation presents serious questions for our determination.

The first question is whether, as counsel for the city and county contend, there is direct statutory authority for San Francisco to issue bonds for the relief of its indigent sick and dependent poor.

[2] There are two statutes which refer to the duty or power of a county to give relief to the poor. Section 4041.16 of the Political Code (as added by St. 1929, p. 1458, § 17) provides in part: "Under such limitations and restrictions as are prescribed by law, and in addition to jurisdiction and powers otherwise conferred, the boards of supervisors, in their respective *counties, shall have the jurisdiction and powers* to provide for the care and maintenance of the indigent sick or dependent poor of the county, and for that purpose to levy the necessary property or poll taxes, or both." It will be observed that this section is permissive, imposing no obligation; and that it refers to *counties* alone. The Pauper Act (Deering's Gen. Laws, 1931, vol. 2, p. 3130, Act 5814) provides in section 1: "Every county and *every city and county shall relieve and support* all pauper, incompetent, poor, indigent persons and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, or by their own means, or by state hospitals or other state or private institutions." This statute is mandatory, and applies to a *city and county* as well as to a county. There can be no question as to the applicability of the first statute, giving power to a county, and the second statute, imposing a duty on the county or city and county, to the existing situation, where large numbers of persons have become indigent through unemployment. The statutes are neither in terms nor spirit limited to the relief of chronic or permanent paupers, or any other class of poor persons, but extend to every person coming within the terms of the statute dependent upon public assistance for the necessities of life.

[3] If, then, a county or city and county must support its poor, how may it raise the funds with which to do so? Section 4041.16 of the Political Code, quoted supra, permits the levy of taxes by a county for this purpose, but does not purport to restrict the county to this means. And section 4088 of the Political Code provides that a county may incur a bonded indebtedness "for any purposes for which the board of supervisors are herein authorized to expend the funds of said county. * * *" This plainly permits a county to issue bonds for relief of the poor. It follows that San Francisco may, subject to any applicable statutory limitations, issue such bonds if it is a *county*. In other words, it has the duty as a city and county, under the Pauper Act, of supporting its poor, by the usual method of taxation, but it can issue bonds under section 4088 of the Political Code only if it is a county.

[4, 5] "The consolidated city and county of San Francisco partakes of the nature of a city and a county. *It has the powers and performs the functions of both.*" Nicholl v. Koster, 157 Cal. 416, 420, 108 P. 302, 304. (Italics ours.) "San Francisco is therefore both a city and a county, and, although the boundaries of the two bodies corporate are coincident, the electors within this territory vote for officers * * * whose powers and duties are prescribed by general laws, and upon which the charter is silent. It must follow from this that some of its officers are city officers, and others are county officers. There is nothing unusual or inconsistent in this. The 'government' of the city is munici-

pal, and the officers who are to exercise that government are municipal officers; but the territory in which that government is exercised is still a part of the state, and, for all purposes other than municipal government, is subject to its control, with the right on the part of the state to authorize the election therein of such officers as may be required to execute its general laws, or to perform such functions disconnected with the municipal government as may pertain to the government of the state." Kahn v. Sutro, 114 Cal. 316, 326, 46 P. 87, 91, 33 L. R. A. 620. These cases establish the rule that the functions performed in the particular case determine whether San Francisco is to be viewed as a city or a county. See, also, Keyes v. City and County of San Francisco, 177 Cal. 313, 173 P. 475; Crowley v. Freud, 132 Cal. 440, 64 P. 696. In Nicholl v. Koster, supra, it was pointed out that the matter in question—the probation system—concerned the whole state, and was therefore a matter of state policy and not a municipal affair. The duty to relieve the indigent, established by state statute, is likewise a matter of statewide interest, in which the city and county of San Francisco is governed by the general law, and acts as a county—an agent of the state. See County of Sacramento v. Chambers, 33 Cal. App. 142, 164 P. 613.

[6, 7] It follows that no inconsistent provisions in the San Francisco municipal charter could limit the performance of these county functions. See Nicholl v. Koster, supra. Actually, however, the charter does not purport to place any limitation upon the issuance of such bonds. Section 2 provides that San Francisco "shall have all rights and powers appropriate to a county, a city, and a city and county," subject to any restrictions in the charter. Section 3 provides that where "a procedure for the exercising of any rights or powers belonging to a city, or a county, or a city and county is provided by statute of the state of California, said procedure shall control and be followed" unless a different procedure is provided by charter or ordinance. Section 101, which incorporates the general law on creation of bonded indebtedness of *municipalities*, applies "except as otherwise provided in this charter," and hence does not prevent the creation of bonded indebtedness for county purposes, as an exercise of powers appropriate to a county under section 2.

[8, 9] The second question is whether the method adopted for the submission of the proposition and the issuance of bonds was proper. The board of supervisors proceeded under section 4088 of the Political Code which sets forth a detailed procedure, and which was therefore applicable both as an appropriate general law, and by virtue of the provisions of section 3 of the charter. Respondent, however, raises two objections to the proceedings. The first is that the specification of a *maximum* rate of interest for the bonds (6 per cent.) was improper, since the statute (Pol. Code, § 4088) requires "the rate of interest" to be stated. But said section permits a maximum rate of 6 per cent., and clearly there can be no objection to a method which permits the issuance of bonds at such a rate *or lower*, if it should be possible to do so. The voters who approve a maximum rate of 6 per cent. impliedly approve any lower rate. See Cole v. City of Los Angeles, 180 Cal. 617, 182 P. 436; Town of Martinez v. Johnson, 201 Cal. 397, 257 P. 853. The second objection is that the special election called under the provisions of section 4088 of the Political Code could not lawfully be consolidated with the August primary election (see Deering's Gen. Laws 1931, vol. 1, p. 1095, Act 2264, § 1), and that for the same reason it could not be held on the same date, with the same precincts. A sufficient answer is that although the elections are to take place on the same date and in the same precincts, they have not been consolidated and are not confused. Separate provision is made for inspectors, judges of election, and clerks; ballots are to be used for the special election, as distinguished from voting machines at the primary election; and the returns are to be separately canvassed. The elections are obviously distinct and separate. See Morgan v. City of Los Angeles, 182 Cal. 301, 187 P. 1050; Mead v. City of Los Angeles, 185 Cal. 422, 197 P. 65.

[10] The final question which must be answered relates to the provisions of article 4, § 31, of the California Constitution, prohibiting the giving, lending, or pledging of the credit of the state or any subdivision thereof, in aid of any individual, association, or corporation, and also prohibiting the making of any gifts of public money or other things of value to any individual, association, or corporation. It is contended that the proposed bond issue is a gift in violation of this section. It must, however, be considered as settled by the recent decision of this court in the case of Patrick v. Riley, 209 Cal. 350, 287 P. 455, that the expenditure of public money in pursuance of a public purpose is not within the scope of the prohibition. See, also, Sacramento County v. Chambers, 33 Cal. App. 142, 164 P. 613; Veterans' Welfare Board v. Riley, 189 Cal. 159, 208 P. 678, 22 A. L. R. 1531; Macmillan Co. v. Clarke, 184 Cal. 491, 194 P. 1030, 17 A. L. R. 288; Pasadena City High School District of Los Angeles County v. Upjohn, 206 Cal. 775, 276 P. 341, 63 A. L. R. 408; State v. Wienrich, 54 Mont. 390, 170 P. 942; Commonwealth of Pennsylvania v. Liveright (Pa. 1932) 161 A. 697; State v. Nelson County, 1 N. D. 88, 45 N. W. 33, 8 L. R. A. 283, 26 Am. St. Rep. 609.

[11] Our conclusion is, therefore, that the city and county of San Francisco, acting through its board of supervisors, had power to issue the proposed bonds, and that the procedure followed was in accordance with all applicable laws. It is accordingly ordered that the writ issue directing respondent to place the measure upon the ballot for submission to the voters in the forthcoming election.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; TYLER, Justice pro tem.

216 Cal. 197

GIRDNER v. UNION OIL CO. OF CALIFORNIA et al.

Sac. 4686.

Supreme Court of California.

Aug. 9, 1932.

Rehearing Denied Sept. 8, 1932.

1. Negligence ⇐83.

Whether last clear chance doctrine applies depends on facts of particular case.

2. Negligence ⇐83.

In determining whether "last clear chance doctrine" applies, question is not whose negligence came first or last, but whose negligence was proximate cause of injury.

If plaintiff's so-called continuing negligence is proximate cause of injury, the doctrine does not apply, but if defendant is able to avoid injuring negligent plaintiff and negligently fails to do so, plaintiff's original though continuing negligence only remotely contributes to the injury and is not proximate cause thereof, and hence the applied doctrine by its own principles establishes plaintiff's right to recover notwithstanding fact that his original negligence would by its continuing nature bar recovery if doctrine were not applicable.

[Ed. Note.—For other definitions of "Last Clear Chance," see Words and Phrases.]

3. Negligence ⇐136(25).

Whether plaintiff's negligence is proximate or remote cause of injury is fact question in each particular case.

4. Negligence ⇐83.

Doctrine of "continuing negligence" has no application, unless negligence of plaintiff is proximate cause of injury.

5. Negligence ⇐83.

"Continuing negligence" rule does not apply where "last clear chance doctrine," by presence of its own elements, is brought into operation.

If all elements of "last clear chance doctrine" are present, and plaintiff's negligence becomes remote in causation, the doctrine applies; but if any one of elements of last clear chance doctrine is absent, plaintiff's negligence remains proximate cause and bars recovery under "continuous negligence rule."

6. Negligence ⇐83.

Contributory negligence does not bar recovery where "last clear chance doctrine" applies.

In order that "last clear chance doctrine" may apply, it must appear that plaintiff has been negligent and, as result thereof, is in position of danger from which he cannot escape by exercise of ordinary care, which includes cases not only where it is physically impossible for him to escape, but also where he is totally unaware of his danger; that defendant has knowledge of plaintiff's peril and knows, or in exercise of ordinary care should know, that plaintiff cannot escape from such situation; that defendant has last clear chance to avoid accident by exercising ordinary care; and that he fails to exercise such care and accident results thereby, and plaintiff is injured as proximate result of such failure.

7. Negligence ⇐83.

Defendant injuring another though able to prevent injury is not relieved of liability, though injured party, unaware of his peril, was brought into danger by own negligence.

Defendant is not privileged to injure another simply because he is negligently or otherwise in position of danger, and if he has opportunity of avoiding injury, he must at his peril exercise it under rule of "last clear chance."

8. Automobiles ⇐244(59).

Evidence and findings in motorist's action for intersectional collision with truck *held* to support application of last clear chance doctrine.

Facts found and supported by evidence were to the effect that plaintiff, in failing to look when crossing intersection, was contributorily negligent; that plaintiff did not know of approach of defendant's truck, and hence was unaware of danger; that driver of truck perceived that plaintiff was unconscious of peril he was in, and hence that plaintiff could not be relied upon to avert collision; that truck driver could have prevented collision had he arrested progress of truck or turned

truck in time; but that, having such time, he negligently failed to do so until it was too late to avoid injury.

In Bank.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by J. H. Girdner against the Union Oil Company of California and another. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

Superseding the opinion of the District Court of Appeal reported in 7 P.(2d) 188.

Chenoweth & Leininger, of Redding, for appellants.

Thomas J. Straub, of San Francisco, and W. R. Dunn, of Sacramento, amici curiæ.

Jesse W. Carter, of Redding, for respondent.

TYLER, Justice pro tem.

Appeal from a judgment awarding plaintiff $5,000 for personal injuries and $500 damages to his automobile, as the result of a collision between plaintiff's automobile and an oil truck owned by defendant Union Oil Company, and driven by defendant Elam. The case was tried by the court sitting without a jury.

[1] The sole question presented by the appeal is whether or not the facts in the case justify a recovery for plaintiff under the last clear chance doctrine. Appellant claims that the evidence is insufficient to support the findings and judgment. Primarily it may be stated that whether the doctrine is applicable in a given case depends entirely upon the existence or nonexistence of the elements necessary to bring it into operation, and this question is controlled by factual circumstances. Here there is evidence to show that the collision between the automobile driven by plaintiff and the truck belonging to defendant oil company and driven by defendant Elam, occurred at the intersection of Ferry street and the California state highway, in the town of Anderson, in Shasta county, on the 6th day of January, 1927, between 2 and 3 o'clock in the afternoon. Ferry street in the town of Anderson runs in an easterly and westerly direction, while the highway runs through said town in a northerly and southerly direction. The Southern Pacific Railroad lies east of and runs parallel with the highway. At the time of the collision, plaintiff was driving a touring car with side curtains. He was proceeding in a westerly direction on Ferry street across the highway. As he passed over the railroad track he was, due to the condition of the road, driving slowly at about 4 or 5 miles an hour. After crossing the railroad track he accelerated his speed to 12 or 15 miles an hour. Plaintiff testified that he looked to the north when 20 or 30 feet from the east side of the track and saw no cars approaching. He then looked south down the highway. He did not again look to the north but drove on to the highway, still looking to the south when the collision occurred. He further testified that he never saw the truck of defendant that day, either before or after the occurrence of the accident.

At the time of the collision and immediately prior thereto the truck was being operated by defendant Elam along the highway in a southerly direction. According to his testimony, Elam saw the plaintiff when he was about 50 feet north of the intersection. He testified that Girdner was traveling about 15 miles an hour and that at no time during the period in which he observed him did Girdner look in his direction; that he (Elam) took his foot off the gas accelerator and let the truck drift toward the intersection; that during the period of time his truck was so drifting the speed thereof was retarded about 3 miles an hour, so that he was traveling about 12 miles an hour; and that when he got about 15 feet from the point of collision he applied his brakes, and turned his truck to the right when about 4 or 5 feet from the point of collision.

Other witnesses variously estimated the speed at which Elam was traveling at from 15 to 30 miles an hour. The court found that he was proceeding at a rate of 20 miles. Elam admitted he did not sound his horn as he approached the intersection prior to the collision, nor did he give plaintiff any warning of his approach. The truck driven by Elam was 18 feet in length and about 5½ feet in width, weighing at the time, with its load, about 5 tons. There was evidence to show that it could be stopped according to the following speeds: 10 miles per hour, 8 to 10 feet; 15 miles per hour, 12 to 13 feet; 20 miles per hour, 20 feet; 25 miles per hour, 23 to 25 feet; 30 miles per hour, 34 or 35 feet.

By reason of the impact, plaintiff's car was shoved or skidded along the pavement in a southerly direction for a distance of from 15 to 20 feet. Skid marks on the pavement showed that the wheels of the truck skidded for a distance variously estimated at from 15 to 20 feet. As a result of the collision plaintiff suffered severe and permanent injuries, and his automobile was completely demolished.

In rendering judgment for the plaintiff, the trial court based its decision upon the last clear chance doctrine, and filed an opinion in the case in which it discussed the evidence. It found, in substance, that plaintiff failed to exercise ordinary care, and did not act as an ordinarily prudent person would have acted in the operation of his automobile when ap-

proaching an intersection, as he failed to look to the north, in which event he would have seen the truck that confronted him. In failing to look, it held plaintiff to be guilty of contributory negligence, barring his right to a recovery unless the doctrine of the last clear chance applied to the facts. It then found that the evidence clearly established the fact that when plaintiff approached and was proceeding across the path of the oil truck, and up to the time of the collision, he did not see and was totally oblivious of the approach of the truck, and the danger that confronted him; that defendant Elam first saw plaintiff's car some 40 or 50 feet away from the intersection; that he saw plaintiff looking straight ahead, in an opposite direction, and not slowing the speed of his automobile; that Elam was traveling at a speed of 20 miles an hour and could have stopped his truck almost immediately, and within a distance of a few feet; that he had ample time and sufficient distance, at least 25 to 35 feet, in which to stop and avoid coming in contact with plaintiff's car, but failed to do so. Accordingly, it applied the doctrine of the last clear chance to the facts of the case.

It is claimed on behalf of appellants that the doctrine of last clear chance has no application to a situation as here, where by mutual carelessness an injury ensues to one of two parties. In other words, the doctrine of last clear chance excludes from the operation of its underlying principle every case wherein it may be said that the negligence of the injured party was contemporaneous, concurrent, continuing, and contributory with the negligence of the party inflicting the injury, up to the very moment of the impact. Accordingly, it is claimed that the trial court had a misconception of the doctrine of last clear chance. In support of their claim appellants cite us to the doctrine announced in such cases as Everett v. Los Angeles, etc., Ry. Co., 115 Cal. 105, 43 P. 207, 46 P. 889, 34 L. R. A. 350; Lee v. Market Street Ry. Co., 135 Cal. 293, 67 P. 765; Young v. Southern Pacific Co., 182 Cal. 369, 190 P. 36; Rowe v. Southern California Ry. Co., 4 Cal. App. 1, 87 P. 220, where the continual negligence doctrine is announced. This doctrine is, like the doctrine of the last clear chance, based upon the particular facts of the case and is but a determination that the facts involved do not bring into operation the latter doctrine, but involve merely the ordinary and proximately contributory negligence which will bar recovery in any case. In other words, the doctrine as pronounced in the cases cited and relied upon generally, hold that the doctrine of last clear chance may not be invoked by a plaintiff to avoid his contributory negligence when the same has proximately contributed to his injury.

[2-7] The real issue in cases of the character here involved is not whose negligence came first or last, but whose negligence, however it came, was the proximate cause of the injury. Esrey v. Southern Pacific Co., 103 Cal. 541, 37 P. 500; Beach on Contributory Negligence, § 50.

Whether or not, therefore, negligence is the proximate or remote cause is, as above stated, a question of fact in each particular case. The doctrine of continuing negligence has no application unless the negligence is the proximate cause of the injury. On the other hand, if all the elements of the last clear chance doctrine are present and plaintiff's negligence becomes remote in causation, then this doctrine applies. If any one of the elements of the last clear chance doctrine is absent, then plaintiff's negligence remains the proximate cause and bars recovery. But the continuous negligence rule does not apply to a situation in which the last clear chance rule, by the presence of its own elements, is brought into operation. Where these necessary elements are lacking, courts have declared, and rightfully so, that plaintiff's negligence being continuous and contributory with that of defendant bars a recovery. The necessary elements, as deduced from the well-considered cases, may be stated in substance as follows: That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure. It has been said that such failure by defendant to use ordinary care under such circumstances amounts to a degree of reckless conduct that may well be termed willful and wanton, and when an act is thus committed, contributory negligence upon the part of the person injured is not an element which will defeat a recovery. Esrey v. Southern Pacific Co., supra, at page 545 of 103 Cal., 37 P. 500.

We do not deem it necessary to review and discuss the numerous cases cited by appellants. The apparent confusion which exists in some of the decisions upon the subject arises in the application of the law to the facts, but as to the rule itself there is little or no confusion. It would be a strange case indeed, to say the least, that would declare it to be permissible to run down and injure one simply because he was in a position of peril of which he was unaware, without responding in damages for his willful act. Such, of

course, is not the law. A defendant is never relieved of liability if he has it in his power to prevent the injury. This doctrine applies whether one is unaware of his peril by reason of his negligence, or when exercising ordinary care is so ignorant. In either situation the rule is the same. A defendant is not privileged to injure another simply because he is negligently or otherwise in a position of danger. If he has the opportunity of avoiding the injury, he must at his peril exercise it. The rule of the last clear chance means just what the words imply. A party who has the last chance to avoid the accident, notwithstanding the previous negligence of a plaintiff, is solely responsible. Townsend v. Butterfield, 168 Cal. 564, 143 P. 760; Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 526, 74 P. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85; Palmer v. Tschudy, 191 Cal. 696, 218 P. 36; Berguin v. Pacific Elec. Ry. Co., 203 Cal. 116, 263 P. 220; Darling v. Pacific Electric Ry. Co., 197 Cal. 702, 242 P. 703; Atkins v. Bouchet, 86 Cal. App. 294, 260 P. 828; O'Farrell v. Andrus, 86 Cal. App. 474, 260 P. 957; Smith et al. v. Los Angeles Ry., 105 Cal. App. 657, 288 P. 690.

The element of continual negligence is present in all last-chance cases. If defendant is not able to avoid injuring plaintiff in the exercise of ordinary care, the plaintiff's original negligence continues to be the proximate cause of his own injury, which bars recovery. If, on the other hand, defendant is able to avoid injuring the negligent plaintiff, and negligently fails to do so, plaintiff's original though continuing negligence only remotely contributes to the injury and is not the proximate cause thereof, and hence the applied doctrine, by its own principles, establishes the right of plaintiff to recover notwithstanding the fact that his original negligence would, by its continuing nature, bar a recovery if the doctrine were not applicable. To hold otherwise would be to dispute its existence.

The real question to be determined in considering cases of the character of the one here involved is whether or not the so-called continuing negligence is the proximate or remote cause of the injury, which question is determined by the application of the principles of the doctrine of the last clear chance itself. Stated in another way, contributory negligence of the party injured is not the proximate cause of the injury, as the negligence of the defendant being later it constitutes the sole proximate cause. Cady v. Sanford, 57 Cal. App. 218, 207 P. 45. When the doctrine applies, plaintiff's negligence becomes remote rather than proximate in causation. If it does not apply, his negligence remains proximate in its causation and will bar his recovery. If these principles are kept in view, no confusion should exist in their application to the facts of a given case. The principle underlying the last clear chance doctrine is that it is humane in its nature, and an exception to the ordinary rules underlying the defense of contributory negligence as laid down in Young v. Southern Pacific Co., supra, and other cases of similar character relied upon by appellants.

[8] It but remains to be seen whether all the elements of the applied doctrine are present in plaintiff's case. The findings were framed upon the facts as stated in the opinion of the court hereinabove recited. There was a conflict in the evidence upon all the material issues, as is usual in such cases, but there is ample evidence in the record to fully support the findings of the trial court, to the effect that plaintiff did not know of the approach of defendants' truck and hence was unaware of his danger; that defendant Elam perceived that plaintiff was unconscious of the peril he was in, and hence that plaintiff could not be relied upon to avert the collision; that Elam could have prevented the collision had he arrested the progress of his truck or turned the same in time, but having such time, he negligently failed to do so until too late to avoid the injury. The facts as found justified the court in applying the doctrine discussed.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.

216 Cal. 205

CENTER v. YELLOW CAB CO. OF LOS ANGELES et al.

L. A. 13737.

Supreme Court of California.

Aug. 9, 1932.

1. Negligence ⇐83.

In determining whether "continuing negligence doctrine," rather than "last clear chance doctrine," applies, real issue is, not whose negligence came first or last, but whose negligence was proximate cause of injury.

Doctrine of "continuing negligence" has no application unless plaintiff's negligence is proximate cause of injury, but if all elements of doctrine of last clear chance are present and plaintiff's negligence becomes remote in causation, then "last clear chance" doctrine applies, but, if any of elements of such doctrine are lacking, plaintiff's negligence, being continuous and contributory with that of defendant, bars recovery.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

[Ed. Note.—For other definitions of "Continuing Negligence" and "Last Clear Chance," see Words and Phrases.]

2. Negligence ⇐83.

Whether contributory negligence is proximate or remote cause of injury must be determined by facts of particular case.

3. Negligence ⇐83.

"Last clear chance doctrine" applies though plaintiff was unaware of his peril by reason of his negligence.

Rule of "last clear chance" means what the words imply, namely, that if one has opportunity of avoiding injury he must at his peril exercise it.

4. Automobiles ⇐245(91).

Whether pedestrian negligently crossing street in middle of block could recover for injury sustained when struck by taxicab *held* for jury under last clear chance doctrine.

There was evidence which tended to show that defendant could have avoided the injury; that he saw plaintiff and knew plaintiff was unaware of his peril; and that, notwithstanding such knowledge, defendant neither sounded his horn nor applied emergency brake, nor attempted to swerve his car to avoid injuring plaintiff, although he had every opportunity so to do.

In Bank.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Edward L. Center against the Yellow Cab Company of Los Angeles and another. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Superseding the opinion of the District Court of Appeal reported in 10 P.(2d) 484.

O'Melveny, Tuller & Myers, Warren S. Pallette, Pierce Works, and B. E. Ahlport, all of Los Angeles, for appellant.

Nimmo, Leighton & Heath and Mark A. Hall, all of Los Angeles, for respondents.

TYLER, Justice pro tem.

Action for damages for personal injuries. At the conclusion of the trial the court granted a nonsuit. This is an appeal from the judgment.

Such of the facts as are necessary for a proper discussion of the case show that plaintiff was struck down and seriously injured by a taxicab owned by defendant Yellow Cab Company, and driven by defendant Foley. The accident occurred in the city of Los Angeles at a time when plaintiff was on the way to his office. He attempted to cross Seventh street from south to north at a point slightly west of the middle of the block lying between Broadway and Hill street. He was walking hurriedly. A line of automobiles was parked parallel to the south curb of Seventh street, about one foot from the curb. There were two lines of street car tracks in the center of Seventh street. As plaintiff emerged from between the automobiles, at a point seven feet from the southerly curb of Seventh street, he looked to the west in order to observe approaching traffic, and continued looking in that direction for the time it took him to travel two or three feet beyond the parked automobiles. He observed a car about fifty feet to the west that was slowly approaching alongside the line of parked automobiles. No other traffic being in sight in that direction, he continued at a brisk walk across the street in a slightly northeasterly direction, looking at the same time to the east to observe traffic approaching from that quarter. At this moment he was struck from the rear at a point on the street two or three feet south of the most southerly rail of the car tracks. He did not see the approach of the automobile that struck him. From plaintiff's location when he last looked to the west, to the point where the collision occurred, he traveled a distance of between ten and fifteen feet. The vehicle which struck him was an east bound yellow taxi, operated as above stated by defendant Foley, a driver in the employ of defendant Yellow Cab Company. Foley's automobile was traveling in second gear at a speed variously estimated from ten to fourteen miles an hour at the time when Foley first saw plaintiff. At this time plaintiff was about twenty feet distant from Foley's seat in the cab. Foley saw that plaintiff was looking in the opposite direction and was unaware of his approach. Foley attempted to stop the taxi by applying the foot brakes, which were of the two-wheel variety. He did not sound his horn, nor did he make any attempt to swerve the taxi in either direction to avoid striking plaintiff, although the whole left side of the street was clear, nor did he apply his emergency brake. It was upon this testimony that the trial court concluded, in granting the motion for a nonsuit, that plaintiff was guilty of contributory negligence which continued up to the very moment of the impact, for which reason he could not recover.

At the time the motion for a nonsuit was made, plaintiff's counsel stated to the trial court that he had tried and rested his case entirely upon the doctrine of the last clear chance. This being so, we will not consider or discuss the question of the sufficiency of the evidence to support a verdict in his favor upon the theory of negligence and absence of contributory negligence, but will deal with the case as to the sufficiency of the evidence under the doctrine of the last clear chance. In

support of the judgment, respondents contend, as the trial judge held, that the evidence shows that plaintiff's negligence continued up to the moment of the injury and proximately contributed thereto, for which reason the doctrine invoked by appellant does not apply, and he therefore cannot recover. In making this contention, we are cited to cases of the character of Young v. Southern Pacific Co., 182 Cal. 369, 190 P. 36, which declare the continual negligence doctrine, and hold that the last clear chance doctrine may not be invoked by a plaintiff to avoid his contributory negligence where the same has proximately contributed to his injury.

[1-3] This doctrine is not necessarily controlling in the instant case. The real issue in cases of this character is not whose negligence came first or last, but rather whose negligence, however it came, was the proximate cause of the injury. Whether or not, therefore, negligence is the proximate or remote cause, depends upon the facts of the particular case. The doctrine of continuing negligence has no application unless the negligence is the proximate cause of the injury. If all the elements of the doctrine of the last clear chance are present and plaintiff's negligence becomes remote in causation, then the doctrine applies. If, on the other hand, any of the elements of the doctrine are lacking, courts have declared, and rightfully so, that plaintiff's negligence being continuous and contributory with that of defendant bars a recovery. But a defendant is never relieved of liability if he has it in his power to prevent injuring another, and this is so whether one is unaware of his peril by reason of his negligence or not.

[4] The rule of the last clear chance means just what the words imply, namely, if one has the opportunity of avoiding the injury, he must at his peril exercise it. Townsend v. Butterfield, 168 Cal. 564, 143 P. 760; Palmer v. Tschudy, 191 Cal. 696, 218 P. 36. As above stated, the real question to be determined in cases of this character is whether or not the so-called continuing negligence is the proximate or remote cause of the injury. If the elements of the last clear chance doctrine are present, and the doctrine applies, the contributory negligence of the party injured is not the proximate cause, as the negligence of defendant, being later, constitutes the sole proximate cause. Here there was evidence which tended to show that defendant could have avoided the injury. He saw plaintiff and knew he was unaware of his peril, yet he neither sounded his horn, nor did he apply his emergency brake, nor did he attempt to swerve his car to avoid injuring the plaintiff although he had every opportunity so to do. This evidence should have been submitted to the jury, and the trial court committed error in granting the nonsuit. The identical question here involved is fully discussed and decided in Girdner v. Union Oil Company of California (Cal. Sup.) 13 P.(2d) 915, this day decided, where the authorities are reviewed.

Upon the authority of that case the judgment herein is reversed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.

216 Cal. 248

BARR et al. v. REAM.

Sac. 4502.

Supreme Court of California.

Aug. 23, 1932.

Rehearing Denied Sept. 22, 1932.

1. Waters and water courses ⇐152(8).

Evidence sustained finding that lower riparian owner had easement to use creek for irrigation, and that upper owner's use was permissive only.

2. Waters and water courses ⇐152(8).

Evidence *held* insufficient to warrant finding that upper riparian owner acquired irrevocable license in water by permissive use followed by expenditures.

In Bank.

Appeal from Superior Court, Siskiyou County; C. J. Luttrell, Judge.

Action by A. J. Barr and another against Henry B. Ream. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Tebbe & Tebbe and B. K. Collier, all of Yreka (Jesse W. Carter, of Redding, of counsel), for appellants.

Carr & Kennedy, of Redding, L. N. Lorenzen, of Mt. Shasta, and Horace V. Ley, of Yreka, for respondent.

PER CURIAM.

This is an appeal by plaintiff from a judgment of the superior court of Siskiyou county in an action to determine certain water rights. Three tracts of land are involved in the action. Plaintiffs' upper tract, about 15 acres in extent, was acquired by them in 1912 from the Sisson Tavern Company. South of it lies 146 acres belonging to defend-

ant. South of that lies plaintiffs' lower tract of 73 acres. A water course known as Cold creek enters the southwesterly portion of plaintiffs' upper tract, flows through it in a southwesterly direction, and thence through the land of defendant, but does not enter plaintiffs' lower tract. A ditch known as Barr ditch taps Cold creek at about the entrance onto plaintiffs' upper tract, and proceeds in an almost southerly direction through said tract, then through the land of defendant, and finally upon the lower tract of plaintiffs. Although some other issues were presented at the trial, the case on appeal is concerned solely with the rights of the parties in the waters of Cold creek and Barr ditch. The trial court found that the ditch was built by plaintiffs in 1904, prior to the time of their acquisition of title to the upper tract, and under permission of the then owners of said tract; that defendant permitted plaintiffs to divert water over his land in said ditch, to the extent that such water was not used by defendant or his tenants; that previously defendant and his predecessors had an easement for a right of way over a portion of plaintiffs' upper tract to divert water from Cold creek, and that it was agreed between the parties that defendant should abandon his said easement and instead make use of Barr ditch for said purpose; that for more than five years prior to the commencement of this action, defendant has used Barr ditch adversely to plaintiffs and has an easement in it to take the waters of Cold creek for irrigation on his land, with the exception of two miners' inches awarded to plaintiffs under their riparian right.

Plaintiffs appeal on the ground of insufficiency of the evidence to sustain the findings. They contend that defendant has not acquired a prescriptive right to divert water through Barr ditch, and that plaintiffs have acquired such a right to thirty inches of water. They point to evidence showing continuous use for many years by plaintiffs, save where defendant or his tenants temporarily interrupted said use. On the other hand, defendant contends and the court found that the use was always permissive, and that defendant always asserted his right to the water and only gave up such quantity to plaintiffs as he was himself unable to use. The amount of water has greatly decreased in recent years and this explains the difficulties that have arisen between the parties.

[1] Our study of the record satisfies us that there is sufficient evidence to support the findings and judgment. The testimony is in substantial conflict, but it would be difficult to arrive at any view contrary to that of the trial court since it definitely appears that on repeated occasions defendant or his tenants interrupted plaintiffs' use, and sometimes took all of the available water.

[2] Plaintiffs also contend that they are entitled to the amount of water claimed on the theory of a permission to take the same, followed by expenditures in reliance thereon, resulting in an irrevocable license or easement. We find no satisfactory evidence in the record to justify the application of this doctrine. On the contrary, it appears that defendant gave plaintiffs permission to use only the excess water, and that the amount claimed by plaintiffs was claimed adversely, according to the evidence presented on their behalf, and not under a parol license.

No purpose would be served by an extensive review of the evidence. We are satisfied with the conclusions of the trial court on all of the issues.

The judgment is affirmed.

216 Cal. 269

EL DORADO IRR. DIST. v. BROWNE, District Treasurer (LUSE et al., Interveners).

S. F. 14431.

Supreme Court of California.

Aug. 29, 1932.

As Modified Sept. 19, 1932.

1. Waters and water courses ⇐224, 230(1).

Legislature has plenary power over irrigation districts and may form them and permit them to issue bonds, without election (Deering's Gen. Laws 1931, Act 3854).

While Legislature has such right, the right to vote on bond issues has been given electors of districts by California Irrigation Act (Deering's Gen. Laws 1931, Act 3854).

2. Waters and water courses ⇐228.

Irrigation district's board may, even after election at which bonds are voted, make substantial changes in plan of proposed project (Deering's Gen. Laws 1931, Act 3854, §§ 30, 30b).

3. Waters and water courses ⇐228.

Publication and distribution of informal report of plan for irrigation works *held* not to limit powers of irrigation district's board to make substantial changes in plan after bond election (Deering's Gen. Laws 1931, Act 3854, §§ 30, 30b).

4. Evidence ⇐65.

Electors at bond election vote with presumed knowledge of powers of irrigation district's board to make substantial changes in

plan after election (Deering's Gen. Laws 1931, Act 3854, §§ 30, 30b).

5. Waters and water courses ⇐228.

Resolution of irrigation district's board, notice of bond election, and proposition placed upon ballot, framed in general terms, *held* not to preclude board from changing plan after bond election (Deering's Gen. Laws 1931, Act 3854, §§ 30, 30b).

Proposition on ballot was whether bonds of district in certain amount should be issued for purpose of constructing and purchasing necessary irrigation canals, pipes, pipe lines, dams, reservoirs, weirs, and works, and acquiring necessary property and rights therefor, and for purpose of acquiring water, water rights, reservoirs, reservoir sites, and other property necessary for purpose of the irrigation and otherwise carrying out provisions of an act under which the district was organized.

In Bank.

Proceeding on the Petition of the El Dorado Irrigation District for a writ of mandate to compel R. W. Browne, as treasurer of such district, to pay a warrant drawn upon the construction fund of the district, in which proceeding Matthew Murray and another, as taxpayers, intervened in opposition to the petition.

Peremptory writ granted.

Downey, Brand & Seymour, of Sacramento, and Thomas Maul, of Placerville, for petitioner.

Ralph H. Lewis, of Sacramento, for respondent.

Robert E. Hatch, of San Francisco, for intervener Murray.

Hadsell, Sweet & Ingalls, of San Francisco, for intervener Luse.

Hankins & Hankins, of San Francisco, A. L. Cowell, of Stockton, Griffin & Boone, of Modesto, and Charles L. Childers, of El Centro, for California Irr. Districts Ass'n.

PER CURIAM.

This is a petition by El Dorado irrigation district for a writ of mandate to compel respondent, its treasurer, to pay a warrant drawn upon the construction fund of the district. Upon the hearing in this matter an order of reference was made and findings of fact were prepared by the referee, Hon. Peter J. Shields, judge of the superior court. From these findings, the essential undisputed facts appear as follows: Pursuant to section 30 of the California Irrigation Act (Deering's Gen. Laws 1931, vol. 2, p. 1948, Act 3854), the district employed S. J. Norris, an engineer, to prepare plans for irrigation works. Upon the rendition of his report, the board of directors estimated that the sum of $1,300,000 would be necessary to carry out the project. The report and estimate were submitted to the bond certification commission (now the California districts securities commission), composed of the Attorney General, state engineer, and superintendent of banks, as required by section 30a of the Irrigation Act. The commission gave its approval, and on January 20, 1927, the board called a special election at which the bonds were voted. Thereafter $600,000 worth of bonds were sold, the proceeds placed in the construction fund, and the money expended.

On December 20, 1928, a supplemental engineering report was submitted by Norris, approved by the directors and by the bond certification commission. This report made certain changes in the original plan of construction embodied in the first report. Thereafter, an additional issue of $350,000 worth of bonds was sold, and construction was continued under the modified plan. Various expenditures were made and obligations were incurred.

On November 25, 1930, an action was commenced by Matthew Murray, a taxpayer of the district, on behalf of himself and other taxpayers, to enjoin further construction, on the ground that the district had no power to change the plans after the bonds had been voted. This action was subsequently dismissed by the plaintiff and a new action was filed, in which a demurrer was sustained and dismissal entered after failure of the plaintiff to amend.

One of the contracts made by the district in carrying out the modified plan was with the Pelton Water Wheel Company. A balance of $403.80 being due under said contract, a claim was presented to and approved by the directors, and a warrant drawn, directing the respondent treasurer to pay the sum. Because of doubts as to the validity of the proceedings, he refused to do so. Because of similar doubts, the general contractor on March 13, 1931, refused to continue performance. There being no litigation then pending by which a speedy determination of the issue could be had, the district sought the remedy by application for mandate to this court. Matthew Murray and John L. Luse, as taxpayers, intervened and filed briefs in opposition to the petition.

The single question which is presented to us is whether the district had the power to

use the funds derived from the sale of the bonds in accordance with a plan which differed substantially from that upon which the original estimate was based. It is conceded that changes in minor details are permissible, but as will hereinafter appear, the differences between the original and modified plan are substantial. It should be noted, however, that the record contains no suggestion of fraud, the changes having been made in good faith, in the belief that they were advantageous to the district.

It is contended by interveners that the modified plan is in effect an abandonment of the original project. This is not borne out by the facts. The first engineering report contemplated the purchase of a system of laterals, dam, and reservoir of El Dorado Water Corporation; enlargement of the laterals and perfection of a water supply for the city of Placerville; storage of water from the Consumnes river by the construction of a reservoir at Sly park in Hazel Valley; and construction of an auxiliary dam to increase the stored water. The second report recommended the same purchase of the El Dorado Water Corporation system, the lateral enlargement and the municipal water supply, but postponed the construction of the reservoir at Sly park and instead provided for the enlargement of a storage reservoir at Weber creek, included in the system purchased from the water corporation. The changes are considerable, but there is no basis for the conclusion that the Sly park reservoir has been abandoned and an entirely new development entered upon. The Sly park and the Weber creek storage are provided for in both plans, the differences being in the priority of development and the proportion of water to be secured from each.

[1] In considering the authority of the district and its directors, it should be remembered that the legislative power over such districts is plenary, and that they might be formed and permitted to issue bonds without any vote of the electorate at all. There is no constitutional right of residents of such a district to vote on bond issues. In re Bonds of San Joaquin Irr. Dist., 161 Cal. 345, 119 P. 198; Los Angeles Flood Control Dist. v. Hamilton, 177 Cal. 119, 169 P. 1028. This right is, however, given to the electors by the California Irrigation Act.

[2] A brief examination of the statute and the cases will show that the board had power to make the changes. The most important decision is Board of Directors of Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 P. 237, where bonds were issued under the Wright Act, St. 1887, p. 29, as amended (the predecessor of the present Irrigation Act) to carry out a plan to bring water from the Stanislaus river to irrigate 108,000 acres of land, and after the bonds were voted, the plan was changed to provide for securing the water from the Tuolumne river for a lesser acreage. The court held that the change could properly be made. The conclusion of this case clearly governs us here, unless it has been limited by later decisions or legislation. In fact, however, it has never been overruled or nullified by statute. In Cullen v. Glendora Water Co., 113 Cal. 503, 39 P. 769, 45 P. 822, 824, 1047, the court said of the Tregea Case: "* * * We held that the authority to issue bonds is not so bound up with the preliminary plans as to sources of supply, upon which the estimate is based, that the proceeds of a valid issue of bonds cannot be used to carry out a modified plan, if the change is deemed advantageous." Subsequent legislation tends to strengthen, rather than weaken, this view. At the time these cases were decided, the statute did not specifically require that a plan be prepared prior to the bond election. The Cullen Case nevertheless held that such a plan was necessary as the basis for an estimate of the amount of bonds to be voted. Subsequent to that time, in 1913, the statute was amended (St. 1913, p. 993) to make express provision for a preliminary plan, but neither at this or any later period was any limitation placed upon the board in the matter of changes. On the contrary, the existence of such a power in the board was recognized by the 1917 amendment to section 30b of the act (St. 1917, p. 762), which requires the approval of the bond certification commission to any changes. The said amendment reads as follows: "* * * Provided, further, that if any district shall issue bonds to carry out any plans approved by said irrigation district bond commission as herein provided it shall be unlawful for said district to make any material change in said plans thereafter without the consent of said commission." The futility of limiting the exercise of a nonexistent power indicates that the power really did exist; and the failure to abrogate the rule of the Tregea Case is still more persuasive. We conclude that an irrigation district may, under the existing law, make substantial changes in the plan of a proposed project, after the election at which bonds are voted.

[3-5] It is urged by interveners that the resolution of the board, the notice of the election, and the proposition placed upon the ballot incorporated the plan of the first engineering report so as to make any subsequent change a violation of a contract with the electors, and emphasis is also placed upon the publicity given the original report, which was distributed among the voters of the district. It is clear that the publication and distribution of such an informal report cannot be deemed to limit the statutory powers

of the board. The electors vote with presumed knowledge of those powers. Los Angeles County Flood Control Dist. v. Wright (Cal. Sup.) 2 P.(2d) 168. As to the resolution, notice, and ballot, inspection discloses that they were framed in general terms. The proposition on the ballot read as follows: "Shall bonds of El Dorado Irrigation District, in the amount of one million three hundred thousand ($1,300,000.00) dollars be issued for the purpose of constructing and purchasing the necessary irrigation canals, pipes, pipe lines, dams, reservoirs, weirs, and works, and acquiring the necessary property and rights therefor, and for the purpose of acquiring water, water rights, reservoirs, reservoir sites and other property necessary for the purpose of El Dorado Irrigation District and otherwise carrying out the provisions of an Act of the Legislature of the State of California, entitled 'An Act to provide for the organization and government of irrigation districts, and to provide for the acquisition and construction thereby of works for the irrigation of lands embraced within such districts, and also to provide for the distribution of water for irrigation purposes', and all acts amendatory thereof, under which Act El Dorado Irrigation District was organized." While the district may, by the form of the proposition, limit itself to a particular plan, no such limitation may be implied from a statement as broad and general as that involved herein. See County of Alameda v. Garrison, 108 Cal. App. 122, 291 P. 464; O'Farrell v. County of Sonoma, 189 Cal. 343, 208 P. 117; Williams v. City of Stockton, 195 Cal. 743, 235 P. 986.

No other points require discussion. The board had the power to proceed under the modified plan, and the obligations incurred thereunder were valid. Respondent's refusal to pay the warrant is therefore unjustified.

It is ordered that a peremptory writ of mandate issue, directing respondent to pay the sum stated in the above-mentioned warrant.

216 Cal. 95

ST. CLAIR v. McALISTER et al.

L. A. 13607.

Supreme Court of California.

July 25, 1932.

1. Carriers ⇐316(1).

Upon plaintiff's showing she was bus passenger and injured while carried as such, presumption of negligence arose requiring carrier to show it was free from fault (Civ. Code, § 2100).

2. Carriers ⇐318(4).

Passenger suing for injuries established prima facie case by proving she was carried as passenger on bus, and that injury was caused by way carrier used instrumentality under its control (Civ. Code, § 2100).

3. Carriers ⇐316(4).

That injured passenger established that motorist colliding with bus was negligent *held* not to constitute waiver of application of res ipsa loquitur doctrine as against carrier.

4. Carriers ⇐316(1).

Where proof does not rebut prima facie showing contemplated in application of res ipsa loquitur doctrine, such prima facie showing supplemented by presumption would constitute proof by preponderance of evidence.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Eva M. St. Clair against Raymond P. McAlister, the Bay Cities Transit Company, and others. From a judgment for plaintiff, the Bay Cities Transit Company appeals.

Affirmed.

Superseding 8 P.(2d) 556, which superseded 5 P.(2d) 914.

B. P. Gibbs and Edmund Nichols, both of Los Angeles, for appellant.

Fogel & Beman and Orlando H. Rhodes, all of Santa Monica, for respondent.

SHENK, J.

This is an appeal from a judgment for the plaintiff in an action for damages for personal injuries.

The plaintiff's injuries were the result of a collision between a passenger bus operated by the defendant company and a Ford automobile operated by Raymond P. McAlister, a minor. The defendants G. N. McAlister and Beatrix McAlister are husband and wife and are the parents of the minor. The parents were sued because of the negligence imputed to them upon their assumption of liability in the issuance of an operator's license to the minor son pursuant to the provisions of the California Vehicle Act (St. 1923, p. 532, § 62). The trial court, sitting without a jury, found for the plaintiff and entered judgment against the defendant corporation and the defendant parents. The McAlisters have not appealed

and the judgment against them has become final. The corporation is the sole appealing defendant.

The collision occurred about 8 o'clock a. m. on October 14, 1927. The bus was traveling in an easterly direction on Carlyle street at its intersection with Tenth street in the city of Santa Monica. The bus had stopped at the southwest corner of the intersection to discharge a passenger. The driver of the bus, Earl Dawes, then started the bus, entered the intersection, and when it reached approximately the center thereof was traveling at a speed variously estimated at from seven to twelve miles per hour. It was then struck by the Ford car just behind the left front fender of the bus. The bus stopped almost instantly. The speed limit applicable to the Ford at this point was fifteen miles per hour and it was being operated at the time of the collision at the rate of from twenty-two to twenty-five miles an hour. The minor testified that he did not see the bus until he was about three feet from it, owing to the fact that he was looking eastwardly at the time.

In the complaint negligence in general terms was charged. It was stipulated at the trial that the plaintiff was a passenger for hire on the bus at the time of the accident; that the bus was owned by the defendant corporation; that Earl Dawes was the driver of the bus at the time; and that he, as the employee of the corporation, was acting as such within the scope of his employment. The plaintiff then proved the extent of her injuries, which were serious, and produced evidence which showed the manner in which the bus was operated at the time of the collision and further showed the details of the operation of the Ford car by the minor. This evidence, beyond question, proved negligence on the part of the driver of the Ford car. Based on his negligence the judgment was rendered against his parents. The driver of the bus was not produced as a witness by either party and no showing was made by the defendant corporation, or otherwise, that the driver of the bus could not have avoided the accident except by inference and conclusions drawn from the evidence of the facts above stated, and particularly from the evidence which showed in detail the conduct of the driver of the Ford car.

As to the defendant corporation the trial court, on the showing made, applied the doctrine of res ipsa loquitur. Whether this rule was correctly applied to the facts forms the principal basis of the controversy on the appeal.

[1, 2] It is not disputed that the burden was on the plaintiff to prove her cause of action against all the defendants by evidence sufficient to entitle her to recover. As to the bus company, under the pleadings, a prima facie case was established when the plaintiff proved that she was being carried as a passenger on the bus and that the injury was caused by the manner in which said defendant used or directed the instrumentality under its control. Connor v. Atchison, etc., Ry. Co., 189 Cal. 1, 207 P. 378, 26 A. L. R. 1462; McCurrie v. Southern Pacific Co., 122 Cal. 558, 55 P. 324; Osgood v. Los Angeles, etc., Co., 137 Cal. 280, 70 P. 169, 92 Am. St. Rep. 171. It was the duty of the carrier to exercise "the utmost care and diligence for their safe carriage" of the plaintiff (section 2100, Civ. Code), and upon showing that she was a passenger and was injured while being carried as such, a presumption of negligence arose, as to which it was incumbent on the carrier to show that it was free from negligence. Scarborough v. Urgo, 191 Cal. 341, 216 P. 584. We have no hesitancy in saying that the plaintiff produced proof entitling her to invoke the doctrine contended for by her.

The evidence offered by the defendant corporation to rebut the presumption consisted in the main in proving the negligence of the driver of the Ford car as to which all parties have agreed. As noted, the driver of the bus was not a witness and his employer offered no proof the effect of which would show that the driver could not have avoided the collision by the exercise of due caution. In the presence of the presumption it cannot be said as a matter of law that the trial court erroneously applied the doctrine.

[3] But the defendant corporation insists that the evidence of the conduct in detail of the driver of the Ford car, and particularly that produced by the plaintiff removed the case from the application of the doctrine of res ipsa loquitur, and that such proof showed the collision to be due solely to the negligence of the driver of the Ford car. We cannot agree. The plaintiff was confronted with a situation where, in charging concurrent negligence, she was entitled to the application of the doctrine upon proof of her status as a passenger on the bus while the same was being operated by the bus company and the resultant injury from such operation. But as to McAlister, she was bound to prove his negligence by a preponderance of the evidence without the aid of the presumption. This she could not do except by proving the particular acts which constituted such negligence. By producing such proof it should not be held that she waived or forfeited her right to invoke the doctrine as to the defendant's carrying her as a passenger. Kilgore v. Brown, 90 Cal. App. 555, 560, 266 P. 297.

[4] Another point made by the bus company is that, assuming the doctrine of res ipsa loquitur to be applicable, the plaintiff has failed to sustain the burden of proving neg-

ligence on the part of the company by a preponderance of the evidence. The argument is grounded on certain language in Scarborough v. Urgo, supra, where, in discussing the effect of the presumption arising under the doctrine of res ipsa loquitur, the court said at page 346 of 191 Cal., 216 P. 584, 586: "Such a presumption is evidence in the case, but it has no greater or different effect than the testimony of witnesses, and in no degree changes the rule as to the burden of proof, viz. the burden of producing a preponderance of evidence." The language just quoted as a correct statement of the law need not be questioned. But it does not follow therefrom that where there is no proof, or where, as here, there is insufficient proof, to rebut the prima facie showing contemplated in the application of the doctrine, such showing, supplemented by the presumption, would not constitute proof by a preponderance of the evidence.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; TYLER, Justice pro tem.

216 Cal. 783

Pearl ROBISON, Plaintiff and Respondent, v. Raymond P. McALISTER, G. N. McAlister, and Beatrix McAlister (his Wife), Bay Cities Transit Company (a Corporation), Earl Dawes, Defendants; Bay Cities Transit Company (a Corporation) and Earl Dawes, Defendants and Appellants.

L. A. 13608.

Supreme Court of California.

July 25, 1932.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Superseding opinion in 8 P.(2d) 558, which superseded 5 P.(2d) 915.

B. P. Gibbs and Edmund Nichols, both of Los Angeles, for appellants.

Fogel & Beman and Orlando H. Rhodes, all of Santa Monica, for respondent.

PER CURIAM.

Appeal from a judgment for the plaintiff in an action for personal injuries. The facts attending a collision between the motorbus of the defendant corporation and a Ford car driven by Raymond P. McAlister, a minor, and the questions of law presented are the same as those involved in the case of Eva M. St. Clair v. Raymond P. McAlister et al. (Cal. Sup.) 13 P.(2d) 924, this day decided, except as to the name of the plaintiff who was a passenger on the same bus at the time of the collision, the extent of the injuries, and the amount of the judgment.

On the authority of that case the judgment herein is affirmed.

216 Cal. 312

KELLY v. DOLLARD et al.

S. F. 14416.

Supreme Court of California.

Sept. 13, 1932.

Rehearing Denied Oct. 13, 1932.

1. Trusts ⇐44(1).

Evidence sustained finding that deceased in delivering jewelry and watches to daughter with written instructions for distribution after death conveyed them to daughter in trust (Civ. Code §§ 2221, 2222).

2. Appeal and error ⇐1073(8).

Decree declaring trust would not be disturbed for error, if any, in holding that shawl passed from deceased to trustee before death.

3. Trusts ⇐33.

Deceased's giving daughter directions regarding disposition after death of deceased's money deposited in daughter's name *held* to create trust.

4. Trusts ⇐59(1).

That, after trust was created in bank deposit, trustee, under creator's directions, drew sum therefrom did not alter trust character of remainder.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Laura A. Kelly, as trustee under oral trusts created by Annie A. Kelly, deceased, against Mary T. Dollard, Annie A. Scanlon, individually and as administratrix of the estate of Annie A. Kelly, deceased, and another. From a judgment for plaintiff, defendant Annie H. Scanlon, individually and as administratrix, appeals.

Affirmed.

W. H. Metson, F. A. O'Connell, and Stanley Burke, all of San Francisco, for appellant.

Chalmer Munday, of San Francisco, for respondent Laura A. Kelly.

Edwin H. Williams, of San Francisco, for respondents Mary T. Dollard and Chester A. Kelly.

CURTIS, J.

This action was brought by the plaintiff against her brother and two sisters for a decree declaring that certain personal property in her possession was held by her in trust for herself and her said brother and sisters, and asking that distribution thereof be made in accordance with the terms of said trust. The defendant Annie A. Scanlon is sued not only in her individual capacity but as the administratrix of the estate of Annie A. Kelly, deceased. The parties to this action are the surviving children of the said Annie A. Kelly, deceased. The plaintiff was the youngest of the four children and lived with and cared for her mother up to the time of the death of the latter. The property of the alleged trust formerly belonged to the said Annie A. Kelly. It consists of a deposit of money in a San Francisco bank in an amount slightly in excess of $14,000, and certain articles of jewelry, a shawl, and a couple of watches. The mother died in January, 1930, and was 91 years of age at the time of her death. The plaintiff testified that "in July, she [the mother] delivered her jewelry, personal jewelry. She brought in a box and handed it to me and said, 'I want to give these to you in trust.' And she also had a paper, and on that paper she had stated exactly as she wanted it distributed. And she told me to put that in the safe deposit box with these papers, and keep it there until she died, and when she died to distribute it exactly as it was stipulated in the paper. * * * It was a diamond bar pin, an emerald and ruby bar pin, emerald earrings surrounded by diamonds, and a white crepe shawl, a gentleman's watch and a lady's watch." The paper referred to by the witness was admitted in evidence. It was dated July 26, 1919. The date, however, was placed thereon, according to plaintiff's evidence, by herself at the time it was given to her by her mother. The paper is as follows:

"San Francisco, July 26, 1919.

"I hereby give, grant, transfer and deliver to my daughter Annie A. Scanlon, my pair of emerald screw earrings, consisting of emeralds surrounded by diamonds, also one small diamond of my bar pin; the other small diamond of the same bar pin I give to my daughter Mary T. Dollard; and the large center diamond of the same bar pin, including the setting I give to my daughter, Laura A. Kelly. I give to my daughter Mary T. Dollard my bar pin consisting of rubies and emeralds, also my white crepe shawl. All the rest of my jewelry, watches, et cetera, I die possessed of, I bequeath to my daughter, Laura A. Kelly.

"[Signed] Annie A. Kelly."

Plaintiff further testified that she took the box from her mother containing the jewelry and watches and deposited it in her safe deposit box and kept it there until the death of her mother. The crepe shawl was left in the house where the mother and plaintiff resided.

In regard to the money on deposit in the bank, the plaintiff stated that on January 1, 1926, as she was preparing to go to the bank to have the interest entered in the bank book, her mother said to her: "Well, now, I have disposed of the jewelry and the real estate by gift deed, now I want to arrange about this money. I will not draw any more from the bank account unless it is absolutely necessary, and if anything happens to me this will pay the sickness or funeral expenses when I die, and the residue in that book—what is left in it, should be divided share and share alike amongst the four children." To this statement by her mother the plaintiff replied: "Very well, I will do that." The bank account referred to is the one involved herein. It then stood, and for some years prior thereto had stood, in the name of the plaintiff. After this date it remained in plaintiff's name until her mother's death. Nothing was drawn from this account during that period except that on or about February 17, 1927, the plaintiff, at the request of her mother, drew $1,000 therefrom, and loaned it to Mrs. Scanlon, who gave her note for that amount, made out in favor of the plaintiff. On the death of the mother the plaintiff called together her brother and two sisters and explained fully to them the disposition the mother had made of the bank deposit and the jewelry. All appeared satisfied with the arrangement their mother had made concerning the disposition of her property, and appeared to acquiesce therein. A few days thereafter Mrs. Scanlon made objections to her mother's plan of disposing of her property, had herself appointed administratrix of her mother's estate, and instituted proceedings to compel the plaintiff to account for said property in the probate court. Thereupon the plaintiff instituted this action for the purpose of having a trust declared and the property distributed according to its terms. Mrs. Scanlon, her brother, Chester A. Kelly, and her sister, Mary T. Dollard, were all made defendants herein. Mr. Kelly and Mrs. Dollard appeared in the action and by answer joined with the plaintiff in asking the court to sustain their mother's plan of disposing of said property and to decree distribution thereof in accordance with said plan. Mrs. Scanlon, however, in-

dividually and as administratrix of her mother's estate, answered plaintiff's complaint, and denied that her mother had made any transfer of said property, or any part thereof in trust, or otherwise, to the plaintiff, and asked for a decree of court compelling plaintiff to turn over and deliver all of said property to her as administratrix. Upon the trial the court found upon all issues in favor of the plaintiff, and entered a decree in plaintiff's favor as prayed for in her complaint. From this decree the defendant Scanlon has appealed. Her sole contention is that the findings are not supported by the evidence, and particularly that the evidence does not justify or warrant the finding that a trust has been created.

In the first place, the record before us does not show any evidence directly contradicting that given by the plaintiff and recited above. No person, other than the plaintiff and her mother, was present on the occasions when the conversations which we have detailed were had between the mother and daughter. There is some slight evidence on defendant Scanlon's part that the mother was seen wearing some of said jewelry after the time plaintiff testified that it had been given into her keeping. This was satisfactorily explained by plaintiff, and as the trial court accepted her explanation the matter is not one of concern to this court. Regarding the bank deposit, no attempt was made at the trial to show that the facts regarding its disposition were any different than as testified to by plaintiff.

[1, 2] The evidence, in our opinion, was beyond doubt sufficient to sustain the finding that the property in controversy was conveyed to the plaintiff in trust, both as to the jewelry and other property delivered to the plaintiff on July 26, 1919, and the bank deposit later transferred to the plaintiff. The evidence shows that the mother during the latter years of her life owned other property, both real and personal. This property she had divided among her children by gift deeds and other like conveyances. She was somewhat fearful of wills, and evidently decided to make final disposition of her property by other methods. The box containing the jewelry and watches was delivered to the plaintiff to place the same in a safe deposit box and to distribute them in accordance with certain instructions, which were also in the box. These written instructions plainly indicate that the property was to be distributed on the death of Mrs. Kelly. These instructions speak for themselves, and it is not necessary for us to specify the particular words or language contained therein indicating such intention. Appellant concedes this by her claim that they express a testamentary intention rather than a direction that the trustees make distribution of the property mentioned. There might be some merit in this claim if we consider the writing alone, but when taken in connection with the act and conduct of Mrs. Kelly in delivering the property described therein to her daughter with directions to hold and then to distribute it in accordance with the writing, the transaction as a whole possesses all the elements of a voluntary trust in personal property. Civ. Code, §§ 2221, 2222. The question is raised as to whether the crepe shawl ever passed out of the possession of Mrs. Kelly and into the possession of the plaintiff prior to the death of Mrs. Kelly. The trial court held that it did. Whether the trial court was warranted in so holding or whether it was not, this court would hardly be justified in disturbing the decree in this case for any such error, if any error were made.

[3, 4] Passing on to the bank deposit, which is by far, in point of monetary value, the principal and most substantial portion of the property involved, we find the evidence equally conclusive. This deposit had been placed by Mrs. Kelly in plaintiff's name some time in 1922, where it remained until Mrs. Kelly's death. It was designated as "Laura A. Kelly, Special." It was in this condition, in the possession of Laura A. Kelly on January 1, 1926, when her mother gave directions regarding its final disposition, which were that after the payment of certain expenses, including her funeral expenses, the residue was to "be divided share and share alike amongst the four children." Under the decisions of this state, the acts of the parties above recited were sufficient to create a trust in the money deposited in the name of "Laura A. Kelly, Special." Hellman v. McWilliams, 70 Cal. 449, 11 P. 659; Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 P. 370; Thomas v. Lamb, 11 Cal. App. 717, 106 P. 254. The fact that in 1927, under the directions of Mrs. Kelly, the plaintiff drew $1,000 from this fund did not alter the trust character of the balance remaining in the account. Hellman v. McWilliams, supra.

The judgment and decree is affirmed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; SEAWELL, J.; TYLER, Justice pro tem.

216 Cal. 280

HIBERNIA SAVINGS & LOAN SOC. v. ELLIS ESTATE CO. et al.

Sac. 4702.

Supreme Court of California.

Sept. 1, 1932.

1. Appeal and error ⇐82(3).

Generally, orders concerning vacation of orders are not directly appealable, unless they themselves be included in class of orders designated by Code as appealable.

2. Receivers ⇐58.

Order vacating order appointing receiver and directing him to pay over money collected has effect of discharging receiver.

3. Appeal and error ⇐82(3).

Order vacating order appointing receiver in mortgage foreclosure action and directing him to pay money collected to defendants *held* appealable as "final judgment" (Code Civ. Proc. § 963).

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words and Phrases.]

PRESTON, J., dissenting.

In Bank.

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action by the Hibernia Savings & Loan Society against the Ellis Estate Company and others. From an order vacating an order appointing a receiver and directing him to pay over to defendants the moneys collected by him, plaintiff appeals. Motion to dismiss the appeal.

Motion denied.

Tobin & Tobin, of San Francisco, Rich, Weis & Carlin, of Marysville, and George A. Clough, of San Francisco, for appellant.

Richard Belcher, of Marysville, for respondents.

WASTE, C. J.

The appellant, plaintiff in this action to foreclose a mortgage, on the same day that it filed the complaint, filed an affidavit in support of an application for an order appointing a receiver. Acting solely upon such affidavit, and without examination of the complaint or other evidence, the court made its ex parte order appointing a receiver, with the powers and duties usually incident to such a receivership. The defendants, respondents here, moved the court to discharge the receiver and to rescind the order appointing him. The court granted the motion. It rescinded the order of appointment, and directed the receiver to pay over to the defendants the moneys collected by him on the ground that the order was void, in that the appointment was made inadvertently and without sufficient cause. From this order the plaintiff has appealed. Respondents move to dismiss the appeal, and for an affirmance of the order vacating the appointment of the receiver upon the ground that no appeal lies from such an order.

[1, 2] It is provided in section 963, subd. 2, of the Code of Civil Procedure, that an appeal may be taken from an order appointing a receiver; but no appeal is provided from an order setting aside and vacating an order appointing a receiver. The order here appealed from is not one made after judgment. It is a general rule that orders relating to vacation of orders cannot be made the subject of direct appeal unless they themselves be of a class of orders designated by the Code as appealable. See Luckenbach v. Laer, 190 Cal. 395, 396, 212 P. 918. But appellant contends that the order here appealed from is a final judgment, in that it amounts to a final determination of a collateral matter distinct from the general subject of litigation—a judgment that is conclusive of a question in the case, and final as to that question. 2 Cal. Jur., p. 144, § 21. An order vacating an order appointing a receiver, and directing him to pay over the money collected by him has the effect of discharging the receiver; and this is so although it does not so provide in terms. While the receiver is an indifferent person as between the parties, and is appointed in behalf of all who may establish rights in the cause, the plaintiff, at whose request the receiver was appointed, having asserted a reasonable probability of being ultimately entitled to a decree in the action, is interested in having the receivership continued, in order that the property and its issues and profits may be preserved.

[3] Therefore, it would seem that the order vacating the order appointing the receiver and directing him to pay the money collected by him over to the defendants, which order, in effect, amounts to a discharge of the receiver, is of such finality on that phase of the case as to be appealable as a final judgment within the meaning of section 963 of the Code of Civil Procedure. Los Angeles v. Los Angeles City Water Co., 134 Cal. 121, 66 P. 198; Anglo-Californian Bank v. Superior Court, 153 Cal. 753, 756, 96 P. 803.

The motion to dismiss the appeal is denied.

We concur: SHENK, J.; SEAWELL, J.; TYLER, Justice pro tem.; CURTIS, J.

PRESTON, J. (dissenting).

This is an action to foreclose a mortgage on a business block in Marysville. The amount claimed to be due thereon is $67,000. Plaintiff, on an affidavit made upon informa-

tion and belief, asserted the property to be of a value less than the debt and costs, and procured an ex parte order on October 30, 1931, appointing a receiver. On November 13th thereafter, defendants gave notice that on November 25th they would move the court for an order vacating the order appointing a receiver upon the ground that it had been improvidently entered; said notice being supported by affidavits showing the property to be of a value in excess of $100,000. This motion was heard on the day named, and the defendants produced several witnesses to prove that the property was in fact of the value of in excess of $100,000. Plaintiff attempted, but wholly failed, to rebut any of this evidence. Thereupon, and on November 27th, less than thirty days from the date of the original order, the court gave its order revoking the receivership appointment.

There is no showing whatever that would have justified the appointment of a receiver. The receiver himself is not attempting to appeal. Plaintiff only seeks this right. No property right of plaintiff, however, has been invaded or adjudicated. The court is perfectly free to render an unrestricted decree upon the merits of the cause. If it be conceded that the order is appealable, it should be affirmed upon the ground that the appeal therefrom is frivolous, as the matter was discretionary, and there is no evidence whatever of an abuse of discretion.

But, in my opinion, the order is not appealable. It is not mentioned in section 963 of the Code of Civil Procedure. It is merely interlocutory, and settles no right of either party nor of the receiver. There might be peculiar circumstances under which an order discharging a receiver or revoking his appointment might have in it the essence of a judgment, but the one here before us certainly contains no such ingredient. The cases cited in the majority opinion are not at all analogous to the situation here. Los Angeles v. Los Angeles City Water Co., 134 Cal. 121, 66 P. 198, was a contest over the settlement of the account of a receiver, and the order directed the payment of his compensation by one of the parties. There was an appeal from it by the party required to pay said compensation and by the receiver also. Manifestly there was in such case a determination of final property rights of the parties, and an appeal was properly allowed. In the other case, Anglo-Californian Bank v. Superior Court, 153 Cal. 753, 96 P. 803, there was involved a contest between the plaintiff bank and the receiver as to whether or not the receiver was entitled to certain funds claimed by third parties. The decision of the court was that the plaintiff pay to the receiver the said funds so claimed by others. There was, of course, in such situation, a final adjudication of property rights, and an appeal was properly allowed.

The general principles governing the situation before us have been well set forth in the case of Title Ins. & Trust Co. v. Calif., etc., Co., 159 Cal. 484, 486, 487, 114 P. 838, 839, where the court reviews the history of orders appointing receivers under the Practice Act and under the Code of Civil Procedure, and declares: "It is well settled by the decisions of this court that no appeal can be taken from an interlocutory order unless the order be designated by statute as one of those from which an appeal may be taken. Such was the rule under the Constitution of 1849 and the Practice Act (Allender v. Fritts, 24 Cal. 447; Myers v. Mott, 29 Cal. 359, 89 Am. Dec. 49), and the same conclusion has been reached in cases arising since the adoption of the Constitution of 1879 and the enactment of the Code of Civil Procedure. Thus, in Illinois Trust & Savings Bank v. Alvord, 99 Cal. 410, 33 P. 1133, the court said that 'the only interlocutory or intermediate orders from which a separate appeal can be prosecuted are those enumerated in subdivision 3 of section 939 of the Code of Civil Procedure.' See, also, Rochat v. Gee, 91 Cal. 356, 27 P. 670. Upon the same ground it was held that, prior to the amendment of 1897 to said section 963 of the Code of Civil Procedure (St. 1897, p. 209), there was no right of appeal from an interlocutory order appointing a receiver. French Bank Case, 53 Cal. 495; Emeric v. Alvarado, 64 Cal. 529, 622, 2 P. 418. In the case at bar the appellant seeks to appeal from an order (made before judgment) vacating a prior order appointing a receiver. An order appointing a receiver is, since the amendment of 1897 (St. 1897, c. 151), to section 963 of the Code of Civil Procedure, the subject of direct appeal. The statute does not, however, authorize an appeal from an order refusing to vacate the appointment of a receiver. It would seem clear, therefore, that the attempted appeal now under discussion does not come within the terms of the statute and that, if the appellant has any right to a review of the order complained of, it must be by means of an appeal from such final judgment as may hereafter be entered in the action. Code Civ. Proc. § 956."

We take it to be too well settled to require the citation of authority that no appeal can be taken from a mere interlocutory order, unless the statute so provides. The question here before us has been directly passed upon in other jurisdictions. See Taintor v. St. John, 50 Mont. 358, 146 P. 939, 940, where the court uses this language: "Since an order annulling an order appointing a receiver is not one of the judgments or orders enumerated in section 7098, above, no appeal lies therefrom, though such order is reviewable upon appeal from the final judgment." A kindred holding is Pagett v. Brooks, 140 Ala. 257, 37 So. 263, 264. See, also, Clark on Receivers (2d Ed.) vol. 1, § 128, p. 153.

A moment's consideration of the question here will disclose the wisdom of such a rule.

Here property worth in excess of the mortgage debt is turned over to the plaintiff, and the defendants are deprived of their possession thereof. Such drastic action should not be indulged, unless upon a clear showing of prejudice to the rights of the plaintiff. The court, recognizing its improvident act, properly set aside its order, and, if this appeal be allowed, where, may I ask, rests the right of possession of the property during the pendency of such appeal? Is the receiver now entitled to possession or is he to be ousted of possession pending the appeal and to be allowed later to resume it, should the order be reversed? To allow an appeal in a case of this character would have a tendency to flood this court with appeals from purely interlocutory orders, and hence hamper the proper administration of justice.

It is my conclusion that the appeal should be dismissed.

125 Cal.App. 649

CALIHAN v. YELLOW CAB CO. OF SAN DIEGO.

Civ. 951.

District Court of Appeal, Fourth District, California.

Sept. 3, 1932.

1. Appeal and error ⇐901.

Burden is on appellant to show that verdict approved by trial court is excessive.

2. Evidence ⇐18.

Economic conditions affecting purchasing power of dollar should be judicially noticed.

3. Appeal and error ⇐1004(3).

Appellate court will accept verdict approved by trial court, except where damages are so grossly excessive as to shock sense of justice and indicate passion and prejudice.

4. Damages ⇐130(1).

$6,400 *held* not excessive for injury to head, cervical and dorsal regions of back, seriously affecting health of nurse of 29, earning about $100 monthly.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Margaret Calihan against the Yellow Cab Company of San Diego. From judgment for plaintiff, defendant appeals.

Affirmed.

Hamilton, Lindley & Higgins and Arthur F. H. Wright, all of San Diego, for appellant.

Adam Thompson and Renwick Thompson, both of San Diego, for respondent.

HARDEN, Justice pro tem.

The plaintiff, Margaret Calihan, Russell K. Dougherty, and two other persons were passengers in a taxicab operated for hire in San Diego by defendant, Yellow Cab Company of San Diego, a corporation, on the 6th day of October, 1930. On that day, while said taxicab was being driven rapidly over a depression commonly known as a "double dip," placed at a street intersection to carry off rain water, plaintiff and said Russell K. Dougherty were thrown from their seats with such force that their heads struck against the top of the taxicab, resulting in personal injuries to both of them. Plaintiff brought suit against defendant, and prayed for general damages in the sum of $7,500 and for special damages in the sum of $550. Trial was before the court and a jury, and resulted in a verdict in plaintiff's favor for the full amount of her demand, $8,050. Judgment was entered accordingly. Motion for new trial was denied. One of the grounds of the motion was that the verdict was excessive. Defendant has appealed from said judgment.

The sole point raised on the appeal is that the judgment was excessive.

Stated substantially in the language of the witnesses, the record would sustain the following findings:

Plaintiff had received personal injuries in an accident which occurred in August, 1928. At that time she sustained a broken leg and injuries to her back and ribs. From said injuries she had recovered, so that on October 6, 1930, she was vigorous and able to follow the profession of nursing; she was then possessed of great endurance; was of a jovial disposition; was plump and rosy, and in good health. At the time of the accident involved herein she was twenty-nine years of age, and earned about $100 per month from following the profession of nurse. In said accident she sustained a bruise to the top of her head, caused by a severe blow. Thereafter she was found to be in extreme agony from injury to her neck, with pain in her head and in the cervical and dorsal regions of her back. Several vertebræ were rotated, and apparently some of the ligaments and muscle fibers were torn. The result was the turning of her head to one side and the raising of her shoulders. She was confined to her bed nine-tenths of the time from October 6, 1930, to December, 1930. Up to the time of the trial, which occurred over eleven months after the accident, she was not able to stand the strain of continued work at her profession. During that period she had cried frequently without reason; she seemed weak and trembling; had lost from ten to fifteen pounds in weight; and there was a marked change in her appearance and disposition. At the trial she seemed haggard and worn,

and appeared to be ten or fifteen years older than before the accident; she looked like a different person; was melancholy, pessimistic, and nervous; her neck and head were drawn over to one side and her shoulders not in normal position; there was a change in her gait, and she leaned forward when sitting. It must be stated, however, that it was admitted at the trial that plaintiff had sustained no permanent injuries.

It was established that plaintiff's special damages, on account of expense incurred for the services of physicians and nurses, amounted to $550, and that up to the time of trial she had been without earnings as a result of her injuries for over eleven months, making an additional loss of about $1,100. After deducting said items from the amount of the general verdict, it appears that the net amount awarded for personal injuries, pain, and suffering, and probable loss of earnings in the future, was $6,400. That is the basis for the contention of appellant that the award was excessive.

[1] In any consideration of the question raised here, appellant has the distinct burden of carrying its point. The verdict was subjected to review by the trial court upon proceedings for new trial, and comes here bearing that court's approval.

Particular emphasis is placed by appellant on the fact that, owing to the financial depression from which the country is suffering at the present time, the value of the dollar has increased to such an extent as to make the award excessive. It is contended that the court will take judicial notice of conditions; that in periods of great prosperity, when money was cheap, courts have considered that fact as a justification for affirming large awards; that conversely, now that money is dear, when much in goods and labor is demanded in return for the dollar, the same rule ought to apply.

[2, 3] Changing conditions should be noted by the court. While it may be proper for defendant to point to the increased purchasing power of plaintiff's dollar, defendant's actual complaint is the scarcity of money. Our judicial knowledge having been invoked, we note signs of the country's gradual emergence from the depths of the depression; we may expect a return to normal conditions. No exact measure of detriment suffered as a result of personal injuries has ever been applied, or is possible. Necessarily, values are different. To plaintiff, her injuries were serious; to defendant, they appeared to be trivial. Aside from special damages awarded and an allowance for loss of earnings, the jury and trial court considered that plaintiff's damages amounted to $6,400, and did so in the knowledge common to courts and jurors alike of present financial conditions. Undoubtedly the standards of court and jury are ordinarily more nearly exact than those of either party to an action. An appellate court may properly rely with confidence on the good sense and sound judgment of those to whom the trial is committed. It is therefore the rule that, unless the award is so grossly disproportionate to any fair limit of compensation warranted by the facts as to shock the sense of justice and indicate that it was based on passion and prejudice rather than sober judgment, the reviewing court will not interfere to impose its judgment for that of the jury and trial court.

[4] Having considered the entire record carefully, we cannot say that the verdict has the appearance of being the result of prejudice or passion. It is not so far at variance from this court's opinion of what was fair compensation as to warrant our interference.

The conditions under which we may interpose our judgment against that of the jury are so well understood that we cite only two authorities in support of our decisions: Smith v. Royer, 181 Cal. 165, 183 P. 660; Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513.

The judgment is affirmed.

We concur: MARKS, Acting P. J.; JENNINGS, J.

125 Cal.App. 701

GORDON v. MOUNT.

Civ. 4518.

District Court of Appeal, Third District, California.

Sept. 8, 1932.

1. Malicious prosecution ⇐58(1).

In suit for malicious prosecution charging theft of cattle, evidence regarding exchange of pastures and cutting of wires inclosing field, disclosing circumstances of taking stock should not have been admitted.

2. Malicious prosecution ⇐18(1).

Where cattle were lawfully taken as estrays and returned with issue except for missing animal, no probable cause existed for filing complaint charging theft of cattle.

3. Appeal and error ⇐934(2).

Where findings were waived, and evidence would not warrant finding defendant filed criminal complaint on probable cause, it must be presumed judgment for defendant was not based on alleged existence of probable cause.

4. Malicious prosecution ⇐56.

One relying on defense of advice of counsel in malicious prosecution action must show he made complete statement of facts within his knowledge bearing on transaction.

5. Malicious prosecution ⇐64(2).

Defendant's testimony in malicious prosecution suit regarding facts he told attorneys *held* insufficient to support defense of advice of counsel.

Defendant testified that he had told his attorneys all the facts in the case to which he had testified in the malicious prosecution suit then being had, while facts disclosed defendant had not testified as to what he told his attorneys.

6. Malicious prosecution ⇐56.

In malicious prosecution action, plaintiff has burden of proving malice and want of probable cause.

7. Malicious prosecution ⇐16.

To support malicious prosecution action, malice and want of probable cause must occur.

8. Malicious prosecution ⇐71(3).

While jury or court without jury can infer malice from want of probable cause, they need not do so as matter of law.

9. Malicious prosecution ⇐71(3).

Whether evidence in action for malicious prosecution charging theft of cattle established charge of malice *held* for jury.

10. Appeal and error ⇐934(2).

Where findings are waived, it is presumed every fact essential to support judgment was proved and found by court.

11. Appeal and error ⇐934(2).

Notwithstanding record in malicious prosecution action showed lack of probable cause and reliance on advice of counsel, appellate court must, in support of judgment for defendant where no findings were made, hold testimony did not show malice.

12. Appeal and error ⇐842(3).

Existence of malice is question of fact on which judgment of trial court is conclusive.

Appeal from Superior Court, Merced County; C. E. Beaumont, Judge.

Action by Milton C. Gordon against J. E. Mount. From a judgment for defendant, plaintiff appeals.

Affirmed.

Norris J. Burke and Hatfield, Wood & Kilkenny, all of San Francisco, for appellant.

Berry & Watson, of Stockton, and J. E. Mount, in pro. per., for respondent.

PLUMMER, J.

In this action the plaintiff sought judgment against the defendant for and on account of a certain alleged malicious prosecution. Judgment went for the defendant. The cause was tried before the court sitting without a jury. Findings were waived. From the judgment of the court, the plaintiff appeals.

The alleged malicious prosecution consisted of the filing of a complaint by the defendant, charging the plaintiff with the theft of a number of cattle. Complaint dismissed upon motion of district attorney.

The record shows that litigation has been pending between the defendant and the James J. Stevinson Corporation, of which the plaintiff in this action is the superintendent, for over twenty years. At the time of the occurrences mentioned in this action, George Hatfield was the manager of both the James J. Stevinson Corporation and the Eastside Canal & Irrigation Company, and was the immediate superior of the plaintiff in this action.

While the various phases of the litigation between the parties herein are set out in the transcript, only that which pertains to this action need be considered.

In one of the actions the title of the Eastside Canal & Irrigation Company to an easement to a certain ditch commonly known as the "Turner Slough" was quieted. This slough ran through the east half of lot 24, in section 26, township 7 south, range 10 east, M. D. B. & M., being property belonging to the defendant.

On or about the 10th day of April, 1928, the plaintiff herein was engaged in cleaning out said Turner slough, where it ran over and through the land belonging to the defendant, and on that date the plaintiff took up as estrays six head of cattle, where they were then grazing on the east half of lot 17, section 16, township 7 south, range 10 east, M. D. B. & M., being property belonging to the James J. Stevinson Corporation.

It appears from the record that two days prior to the taking up of the cattle a notice had been served upon the defendant to keep his cattle off the described premises. After the taking up of the cattle by the plaintiff, proceedings were had under the provisions of the statute relating to estrays, and thereafter it appears that a suit for the recovery of the cattle was prosecuted by the defendant, and one Woolman who claimed to be the owner of some cattle theretofore left in the possession of the defendant Mount, and taken up as estrays by the plaintiff Gordon. This action resulted in a judgment directing the return of the cattle upon payment of the sum of $85, cost of the proceeding. This sum being paid, the plaintiff proceeded to return the cattle claimed to have been taken up by him as es-

trays, save and except as to one that had died during the pendency of the action just referred to. It also appears that there were two or three calves also returned with the cows that had been taken up.

The controversy which led to the filing of the criminal complaint by Mount arose out of the contention on the part of the defendant in this action that the cattle returned were not the same as those that had been taken up. The cattle were taken up as estrays, as heretofore stated, on or about the 10th day of April, 1928, and returned to the defendant by the middle of July, 1929. The cattle were returned by placing them in a public highway opposite the residence occupied and belonging to the defendant Mount. The claim on the part of the plaintiff is that the identical cattle, with their issue, were returned, save and except as to the one head that had died. The testimony on the part of the plaintiff was to the effect that one of the cattle taken up was missed on or about two months after being taken up, that the country was searched, and said animal could not be found. The testimony on the part of the defendant was to the effect that they could not identify the cattle returned, as the ones taken up, save and except as to one of them.

We do not need to follow the testimony set out in the transcript, relative to the identity of the cattle returned as being what was left of the cattle that had been taken up as estrays by the plaintiff, and will content ourselves with saying that it largely preponderates in favor of the contention of the plaintiff that, of the six cattle taken up as estrays, all of them were returned with their issue, save and except as to one which the court found, in the claim and delivery proceeding, had disappeared from the possession of the James J. Stevinson Corporation without any fault on the part of the corporation, and without any fault on the part of the plaintiff in this action.

[1] During the introduction of testimony relative to the taking up of the cattle and the place where they were grazing at the time of the taking up, the court, over the objection of the plaintiff, allowed the defendant to introduce testimony to the effect that defendant had had an agreement with A. J. Stevinson, an employee of the Stevinson Corporation, relative to an exchange of pastures, and that the cattle were where they had a right to be at the time they were taken up as estrays. Also there was other testimony introduced over the objection of the plaintiff that the wires inclosing the field in which the cattle had been, had been cut by employees of the Stevinson Corporation, and the cattle escaped therefrom. While this testimony does not appear to be material to any of the issues involved in this action, and the objection of the plaintiff to its introduction should have been sustained by reason of what we shall hereafter say, it is unnecessary to follow the rather extensive argument of counsel for the appellant relative to the authority of A. J. Stevinson to bind the corporation by any such agreement, even though made by him.

[2, 3] Three grounds of defense, though not specifically set out in the answer, appear to be tendered by the testimony, to wit: Probable cause; advice of counsel; lack of malice. The record shows, as we have summarized, that the cattle in question were taken up as estrays, a judgment of the court finding that the cattle were lawfully taken up and directed to be returned upon payment of costs, that the costs were paid, and, the testimony largely preponderating in favor of the contention that the same cattle taken up as estrays were returned, together with their issue, save and except as to the one missing animal, it is evident that no probable cause existed for the filing of a criminal complaint charging theft of the cattle. The findings in the case having been waived, and there being nothing in the evidence which would warrant a finding that the defendant had probable cause for the filing of a criminal complaint, it must be presumed that the court did not base its judgment upon the alleged existence of probable cause.

[4, 5] The second ground of defense is that of advice of counsel. To sustain this defense, the law is well established that any one relying thereon must show that he made a full and complete statement of all the facts within his knowledge bearing upon the transaction. This can only be done by the testimony showing what facts were stated by the defendant to the counsel consulted by him. It is not sufficient simply for the defendant to say in substance, "I stated to counsel all the facts within my knowledge concerning the transaction." Such testimony is only the conclusion of the witness. It appears that the defendant consulted the district attorney of Merced county, who advised him that he would not issue a complaint. The defendant also consulted the attorney who had represented him in a civil action, and was advised by him that he could do no more in the cause. The defendant then consulted counsel in the city of Stockton and obtained a complaint from them which he subsequently filed with a justice of the peace in Merced county, who issued a criminal complaint thereon. The defense of advice of counsel is based upon the action of his Stockton attorneys. All the testimony relative to the statement of facts is really summarized in a few questions which are as follows (taken from the testimony of the defendant):

"Q. Now, in consulting your attorneys in Stockton, did you tell them all the facts within your knowledge pertaining to the case?

"Mr. Burke: We object to that as calling for a conclusion of the witness.

"The Court: Overruled.

"Mr. Watson: Q. Did you relate to them, all of the facts to which you have testified here?

"Mr. Kilkenny: We object to the question in that form, as leading and suggestive, and calling for the conclusion of the witness.

"The Court: Well, it is leading. Change the form of the question.

"Mr. Watson: Q. Did you, or did you not, tell your attorneys, on that occasion, to which you have testified, before the complaint was filed, relate to them all of the facts to which you have testified in this case? A. Yes, sir, the same."

There is no testimony that the defendant testified as to what he told his attorneys. He merely stated, over plaintiff's objection, that he told them all the facts of the case to which he had testified in the proceeding then being had before the court. It is almost unnecessary to cite authorities to show that this testimony is insufficient to support the defense of advice of counsel. However, we will cite an excerpt from the testimony set out in the case of Lansky v. Prettyman, 140 Mich. 40, 103 N. W. 538, 540, which is strikingly similar: "Q. Did you state all the facts that you knew in relation to this case both for and against Mr. Lansky and Van Kaul? A. I gave him the facts that I knew. Q. Did you give him all the facts you knew? A. I certainly did. I told him everything I knew about the case from the beginning." The court held that plaintiff's objection to such testimony should have been sustained. That the defendant must, by his testimony in court, set forth all the facts that he stated to his counsel in making an alleged full and fair disclosure, is supported by all the authorities. We simply cite 19 Am. & Eng. Law (2d Ed.) p. 387 (cases cited in note 5); Beadle v. Harrison, 58 Mont. 606, 194 P. 134; Murphy v. Davids, 181 Cal. 706, 186 P. 143. The list of authorities supporting what we have said is too long for further citation. It must therefore be held that the defense of advice of counsel is not supported by the testimony in this cause.

[6, 7] There remains for our consideration the question of malice, upon which question there was no testimony in addition to what inferences might be drawn from lack of probable cause and lack of advice of counsel other than the following: Justice McConnell, the justice of the peace before whom the complaint was filed, testified that the defendant said: "I want to get even with the Stevinson Corporation." On the part of the defendant Mount the testimony is as follows:

"Q. On the date the complaint was filed, what conversation was had between you and Judge McConnell? A. I just gave him the complaint and he filed it. I don't think there was much of a conversation then. I don't remember that conversation.

"Q. Did you say to him that you were going to get even with the Stevinson Corporation? A. No sir, I did not."

Upon the subject of malice, we find the following in 16 California Jurisprudence, p. 746: "It is incumbent upon the plaintiff, in an action for malicious prosecution, to prove malice. The existence of malice may be inferred by the jury from acts or declarations of the defendant expressing or indicating prejudice, ill-will or malicious motive in the matter of the prosecution. And while malice is not presumed to exist from want of probable cause as a matter of law, it may be inferred therefrom by the jury. But in whatever way malice may be proved, it must be proved as a fact." And on page 735 of the same volume we find the following text, which we think is fully borne out by the cases cited in the footnotes: "It is not sufficient, in an action for malicious prosecution to show that the proceedings complained of were prosecuted without proper ground, or even without what in law constitutes probable cause. Malice, that is, actual malice on the part of the prosecutor, is a necessary element in the cause of action. It is abundantly settled that no suit may be maintained against an unsuccessful plaintiff or prosecutor, unless it is shown affirmatively that he was actuated in his conduct by malice —some improper or sinister motive. Malice is essential to the maintenance of such action and not merely to the recovery of exemplary damages. There is no distinction in this respect between actions for actual damages and those for exemplary damages, or between actions for instituting civil and those for instituting criminal proceedings." The burden of proving both malice and want of probable cause is on the plaintiff. Runo v. Williams, 162 Cal. 444, 122 P. 1082; Lee v. Levison, 173 Cal. 166, 159 P. 438; Burke v. Watts, 188 Cal. 118, 204 P. 578; Carpenter v. Ashley, 15 Cal. App. 461, 115 P. 268; Foster v. Banks, 112 Cal. App. 622, 297 P. 106. Further: In order to sustain an action for malicious prosecution, malice and want of probable cause must occur. If either be wanting, the action must fail. The authorities supporting this statement of the law are so numerous that we cite only a recent decision, to wit: Pickering v. Havens, 70 Cal. App. 381, 233 P. 346.

[8-10] While the jury or the trial court sitting without a jury may properly infer malice from want of probable cause, they are not required to do so as a matter of law. It therefore follows that we cannot state as a matter of law that the evidence in this case establishes the charge of malice. Where findings are waived, it is presumed that every fact essential to the support of the judgment was proved and found by the court. Gray v. Gray, 185 Cal. 598, 197 P. 945; 24 Cal. Jur. p. 956, and the cases there cited.

[11, 12] In support of the judgment, there

being no findings in this case, we must hold that the court, notwithstanding the record shows want of probable cause and lack of reliance upon advice of counsel, that the testimony introduced in the cause did not justify the charge of malice, and the existence of malice being a question of fact, we are bound by the judgment of the trial court.

The judgment is affirmed.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

125 Cal.App. 440

CRESPI & CO. v. GIFFEN et al.

Civ. No. 813.

District Court of Appeal, Fourth District, California.

Aug. 22, 1932.

Appeal and error ⊂655(1).

Where trial judge certified to entire transcript, it would not be stricken from record because official reporter did not certify to part (Code Civ. Proc. §§ 273, 953a).

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Crespi & Co. against L. F. Giffen and others. From a judgment for plaintiff, defendants appeal, and plaintiff moves to strike the reporter's transcript from the record on appeal and for an order affirming the judgment of the trial court.

Motions denied.

Irvine P. Aten, of Fresno, for appellants.

G. Levin Aynesworth, of Fresno, for respondent.

MORTON, Justice pro tem.

This is a motion by respondent to strike the reporter's transcript from the record on appeal and for an order affirming judgment of the trial court. The motion is based upon the ground that the reporter's transcript has not been and cannot be properly authenticated under section 953a of the Code of Civil Procedure, for the reason that the official reporter was not present during a portion of the trial, at which certain evidence was introduced. It appears that, after the taking of the evidence at the first hearing, the trial court requested a further deposition of the witness Knowles. By stipulation this deposition was taken and filed in the action. Shortly thereafter counsel for both appellant and respondent appeared in court, and without objection this deposition was offered and introduced in evidence and considered by the court; the cause was then further argued by both counsel. The official court reporter was not present during this hearing. It was also found necessary to correct the minutes of the court to show the introduction in evidence of this deposition and also another deposition offered during the trial. The official reporter certified to all of the evidence incorporated in his transcript except the two depositions. The trial judge, over the written objection of respondent, certified to the entire transcript as containing all the testimony and evidence offered and received at the trial. The court rendered judgment for the plaintiff, and the defendant appeals.

Under section 953a of the Code of Civil Procedure, it is the duty of the trial judge, when the reporter's transcript is presented to him for his approval, to examine it and to "see that the same is a full, true and fair transcript of the proceedings had at the trial, the testimony offered or taken, evidence offered or received. * * *" In the case of Lake v. Harris, 198 Cal. 85, at page 88, 243 P. 417, 419, the court held: "It is the duty of the trial judge to authenticate all papers, records, and files which are not subject to certification solely by the clerk, and which are essential to a proper determination of the appeal"—citing cases. We find in Bell v. Brigance, 194 Cal. 445, 229 P. 27, 28, a case closely in point. There it appeared that certain proceedings were had at the trial, and then a court reporter took the proceedings "from said point aforesaid." In denying the motion made to affirm the judgment, the court said: "The judge shall examine the transcript, and if he finds it a full, true, and fair transcript of the matter required by the statute to be included, he shall certify to its truth and correctness. * * * The certificate of the judge is the only certificate required or provided for by section 953a, supra, and is the only authentication of the transcript to which this court will look. The reporter's certificate may have been of assistance to the judge below, being prima facie evidence of the testimony and proceedings (Code Civ. Proc. § 273), but it adds nothing to the authenticity of the transcript in question. Williams v. Lane, 158 Cal. 39, 40, 109 P. 873." We feel this statement of the law clearly determines the question in issue here. The motion to strike the reporter's transcript from the record is therefore denied.

The ruling on the motion to strike removes the basis for the motion to affirm the judgment of the trial court, and therefore it is also denied.

We concur: MARKS, Acting P. J.; JENNINGS, J.

125 Cal.App. 647

SHANFELD v. MUNSON et ux.

Civ. 392.

District Court of Appeal, Fourth District, California.

Sept. 2, 1932.

Appeal and error ⇐773(2).

Where appellant failed to file points and authorities as provided by rules, or to show diligence or meritorious case, appeal will be dismissed (Rules of District Court of Appeal, Rule I, § 4, and Rule V).

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by David Shanfeld against Guy H. Munson and Anna Munson, who brought separate action against plaintiff, after which the cases were consolidated and tried together. From judgment rendered, David Shanfeld appeals. On respondents' motion to dismiss appeal.

Appeal dismissed.

Christian Hoeppner and Gilbert H. Jertberg, both of Fresno, for appellant.

Wakefield & Hansen, of Fresno, for respondents.

HARDEN, Justice pro tem.

Plaintiff, David Shanfeld, brought suit against the defendants, Guy H. Munson and Anna Munson, husband and wife, for damages as a result of personal injuries sustained by him on February 18, 1930, in a collision between an automobile truck driven by plaintiff and an automobile driven by the defendant Anna Munson. In said collision said Anna Munson also sustained personal injuries, on account of which she and her husband brought a separate action against the plaintiff herein for damages. The cases were consolidated and tried together before the court and a jury. The verdict was in favor of the defendant in the present action and in favor of plaintiff herein as defendant in the other case. Judgment was entered accordingly. From the judgment entered herein plaintiff has appealed.

The transcript on appeal was filed on May 4, 1931. Respondents gave appellant written notice on July 21, 1932, that they would move the court on August 9, 1932, to dismiss the appeal on the ground that appellant's points and authorities had not been filed within the time allowed by the rules of court. Rule I, section 4, of this court required the appellant to file points and authorities on or before June 3, 1931. No order was made granting any extension of time for such filing. Rule V provides for dismissal of an appeal on motion for failure to file points and authorities within the time allowed. Pursuant to said notice, respondents made their motion on August 9, 1932, to dismiss the appeal. The rules also provide that such motion to dismiss shall be denied, if points and authorities are on file at the time the notice is given; but no points and authorities had been filed at that time nor when the motion to dismiss was made. No diligence has been shown to comply with the rules nor to resist the motion. No showing was made that the appeal is meritorious.

The respondents are entitled to a dismissal of the appeal. McCabe v. Healey, 139 Cal. 30, 72 P. 359; Coats v. Coats, 146 Cal. 443, 80 P. 694; Gilbert v. United States F. & G. Co., 97 Cal. App. 42, 274 P. 1023; Welch v. Stratton, 73 Cal. App. 765, 239 P. 380; Pierce v. Employers' Indemnity Exchange, 33 Cal. App. 98, 164 P. 403; Barnhart v. Conley, 17 Cal. App. 230, 119 P. 200.

The appeal is therefore dismissed.

We concur: MARKS, Acting P. J.; JENNINGS, J.

125 Cal.App. 583

CREDIT FINANCE CORPORATION v. MOX et al.

Civ. 8311.

District Court of Appeal, First District, Division 1, California.

Aug. 29, 1932.

1. Usury ⇐106.

Compromise settlement definitely fixing indebtedness due and releasing debtor's claims against creditor, and note executed as part payment of amount due *held* enforceable, though original transaction was usurious (Usury Law [St. 1919, p. lxxxiii]).

2. Compromise and settlement ⇐6(2).

Compromise of doubtful claim asserted and maintained in good faith constitutes sufficient consideration for new promise.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by the Credit Finance Corporation against Gustav Mox and others. From a judgment for plaintiff, named defendant appeals.

Affirmed.

L. M. Pritchard, of Los Angeles, for appellant.

Hewitt, McCormick & Crump and H. L. Green, all of Los Angeles, for respondent.

KNIGHT, J.

This is an action to recover on a promissory note executed by the defendants Gustav and Otto Mox and J. L. Deane for the payment of $25,000. The answers admitted due execution of the note, but pleaded want of consideration and usury. The trial took place before the court, and judgment was given in favor of plaintiff for the full amount of the note and interest; and from such judgment the defendant Gustav Mox has appealed. The appeal was taken on the judgment roll alone, and the sole question presented is the legal sufficiency of the findings to support the judgment.

It appears from the findings that defendants owned approximately 65 per cent. of the outstanding stock of Mox, Incorporated, which was engaged in the business of selling lumber; and in October, 1925, plaintiff agreed to lend the corporation such sums of money as it might require to operate its business, taking as security therefor the assignment of book accounts due the corporation. Up to February, 1927, there were some seventy-five separate loans made, the amounts advanced being equal to 60 per cent. of the face value of the accounts taken as security therefor; and the total amount thereof aggregated several hundred thousand dollars. In June, 1926, on demand of plaintiff, the defendants herein gave plaintiff a written agreement of continuing guaranty, by the terms of which defendants jointly and severally and unconditionally guaranteed the payment of all indebtedness due plaintiff from the corporation. Thereafter a dispute arose between the parties as to the exact amount due from the corporation to plaintiff; the corporation and the defendants claiming that part of the sums demanded by plaintiff were usurious. Eventually the parties agreed upon a compromise and settlement, whereby plaintiff deducted some $18,000 from the amount claimed; "the mutual belief of all of the parties being," according to the trial court's findings, "that the allowance of said claim of some $18,000 would purge all transactions of any possible taint of usury." Whereupon, and in February, 1927, in consummation of said compromise and settlement, the parties entered into a written agreement whereby the amount of the indebtedness due plaintiff was fixed at $100,000, and the corporation and defendants agreed, as the court found, "to release all claims whatsoever held by any or either of them against plaintiff and its subsidiary corporations, and to pay to plaintiff the sum of $100,000.00, irrespective of what the books of any or either of said corporations might show as due and/or owing"; and as part of the same settlement and in part payment of said $100,000 the defendants herein executed and delivered to plaintiff the promissory note here sued upon, for $25,000, no part of which has ever been paid.

The trial court further found that prior to said settlement and compromise plaintiff claimed a balance due of $172,838.39, and that "of said sum * * * $41,500.00 constituted interest charges made by plaintiff for loans to said Mox Incorporated, and * * * that all of said sum of $41,500.00 is an improper charge and not allowable." Continuing, the finding reads: "Deducting said sum of $41,500.00 from the balance due and owing from Mox Incorporated, its subsidiaries, and defendants, to plaintiff, the Court finds that a sum in excess of $100,000.00 was due and owing * * *" to plaintiffs in "February, 1927, prior to the execution of said agreement of compromise and settlement." The trial court's legal conclusions were that the loans made by plaintiff to said corporation "were tainted with usury and in violation of The Usury Act of the State of California" [St. 1919, p. lxxxiii]; and that "the sum of $41,500.00 constitutes interest in excess of $12.00 upon each $100.00 per year, and is therefore a void and illegal charge"; but, continuing, the court found that "prior to the execution of said agreement of compromise and settlement" there was due plaintiff a sum in excess of $100,000.

[1, 2] The main contention made by appellant on this appeal is that, inasmuch as the trial court found that part of the sum of $172,838.39 claimed by plaintiff to be due prior to the compromise and settlement, to wit, the sum of $41,500, constituted usurious interest and consequently was a void charge, the agreement entered into as a result of such compromise and settlement and the note here sued upon which was given in part payment of the amount found to be legitimately due are likewise tainted with usury and consequently void. We find no merit in the contention, for, as said in Lamb v. Herndon, 97 Cal. App. 193, 275 P. 503, 508, in the absence of a showing of fraud or undue influence, a compromise agreement, like a judgment, is decisive of the rights of the parties thereto, and "even though there had been usury in the original transaction, it would seem that upon a settlement upon which each of the parties released the others from all claims and liabilities of every character then existing, the right to rely upon a previous usurious transaction would cease to exist. Ector v. Osborne, 179 N. C. 667, 13 A. L. R. 1207, 103 S. E. 388; Hoopes v. Ferguson, 57 Iowa, 39, 10 N. W. 286; Blohm v. Hannan, 82 N. J. Eq. 192, 88 A. 622." To the same effect is Thayer v. Buchanan, 46 Or. 106, 79 P. 343. Furthermore it is held generally in this state that the compromise of a doubtful claim asserted and maintained in good faith constitutes a sufficient consideration for a new promise. Snowball v. Snowball, 164 Cal. 476, 129 P. 784;

Bank of Commerce v. Scofield, 126 Cal. 156, 58 P. 451; Rohrbacher v. Aitken, 145 Cal. 485, 78 P. 1054.

Here the trial court found that during all of the negotiations for compromise the plaintiff in good faith maintained that the transactions involving the advances were not tainted with usury, and that much more than $100,000 was legitimately due plaintiff on said indebtedness. Therefore, since no claim has been made by appellant at any time that the compromise was brought about by fraud or undue influence, or any unfair advantage, he is bound by the agreements he entered into as a result thereof.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

125 Cal.App. 393

MADSEN v. LE CLAIR.

VALDICK v. SAME.

Civ. 8348.

District Court of Appeal, First District, Division 1, California.

Aug. 19, 1932.

Rehearing Denied Sept. 17, 1932. Hearing Denied by Supreme Court Oct. 17, 1932.

1. Appeal and error ⇐1099(8).

Decision on former appeal that certain questions were questions of fact became law of case.

2. Appeal and error ⇐1099(7).

Question of sufficiency of evidence is not controlled by decision on former appeal as to sufficiency of similar evidence given at former trial.

3. Master and servant ⇐330(3).

Finding that hoisting contractor's employee operating hoisting equipment rented to building contractor remained under former's control, *held* justified under evidence in action based on employee's negligence.

The evidence disclosed that the hoisting contractor rented to the building contractor, engaged in erecting a stadium, a tractor and hoisting attachments, and furnished an operator, charging for the use of the hoisting apparatus and operator a specified sum per day. The operator's wages were paid by the hoisting contractor, and no one in the employ of the building contractor directed him as to care or operation of motor or hoist. The injuries were due to workmen's falling when cage fell as result of carrying load too great for the hoist.

4. Master and servant ⇐330(3).

Finding that negligence of hoisting contractor's employee who, in operating hoisting equipment rented to building contractor, permitted overloading of elevator cage, was proximate cause of injury to workmen, *held* justified under evidence.

5. Appeal and error ⇐931(1).

On appeal, all conflicts in evidence must be resolved in favor of judgment.

Appeals from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Actions by A. Madsen, and by F. Valdick, against S. D. Le Clair. Judgments for plaintiffs, and defendant appeals.

Affirmed.

Barry J. Colding, Theodore Hale, and Carroll B. Crawford, all of San Francisco, for appellant.

Cooley, Crowley & Gallagher and Cooley, Crowley & Supple, all of San Francisco, for respondents.

LAMBERSON, Justice pro tem.

We have before us two appeals of the defendant S. D. Le Clair, which have, by stipulation of the parties, been consolidated and presented in a single record. Each of the plaintiffs sued defendant for damages for personal injuries suffered as a result of the falling of a construction elevator cage used in the hoisting of building materials and equipment going into the construction of a concrete structure known as Kezar Stadium in Golden Gate Park, in San Francisco. The trial, which has resulted in this appeal, was the second trial of the case, and was had before the court without a jury. In the former trial, with a jury, the court directed a verdict in favor of the defendant. Upon an appeal the judgment was reversed. Valdick v. Le Clair, 106 Cal. App. 489, 289 P. 673. Upon a second trial the court gave judgment in favor of the plaintiff F. Valdick in the sum of $2,050, and in favor of the plaintiff A. Madsen in the sum of $3,000. The appeal is from each judgment.

At the beginning of the second trial, counsel agreed by stipulation that certain facts, as set forth in the opinion of the court in Valdick v. Le Clair, supra, were established. We consider it advisable for the purposes of this opinion to restate the facts, because the testimony, as it was developed at the second trial, varied in some particulars from that given at the first trial. The facts, in substance, were as follows:

J. A. Bryant was a general contractor who had secured a contract for the erection of the

Kezar Stadium. During the progress of the work, it being necessary for the carrying on of the work that hoisting machinery be used, Bryant went to the appellant, who was a hoisting engineer, and had been engaged in the business of renting hoisting machinery and engines of various types, and supplying operators for the same for many years. Bryant told Le Clair of his contract and of his requirements. According to the testimony of Le Clair, he asked Bryant if the latter wanted a small steam engine, and Bryant replied that he did not want such an engine, because it would be necessary to move the machinery several times, and, as the ground was rough, he would like to have a tractor. In describing his requirements, Bryant stated that he desired to run a cage or elevator platform of a size large enough to accommodate two buggies, which are large steel wheelbarrows used for carrying concrete from the trucks to the places where it is poured into the walls under construction. Appellant told Bryant that a tractor was not large enough to handle two loaded buggies on a single line. The latter then said that he intended to hoist one buggy loaded, and allow enough room on the platform for the placing of an empty buggy which could be lowered, presumably, while the loaded buggy was being emptied, thus allowing the loading and unloading to be a continuous operation. It was agreed that Bryant should pay $18 per day to the appellant for the use of the engine and hoisting apparatus, including $8 as wages for an operator to be provided by Le Clair. On the following day, pursuant to agreement, a representative of Le Clair went out to the stadium, and in a talk with Bryant's foreman it was agreed that a cage large enough for two buggies should be used. The foreman wanted to use a single line running from the center of the cage, and appellant's representative suggested that, because of a loaded buggy being carried on one side of the cage, the cage would tip or rack, and that, in order to remedy such defect, he would furnish with the hoisting apparatus a device known as a bridle. Shortly thereafter this representative of Le Clair personally delivered at the scene of work a Fordson tractor with a hoisting apparatus of the drum and cable type, known as an Ellison hoist, adjusted thereto. This equipment was delivered at a point about 200 feet from the elevator tower which was in process of erection, and with which the hoisting apparatus was to be used. Three or four days later, upon notification from Bryant or his foreman, Le Clair's representative, telephoned to one of their hoisting engineers, a man named Pratt, who had been employed by Le Clair for at least 14 years, to report for work on the following morning to Bryant's foreman, and to take his orders from Bryant or the foreman. On the following day Pratt reported to the foreman about 8 o'clock in the morning, and was told that they were not ready to pour, but to get the tractor warmed up and ready for work. In the time intervening between delivery of the engine and hoist to the scene of the work, and the morning on which Pratt had reported for work, the hoisting engine and hoist had been moved to a position near the tower, and rigged up for work. Le Clair's representative testified that the work of rigging up the hoist had not been done by any one connected with Le Clair's establishment. Pratt examined the engine, and warmed it up for work, and during the morning hoisted some equipment for Bryant's foreman. About 11 a. m. he was informed that they were ready to hoist concrete. Two loaded buggies were run on to the cage and hoisted to the level of a runway where the respondents, who were employees of Bryant, were stationed with orders to take the buggies off of the cage. There is some conflict in the testimony as to whether or not Pratt made objection to Bryant or his foreman that the load was too great for the hoist. As the respondents stepped forward to pull the buggies off of the cage, they each placed a foot on the cage and pulled on the buggies. Thereupon the cage fell, and each of the respondents was precipitated to the ground a distance of about 14 feet, receiving the injuries which form the basis of the action. It was later found that the excessive weight had sheared off a contrivance known as a "Woodruff key," which is a steel wedge or cotter pin inserted in a slot of a steel rod or shaft, and which was a part of the braking apparatus of the hoist, thereby permitting the cage to fall.

Pratt continued to work on the job for some days after the accident. When concrete was not to be poured, he would be told by the Bryant foreman that he would not be needed the following day, and, when concrete was to be poured, the foreman would notify Le Clair's office, and some one at that place would notify Pratt to report on the job. Pratt received his wages from Le Clair at the rate of $8 per day, and frequently worked overtime at the request of Bryant's foreman. All of his wages were paid by Le Clair, who also furnished gasoline and oil with the tractor. The trial court found in each case as follows: "Shortly prior to June 15, 1928, the defendant S. D. Le Clair, a hoisting contractor, entered into an agreement with the said J. A. Bryant, and pursuant to said agreement, the defendant S. D. Le Clair agreed to and did furnish to said J. A. Bryant for hire a certain hoisting engine and apparatus, owned by the said defendant, together with a hoisting engineer in the employ of said defendant, to operate the same, in the construction of said Kezar Stadium; the said defendant S. D. Le Clair, by and through his said employee and hoisting engineer, operated and controlled said hoisting engine and apparatus in the construction of said Kezar Stadium on said 15th day of

June, 1928; the said employee and hoisting engineer of said defendant was not, at said time and place, a servant or employee of the said J. A. Bryant but, in the operation and control of said hoisting engine and apparatus, was and remained the employee and servant of said defendant, acting within the course and scope of his employment by, and under the control of, the defendant S. D. Le Clair."

The facts, as developed in the second trial of the case, do not differ materially from those adduced during the first trial. We have already related such additional matters which seem or tend to explain the relation which Pratt bore respectively to Bryant and to appellant. The solution of the controversy depends, as it did in the former appeal, upon the status of Pratt, who had worked for Le Clair for a long period of time. No one in the employ of Bryant directed Pratt as to the care or operation of the motor or hoist. Even Pratt said that no signals or directions were actually given as to when to hoist, but he watched the men, or the placing of the buggies on the cage, and it was customary for the engineer to use his own judgment as to when the cage was ready to go. He further testified that he knew the two buggies weighed 900 pounds each, and that the capacity of the hoist, as it was rigged, was about 1,500 pounds.

The court upon the former appeal (Valdick v. Le Clair, supra), said at page 497 of 106 Cal. App., 289 P. 673, 677: "We are of the opinion that the testimony is susceptible of the inference that the work of hoisting or raising the concrete 'buggies' to the workmen on the stadium was being done by respondent Le Clair through his employee, Arthur M. Pratt; that the jury might well have concluded, without abusing the discretion vested in it as the trier of the facts, that Le Clair at no time had surrendered full control over Pratt to Bryant, nor had Bryant exercised that degree of control over Pratt which would establish the relation of special employer and employee between Pratt and Bryant, but Le Clair had himself retained the right to control Pratt; Bryant merely, through his foreman, giving Pratt directions as to the details of the work and the manner of doing it."

Upon the question as to the correctness of the trial court's order granting a motion for a directed verdict, the court said in substance that, the evidence in the record being sufficient to support a finding that at the time of the accident Le Clair had not resigned full control of Pratt, it followed that Le Clair would be liable for damages if Pratt was negligent, and his negligence was the proximate cause of the injuries received by the plaintiffs, and the question of Pratt's negligence was a question of fact for the jury, to be determined from all the evidence, and held that, only when the facts are clear and undisputed, and the dictates of common prudence point to only one reasonable conclusion, the question is then, and only then, one of law for the court.

[1] Respondents urge that the conclusions of the court on the former appeal became the law of the case. The conclusion of the court that the question as to the control of Pratt, and as to his negligence, were questions of fact for the jury to determine, did become the law of the case.

[2] Where the appellate court has, in its opinion, stated a rule or principle of law necessary to a decision, that rule or principle must be adhered to and observed throughout the subsequent progress of the case, both in the lower court and upon subsequent appeals, although it may be believed upon further consideration that the former decision in that particular was erroneous. Burns v. Jackson, 53 Cal. App. 345, 200 P. 80, citing Westerfeld v. New York L. Ins. Co., 157 Cal. 339, 107 P. 699. This doctrine does not, however, extend without exception to questions of fact. In Wallace v. Sisson, 114 Cal. 42, 45 P. 1000, 1001, cited with approval in Allen v. Bryant, 155 Cal. 256, 100 P. 704, the court said: "But, when the fact which is to be decided depends upon the credit to be given to the witnesses whose testimony is received, or the weight to which their testimony is entitled, or the inferences of fact that are to be drawn from the evidence, the sufficiency of the evidence to justify the decision must be determined by the tribunal before which it is presented, and is not controlled by an opinion of the appellate court that similar evidence at a former trial of the cause was insufficient to justify a similar decision * * * and if, in the opinion which it renders, it assumes that the evidence sustains any fact, it is only the opinion of the court, and not a finding of that fact." In Allen v. Bryant, supra, the court said that the doctrine of law of the case is rarely, and in a very limited class of cases, applied to matters of evidence as distinguished from rulings of law.

[3, 4] We must conclude, therefore, that the questions of fact as to whether Pratt was the servant of appellant rather than Bryant, and as to whether the negligence of Pratt as the employee of appellant was the proximate cause of the injury to the respondents, were still to be determined by the trial court upon the second trial, and the problem here to decide is the sufficiency of the evidence to support the findings of the trial court.

An excellent analysis and carefully considered review of the California cases involving the question which we have before us in this case is found in the case of Peters v. United Studios, Inc., 98 Cal. App. 373, 277 P. 156, 157. In that case, Daum, a tractor driver in the employ of United Studios, Inc., was sent with the tractor by his foreman to the Christie Studios, with instructions to go over to

the Christie Studios to do whatever they wanted done over there. The United Studios rented the tractor and furnished Daum as the driver. Oil and gas were furnished by the Christie Studios. Daum reported to the foreman of the latter, and thereafter the tractor was taken to Wilmington, where it was used in filming certain scenes of a motion picture. The Christie Studios people attached two angle irons to the front of the tractor, and on one occasion the tractor was driven for a short time by one of the Christie actors. On other occasions Daum was furnished costumes and doubled for the actors, while on other occasions he wore his own working clothes, and was not made up. The Christie foreman told Daum what to do, but did not undertake to interfere with the mechanical operation of the tractor. Daum knew nothing about the contract, but turned in his time to the United Studios people, and during the time that the tractor was used by the Christie people the United Studios had nothing to do with the operation of the machine and in no way interfered with the operation of the machine. Judgment was rendered upon a verdict against the defendants, United Studios, and the operator of the tractor, for injuries received by an actor employed by Christie Studios, who was injured while the tractor was being operated by Daum in the filming of a picture.

At the trial of the case the court instructed the jury as follows: " 'You are instructed that, as a matter of law and as a matter of fact, the defendant Kenneth Daum, in the driving, management and operation of the tractor that struck the plaintiff on the occasion involved here, was the agent and servant of the defendant, United Studios, Incorporated, and any act of negligence, if any, on his part, was the act of negligence of said defendant corporation as well as his own.' "

In holding that the trial court erred in giving such an instruction, the appellate court said: "The question is, again, not what control was actually exercised, but who had the authoritative right to control. The fact that the terms of the contract of hiring were not conclusively proved left it, in our judgment, to the jury to determine from all the evidence who at the time and place of the injury had the right to exercise exclusive direction and control of the conduct of Daum. In the last analysis the question really depends on the construction to be given to the direction to Daum to 'do whatever they want done' in the light of all the proved circumstances in the case. That was peculiarly a fact to be determined by the jury and should not have been taken from them. We conclude, therefore, that the court erred in instructing the jury as a matter of law that appellant United Studios, Inc., was liable for the negligence of Daum. We likewise conclude that under the evidence in this case the question of whether or not Daum remained subject to the control of United Studios, Inc., so as to render them liable for his negligence, should have been left to the jury to decide under appropriate instructions by the court."

The case of Umsted v. Scofield Eng. Const. Co., 203 Cal. 224, 263 P. 799, 801, was another case where the employee of the general employer was instructed to go over to the special employer's job and do " 'anything they wanted to take care of' " or "do whatever was needed." On the job the construction superintendent of the special employer had directed the employee Umsted, as to what was to be done, but not as to how to do anything. The Supreme Court said that the jury might have inferred that the instructions given by the representative of the construction company, the special employer, were merely directions as to the result to be accomplished, such as are required in the nature of things to be given to independent contractors in any case.

[5] On appeal, all conflicts in the evidence must be resolved in favor of the judgment, and all reasonable inferences from the evidence will be drawn in its support. Witherow v. United American Ins. Co., 101 Cal. App. 334, 281 P. 668.

While we are of the opinion that some of the cases relied upon by respondent are to be distinguished from the case before us, particularly the case of Moss v. Chronicle Pub. Co., 201 Cal. 610, 258 P. 88, 55 A. L. R. 1258, in which the employees involved were engaged in doing work for the mutual benefit of their respective employers, and the case of Billig v. Southern Pacific Co., 189 Cal. 477, 209 P. 241, in which the employee of the general contractor was controlled during the greater part of the time by the general employer, and was beyond the control of the special employer for long periods of time, we must, nevertheless, conclude that the question of whether Pratt was actually under the control of Bryant to such an extent as to absolve the appellant of responsibility for the negligence of Pratt, as well as the question of whether or not Pratt's negligence was the proximate cause of the injury to respondents, was a question of fact to be determined by the court, and that its findings cannot be disturbed.

It would be idle to review the California authorities, because they have been set out very fully in several decisions, and particularly in Peters v. United Studios, Inc., supra. The cases have gone far in supporting the principle that to escape liability the original master must resign full control for the time being, it not being sufficient that the servant is partially under the control of a third person; and that it is necessary to distinguish between authoritative direction and control,

and mere suggestions as to details, or the necessary co-operation where the work furnished is part of a larger operation.

It is ordered that the judgment be affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

125 Cal.App. 709

PEOPLE v. LEE et al.

Cr. 1654.

District Court of Appeal, First District, Division 1, California.

Sept. 10, 1932.

Rehearing Denied Sept. 24, 1932.

1. Indictment and Information ⇐161(4).

Evidence at preliminary hearing *held* to show robbery and subsequent attempted robbery so as to justify amended information containing count based on attempt.

2. Robbery ⇐12.

Possession of money by intended victim is not essential to crime of attempt to commit robbery.

3. Criminal law ⇐829(1).

Accused cannot complain of refusal to give instruction, where points involved were covered in court's charge.

4. Criminal law ⇐1218.

Accused convicted of attempt to commit robbery of second degree were properly sentenced to imprisonment in state prison instead of in county jail (Pen. Code, § 213, and § 664, subd. 1).

5. Robbery ⇐26.

Weight of complaining witness' testimony in prosecution for attempted robbery *held* for jury.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Harold Lee, George Chan, and Lou Horn were convicted of attempt to commit robbery of the second degree, and they appeal.

Affirmed.

Frank M. Carr and W. W. Laidley, both of Oakland, for appellants.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

PER CURIAM.

Appellants, with Lee Chong, James Loo You, and a woman named Lonie Chan were charged by a complaint filed in the police court of the city of Oakland with the offenses of robbery and conspiracy to commit robbery and extortion. On December 10, 1931, after a preliminary examination, the charges against said Lee Chong and James Loo You were dismissed, and appellants, with Lonie Chan, were held to answer to the Superior Court on the charge of robbery. The district attorney of Alameda county thereafter filed an information charging the four last mentioned with that crime, and later, over their objection, filed an amended information by which was added a second count charging them with the crime of attempt to commit robbery.

The four were duly tried, and Lonie Chan was acquitted on both counts. Appellants were acquitted on the first count and convicted of the crime of attempt to commit robbery of the second degree. Motions by the latter in arrest of judgment and for a new trial were denied, and the appeal is from the order denying a new trial and the judgment of conviction.

[1] Appellants claim that it was error to permit the filing of the amended complaint, for the reason that an attempt to commit robbery was not shown by the evidence taken at the preliminary examination, and that their motion to strike therefrom the second count mentioned should have been granted.

The complaining witness, a Chinese named Yip Wong Sun, with one Lin Hoy, conducted a barber shop on Eighth street in Oakland. They lived in rooms at the rear of the shop. This witness testified that on November 20, 1931, at about 10 p. m., at the suggestion of said James Loo You, he visited a beauty parlor conducted by Lonie Chan for the purpose of having his hair cut. He was invited into an inner room, and upon his entering she made an outcry. Appellants, with another Chinese, thereupon made their appearance. They seized the witness, threatened him with violence, and took from his person a sum of money and certain jewelry. Upon these acts was based the charge of robbery contained in the first count of the information. According to Lonie Chan, when the complaining witness entered her shop, he made improper advances, which led her to call for assistance, and appellants responded. The complaining witness testified that he was held a prisoner in the Chan house until the morning of November 21, 1931, when he was taken by appellants to his own shop for the purpose of getting from him the further sum of $600. During the night he was induced to sign a writing in Chinese which he copied from a draft prepared by appellants. This paper corroborated the story of Lonie Chan, and therein the witness agreed to pay the last-mentioned sum. The writing was found under a rug in the Chan house by police officers. The witness also testified that, when the appellants brought him to his shop, they were armed with pistols and threatened violence, if the above sum should

not be produced. Upon his arrival, he ran through the shop and locked himself in a lavatory, at the same time calling to his partner for help and stating that appellants intended to rob him. The partner testified that appellant George Chan said, "We came to get some money," but, after some conversation, appellants departed. According to a police officer, appellants admitted that the complaining witness remained at the Chan house all night, one stating that they were holding him in order that they might obtain a warrant for his arrest. They also admitted that he signed the document mentioned, but all denied that any violence was used or that they were armed. The complaining witness, his partner and a police officer testified substantially as above both at the preliminary examination and at the trial.

As contended by respondent, this testimony tended to establish two separate offenses—first, the alleged robbery at the Chan house on November 20, and an attempted robbery on the following morning, and the evidence was such as to justify the amendment complained of. People v. Bird, 212 Cal. 632, 300 P. 23.

[2] Appellants contend that it does not appear that the complaining witness had any sum of which he could be robbed, or that any robbery was attempted.

Under the decisions, it was unnecessary to show that the witness possessed any sum, and the evidence was sufficient to support the charge of an attempted robbery (People v. Lee Kong, 95 Cal. 666, 30 P. 800, 17 L. R. A. 626, 29 Am. St. Rep. 165; People v. Holden, 13 Cal. App. 354, 109 P. 495; In re Magidson, 32 Cal. App. 566, 163 P. 689).

[3] With respect to certain instructions which appellants claim were erroneously refused, the record discloses that the first and second were given; the third referred to the presumption of innocence; and the fourth to the evidence required to overcome this presumption. Other instructions were given which fully covered the matters contained in those offered by appellants, and their refusal was not error. The fifth required the jury to find, before a conviction could be had on the second count in the information, that the complaining witness had in his possession or immediate control the sum of $600. Such a finding under the cases cited above was unnecessary, and the instruction was properly refused. The sixth was fully covered by another instruction given by the court.

We find no merit in the further claim that the court erred in its rulings on the admissibility of certain evidence.

[4] Appellants were sentenced to imprisonment in the state prison. They assign this as error, claiming that they should have been sentenced to imprisonment in the county jail.

As stated, they were convicted of the crime of attempt to commit robbery of the second degree. Section 213 of the Penal Code provides that robbery in the second degree shall be punishable by imprisonment in the state prison "for not less than five years," and robbery in the second degree by imprisonment in the state prison "for not less than one year." Subdivision 1 of section 664 of the same code provides that, if the offense attempted is punishable by imprisonment in the state prison for five years or more, the person guilty of such attempt is punishable by imprisonment in the state prison for a term not exceeding one-half the longest term of imprisonment prescribed upon conviction of the offense so attempted, provided that, if the crime attempted is robbery, such attempt shall be punishable by imprisonment in the state prison for a term of not more than twenty years; and that, if the offense attempted is punishable in the state prison for any term less than five years, the person guilty of such offense is punishable by imprisonment in the county jail for not more than one year.

It has been held that the word "punishable" as used in the latter section refers to the maximum punishment which may be inflicted (Ex parte Hope, 59 Cal. 423; People v. Superior Court of City and County of San Francisco, 116 Cal. App. 412, 2 P.(2d) 843); and that under this section the maximum punishment for an attempt to commit robbery is the same regardless of the degree of the crime attempted (People v. Arguero, 113 Cal. App. 424, 298 P. 520). We are satisfied that respondent's contention is correct; namely, that for the offense committed by appellants they were punishable under subdivision 1 of the section, and were properly sentenced to imprisonment in the state prison.

[5] While there were elements of improbability in the testimony of the complaining witness, we cannot say that his testimony as a whole was unworthy of belief. It was corroborated in material particulars by the testimony of other witnesses, and the question of its weight was for the jury. People v. Raich, 26 Cal. App. 286, 146 P. 907; People v. Chesney, 72 Cal. App. 570, 237 P. 793; People v. Castro, 85 Cal. App. 228, 259 P. 117.

The verdict was fairly sustained, and no error has been shown which would warrant a reversal.

The order and judgment appealed from are accordingly affirmed.

125 Cal.App. 623

FARRELL v. MIRAMAR HOTEL CO., Limited et al.

Civ. 8287.

District Court of Appeal, First District, Division 1, California.

Sept. 1, 1932.

1. Fraud ⇐58(1).

Fraud may be proved by circumstantial evidence.

2. Corporations ⇐80(11).

In action to rescind stock purchase for fraud, plaintiff had burden to establish fraud; presumption being in favor of fair dealing.

3. Fraud ⇐58(1).

Fraud need not be proved beyond reasonable doubt, proof by preponderance of evidence being sufficient (Code Civ. Proc. § 2061, subd. 5).

4. Corporations ⇐80(11).

In action to rescind stock purchase for fraud, finding that individual defendant's agent misrepresented stock as treasury stock and that individual defendant received proceeds from sale of stock and club memberships *held* sustained by evidence.

5. Corporations ⇐80(1).

Record *held* to show that misrepresentations respecting stock caused buyer "injury" entitling him to rescission of stock and club memberships purchase for fraud.

Record disclosed that if there had been no fraud, money paid for stock would have gone into treasury of the corporation, a hotel company, to be used for constructing new building, which had been deemed for hotel company's best interests; that proceeds of sale of memberships in club would have been used for erection of club improvements and nothing more would have been spent therefor, and that consequently there would have been no indebtedness on that score against club, but that buyer's real position because of fraud was that money paid for stock was not used for improvements considered advisable for best interests of company and not available therefor, and that as to memberships in club, far greater and more expensive improvements had been made to club property than had been represented to buyer would be made, and cost thereof was outstanding indebtedness against club.

[Ed. Note.—For other definitions of "Injury," see Words and Phrases.]

6. Appeal and error ⇐1061(3).

In action to rescind stock purchase for fraud, allegedly erroneous refusal of nonsuit *held* not prejudicial where, at conclusion of entire case, evidence warranted finding of misrepresentation.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by H. E. Farrell against the Miramar Hotel Company, Limited, Gilbert F. Stevenson, and others. From a judgment in favor of plaintiff against named defendant Stevenson, such defendant appeals.

Affirmed.

Richard L. North, of Los Angeles, for appellant.

Fogel & Beman, of Los Angeles, and John W. Loucks, of Pomona, for respondent.

BEAUMONT, Justice pro tem.

This is an action to rescind a contract on the ground of fraud. In 1926, Gilbert F. Stevenson and his wife owned certain real property in Santa Monica upon which were situated a hotel and an apartment house. A corporation was formed, at their initiation, under the name of Miramar Hotel Company, Limited. The real property, subject to a mortgage of $500,000, was conveyed to the hotel company, as said corporation will be hereinafter designated. The consideration for this transfer was 799 shares of the capital stock thereof, issued under permit from the corporation commissioner. The corporation commissioner also gave permission to the hotel company to sell to the public 701 shares of its capital stock for the purpose of obtaining funds necessary for construction of an addition to its building. All money so realized was to be impounded until released by the commissioner. At the time of the formation of the hotel company, another corporation was organized under the name of Miramar Club of California. This corporation was formed for purpose of conducting a "beach club" in conjunction with the hotel. The Stevensons were the owners of substantially the entire outstanding stock of both corporations. Clyde R. Commons was employed by Gilbert F. Stevenson to sell certain of his shares of the capital stock of the hotel company and "founders'" life memberships in the club. He, in turn, employed one J. E. Griffin as a salesman. Griffin effected a sale of two shares of stock and two memberships to H. E. Farrell. Action was instituted against both corporations, Gilbert F. Stevenson and wife. Judgment of nonsuit was entered as to Mrs. Stevenson, and judgment was in favor of defendant corporations. Plaintiff recovered against Gilbert F. Stevenson in the sum of $3,300 and interest. Said last-named defendant has appealed upon the ground of insufficiency of evidence; that the decision is against law, and because of alleged errors occurring at the trial.

In August, 1926, appellant's agent, Griffin, called at respondent's home and, not finding him, left word that he desired to see respondent about a business matter. Respondent

thereafter went to the office of Griffin, which was situated in the hotel company's building. Griffin told respondent he was selling shares of stock and units of the two corporations; that it was a sort of "two-headed concern"; that the plan was to be "a share of stock in the hotel company and a share of stock or a membership in the beach club"; that there was being issued "something like 2500 units or shares in this organization and with that money they were to build a hotel up on top of the palisades of the Miramar Park; they were to build a beach club below. * * * These moneys that were to be raised by the sale of this stock, were to be put into that construction"; that the club "would own all the property." At the time of the negotiations, Griffin offered to sell respondent the stock on a part-payment plan, and stated he "was authorized by his corporation to make that allowance" to respondent. Respondent further testified that as a part of the inducement to purchase the stock, Griffin gave him a pamphlet upon which appeared: "Statement of Physical Assets of the Corporation Which Owns the Miramar Properties. * * *" This pamphlet contained a statement that there were 1,500 shares of capital stock of which 795 were issued, and that the "balance are in the treasury unissued." It contained the further statement: "A new addition is to be built at once onto the present apartment wing." Respondent's testimony is further to the effect that relying upon the oral statements of Griffin and upon the printed instruments handed him by Griffin, he believed he was purchasing part of the unissued treasury stock of the hotel company; that so believing, he accepted Griffin's offer, signed the application presented to him by Griffin, and gave him a draft in favor of the Miramar Club for $1,650; that if he had known the stock was the individual stock of appellant and not treasury stock, he would not have purchased it. The application respondent signed was headed "Miramar Club of California" and was for a "founder" membership, price $1,650. Respondent, still relying on Griffin's representations and believing he was purchasing treasury stock, procured another share of stock and life membership September 4, 1926; this latter being for his son. Commons and Griffin maintained their offices for selling appellant's stock in the hotel building and it was there respondent carried on said negotiations. Neither Commons nor Griffin appeared at the trial as a witness. No treasury stock was sold to any person. Certificates for the two shares of stock and for the two memberships were delivered to respondent.

There was introduced in evidence a letter received by respondent, which is as follows: "Dear Mr. Farrell: Enclosed are two of the new blanks, which we hope are in accordance with the rulings of the Corporation Commissioner of the State. The original one signed by you, was found incomplete after consultation with him. Would you be so good then, to sign each of the white ones and mail in the enclosed envelope to Mr. Clyde R. Commons, 815 South Hill St., Los Angeles. It is merely a detail of complete and accurate records." This letter was dated October 6, 1926, and was signed by Griffin. The statement therein regarding consultation with the corporation commissioner was utterly false. One of the inclosures was an application for membership in the club, price $600, and the other was in part as follows: "Miramar Hotel Company Limited * * * A California Corporation. Capital Stock $1,500,000. Divided into 1500 shares. All Common Stock and each share participates equally in the ownership, profits and management of the Corporation. I hereby purchase one share of the Common Capital Stock of the Miramar Hotel Company Limited of Santa Monica, California, for the sum of $1,050.00. * * * This application may be rejected by the Company by refund of moneys paid hereon." Both applications were dated September 3, 1926, when received by respondent.

Appellant's testimony, in part, follows:

"Q. Did you have anything to do with making the application to the Commissioner of Corporations for the permit to sell the stock of the Hotel Corporation? A. I consulted some lawyer probably who drew it up and he might have handed me the application to sign.

"Q. You did not read it, did you, when you signed it? A. Probably, it was owing to how much I trusted the lawyer that drew it up. * * *

"Q. And you formed the corporation for the sale of that property? A. Some five years after I owned it, yes.

"Q. And before this date that you sold this stock to Mr. Farrell? A. Yes.

"Q. And you took some 700 shares of the common stock? A. For my interest, for my interest in the hotel. * * *

"The Court: I would like to ask a few questions. Mr. Stevenson, do you know how stock got into the hands of the broker or anyone else and was sold? A. He got it from me. He was appointed the person to handle it by me. He had a broker's license, and I was afraid to have anything to do with it myself, and I wanted all the printed matter made by one that had been successful in club work.

"Q. You authorized him to print anything that pertained to the sale of the stock? A. Yes, he was a broker to handle it in a legal way, and I did not pay any attention to it, to any printed matter that was put out.

"Q. What did you authorize him to do, if anything, about the sale of the stock? A. He used his own judgment about handling it. He had handled some other clubs and appeared to be an expert in that line. * * *

"Q. Do you know how the stock got into his hands, or in the hands of Mr. Griffin? A. Well, they made requisitions to have some stock issued about once a week, I think on Saturday afternoons, what they had to have issued.

"Q. What they had to have issued? A. What they had sold, and they wanted the stock in order to deliver it. I had the stock; I was selling my stock.

"Q. You were selling your own stock? A. My own stock; that was the only stock that could be used, because the permit of the Corporation Commissioner was that the treasury stock was to build the hotel and I could not build that club and sell any treasury stock; I had to sell my own. It cost about $150,000.00 to furnish that down on the beach there, and I put my stock money that I received in to that club. If I had sold treasury stock how could I use the money for that? I advanced the money to build that club.

"Q. And then took some security for it, did you? A. No security only what security I have by controlling the Board of Directors of it.

"Q. You did not donate that money to the corporation? A. No, it stood on the books as they owing that much for what I advanced to build it. But the club is out of debt and is considered one of the finest on the beach.

"Q. Did Mr. Commons ever show you any of the printed matter? A. Why, yes. I would see it on his desk when I would go in there.

"Q. Have you ever seen any of these forms that he was using? A. I would look at them, I would ask him if they were all right, if I said anything to him, yes. * * *

"Q. And you think you have seen both of these forms and knew he was using these forms to sell the stock? A. Why, I probably have. I would not pay much attention to them only ask him if they were all legal.

"Q. I am referring to Plaintiff's Exhibit 1 [the first application] and Plaintiff's Exhibit 4 [applications inclosed in Griffin's letter of October 6]. Then you did see Mr. Griffin in the office there? A. Why, yes.

"Q. And you knew he was one of the salesmen? A. He was one of Mr. Commons' salesmen, yes. * * *

"Q. When did Mr. Commons come into this transaction, what date? A. I don't remember,

"Q. Do you remember whether it was before or after the 24th of August, 1926? A. Why, he was around there in July.

"Q. Was he working for you as your broker on the 24th of August, 1926? A. I presume so.

"Q. Are you sure that he was? A. I am sure he was working, yes.

"Q. Working as your broker? A. Yes.

"Q. At the Miramar Hotel? A. Yes.

"Q. On the date this transaction took place did you pay Mr. Griffin any money yourself, by your own personal check? A. I have paid Mr. Griffin part of the money and handed the rest over for the other parties at his solicitation on account of needing money before the Judge [Commons] came down on Sundays or something.

"Q. At whose solicitation? A. Mr. Griffin's.

"Q. Then you have paid him money? A. That check that was left for me, that money Mr. Farrell testified he came down and left a check for his son's stock, and I knew what Mr. Commons' share would be to go to him, and I give it to him, and then Mr. Commons, the balance was settled up with him, yes."

The check delivered to appellant by respondent on September 4, 1926, was made payable to the order of Miramar Club for the sum of $1,650. It was indorsed: "Miramar Club of California, By Gilbert F. Stevenson, Treasurer." It also contained a further indorsement as follows: "Pay to the order of The Citizens National Bank of Los Angeles, Cal. Western Mutual Life Assn. G. F. Stevenson." It appears that appellant was secretary and manager of the Western Mutual Life Association.

[1-3] Fraud may be proved by circumstantial evidence. Hageman v. Colombet, 52 Cal. App. 350, 198 P. 842; 12 Cal. Jur. 829. The burden was upon respondent to establish the existence of fraud, the presumption being in favor of fair dealing. 12 Cal. Jur. 816. Nevertheless, as was said in Eade v. Reich (Cal. App.) 7 P.(2d) 1043, 1045: "Fraud need not be proved beyond a reasonable doubt (Bullard v. His Creditors, 56 Cal. 600, 603), it being sufficient if it be established by a preponderance of the evidence (Code Civ. Proc. § 2061, subd. 5; Noll v. Baida, 202 Cal. 98, 259 P. 433). As the court said in Edmonds v. Wilcox, 178 Cal. 222, 172 P. 1101, 1102: '* * * All judicial expressions concerning the necessity of clear and satisfactory proof of fraud must be construed in the light of the fundamental rule that a preponderance of the evidence controls in a civil case.'"

[4] We are convinced the testimony of respondent, together with the circumstances disclosed by the evidence, amply sustains the court's finding as to fraud. Certainly the letter of October 6, 1926, containing the two applications, is evidence from which intent to deceive may be inferred. 12 Cal. Jur. pp. 830, 831; Butler v. Collins, 12 Cal. 457; Walberg v. Underwood, 41 Cal. App. 679, 183 P. 254; Smith v. Reynolds, 94 Vt. 28, 108 A. 697; 27 Cor. Jur. 40. We quote here, as particularly applicable, the finding of the court regarding the letter. It is as follows: "The reference to the Corporation Commissioner was pure fiction. The writer had not consulted the Corporation Commissioner, and there was no ef-

fort to comply with his rulings." This is fully sustained by the evidence. There is no question that respondent relied on the statements made to him, and in particular that he believed he was purchasing treasury stock of the hotel company. And there is no question as to agency. The evidence shows appellant gave Commons and Griffin full power to make the representations they made. In fact, the issue as stated in appellant's brief is: "The entire case has dwindled to the single proposition of whether or not appellant represented to respondent that the two shares of stock in Miramar Hotel Company, Limited, purchased by respondent, were treasury stock, and said paragraph VI of the findings of fact decides that he did." In addition, however, appellant calls attention to paragraph XIV of the findings, which is to the effect that appellant, and not the hotel company or the club, received the proceeds from the sale of the stock and memberships. We have heretofore referred to the evidence regarding this, and we are of the opinion that it sustains the finding so attacked.

[5] Appellant urges that the decision is against law. He claims that even if fraud be conceded, it has not been shown that respondent suffered injury. What would have been respondent's situation, if there had been no fraud? The money he paid for his stock would have gone into the treasury of the hotel company, to be used for constructing a new building which had been deemed for the best interests of the hotel company's business. The proceeds of the sale of the memberships in the club would have been used for the erection of the club improvements and nothing more would have been spent therefor. Consequently, there would have been no indebtedness on that score against the club. What was respondent's real position? He and the others who purchased stock in the hotel company had their stock, but the money paid therefor was not used for the improvements considered advisable for the best interests of the company, and it was not available therefor. As to his membership in the club: Far greater and more expensive improvements had been made to the club properties than had been represented to respondent would be made, and the cost of all of those provided by the money "advanced" by appellant was an outstanding indebtedness against the club. We believe there was injury under the principles announced in Spreckels v. Gorrill, 152 Cal. 383, 92 P. 1011, and Munson v. Fishburn, 183 Cal. 206, 190 P. 808. See, also, J. B. Colt v. Freitas, 76 Cal. App. 278, 244 P. 916; Denovan v. Golden State Woolen Mills, 104 Cal. App. 504, 286 P. 714; Stillwell v. Rankin, 55 Mont. 130, 174 P. 186; 12 Cal. Jur. 766–7.

[6] Appellant complains of the denial of the motion for a nonsuit as to appellant. The motion was specifically made on the ground that no misrepresentation was made. The evidence we have heretofore referred to as to the making of the representations was before the court for consideration at the time the motion was acted upon. The motion was properly denied. In addition, there was no prejudice to appellant when the entire evidence is considered. "If, upon the conclusion of the whole case, there is evidence upon the material issues warranting the submission of the cause to the jury, the question of whether the court erred in denying a nonsuit becomes of no consequence." Peters v. Southern Pacific Co., 160 Cal. 48, 52, 116 P. 400, 402.

Judgment affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

MANNION v. BALDWIN et al.*

Civ. 8288.

District Court of Appeal, First District, Division 1, California.

Aug. 2, 1932.

Rehearing Denied Sept. 1, 1932. Hearing Granted by Supreme Court Sept. 28, 1932.

1. Licenses ⇐18½.

Permits issued by corporation commissioner for sale of stock must be strictly complied with (St. 1917, p. 673, as amended).

2. Licenses ⇐39.

Evidence *held* to sustain finding that stock issued to incorporator was for partnership business in violation of permit under Corporate Securities Act providing stock should be issued only for cash (St. 1917, p. 673, as amended).

3. Licenses ⇐39.

Director selling stock which she knew was void *held* liable to innocent buyers (St. 1917, p. 673, as amended).

4. Licenses ⇐39.

Directors present at meeting voting to issue stock in violation of Corporate Securities Act *held* liable to innocent buyers thereof, although not participating in sale (St. 1917, p. 673, as amended).

5. Licenses ⇐39.

Presumptively corporation received par value for stock sold to incorporator who knew stock was issued in violation of Corporate Securities Act (St. 1917, p. 673, as amended).

6. Licenses ⇐39.

Corporation receiving par value for stock issued in violation of Corporate Securities

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 20 P.2d 678.

Act *held* liable with directors to innocent buyers of stock (St. 1917, p. 673, as amended).

7. Licenses ⇐39.

Partner receiving, from director of corporation taking over partnership, money derived from sale of void stock, in payment of partnership interest, *held* not liable to innocent buyers of stock (St. 1917, p. 673, as amended).

Such partner was not liable to the innocent buyers of such void stock which was issued in consideration of the partnership business transferred to the directors in violation of the Corporate Securities Act (St. 1917, p. 673, as amended), providing stock should be issued only for cash, since he was not connected with the issuing thereof.

8. Licenses ⇐39.

Stock issued contrary to permit granted by corporation commissioner is void, so that buyer of stock may recover purchase money (St. 1917, p. 673, as amended).

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Josephine Mannion against Simeon Baldwin and others. From the judgment for defendants, plaintiff appeals.

Reversed.

Fred N. Arnoldy, of Los Angeles, for appellant.

John Perry Wood and John F. McCarthy, both of Los Angeles, for respondents Simeon and Helen D. Baldwin.

Walter A. Ham, of Los Angeles, for respondents Sykes and others.

TUTTLE, Justice pro tem.

This is an action brought to recover the sum of $7,500 which it is contended was paid for stock issued and sold in violation of a permit granted under the Corporate Securities Act (St. 1917, p. 673, as amended). The trial court found to the contrary, and judgment was entered in favor of defendants. The appeal is taken from the judgment.

The sole question before this court is the sufficiency of the evidence to support the findings.

In May, 1927, respondent Sherman M. Sykes and respondent Simeon Baldwin entered into a partnership to conduct a retail clothing business. Baldwin furnished some $800. Sykes advanced no money whatever. Each owned a half interest in the business. From time to time Baldwin advanced more money for the business, until there was owing him some $10,000. Eventually he became dissatisfied with the manner in which the business was being conducted, and agreed to sell his interest in the partnership to Sykes for the sum of $10,000 and to accept in payment thereof two promissory notes for $5,000 each. In the meantime a corporation known as "The Trousseau Shop, Inc.," was formed by Baldwin and his wife, Helen D. Baldwin, and Gladys Sykes, the wife of Sherman Sykes, for the purpose of taking over the partnership business, and on October 24, 1927, the commissioner of corporations granted a permit authorizing the corporation to sell 200 shares of its capital stock at par ($100) for cash. On December 1, 1927, Sykes, his wife, and his mother executed and delivered to Baldwin the two promissory notes above mentioned for $5,000 each in payment of his share in the partnership; and on the same day the directors of the corporation authorized Baldwin as president and Mrs. Sykes as secretary to issue five certificates calling for a total of 160 shares of stock. Certificates numbered 1, 2, and 3 were issued for one share, each, as qualifying shares to the incorporators; and certificates numbered 4 and 5 were issued to Gladys Sykes for 75 and 82 shares, respectively. Certificate No. 5 was thereupon delivered to Baldwin as security for the payment of said promissory notes; and certificate No. 4 was reissued as certificate No. 6, for the same number of shares, 75, with the name of the holder thereof left blank. Baldwin and his wife and Mrs. Sykes as directors of the corporation thereupon adopted a resolution authorizing the purchase from themselves and Sherman Sykes of the partnership business, subject to its obligations, for $16,000 cash; and Baldwin, his wife, Sykes, and his wife then joined in an instrument transferring to the corporation the partnership assets subject to its obligations.

On the next day, December 2, Baldwin and Mrs. Sykes met at the bank and Baldwin delivered his certified check for $16,000, payable to the defendant corporation. This check was then and there deposited to the account of the corporation and immediately withdrawn therefrom and paid back to Baldwin in the form of a cashier's check for a like amount.

On December 5, 1927, defendant Gladys Sykes met plaintiff at the bank. Mrs. Sykes signed certificate No. 6 as secretary (it had already been signed by Baldwin as president of the corporation) and delivered the same to plaintiff and received from plaintiff a check for $7,500, which was deposited to the account of the corporation. The sum of $5,000 was thereupon withdrawn from said account and paid over to Baldwin in payment of one of his notes. The balance, $2,500, remained in the bank account of the corporation.

It appears that plaintiff had a nephew for whom she was desirous of securing a posi-

tion, and the understanding was that he would be given work if she made the investment. In any event, as soon as she paid for the stock the nephew started to work for defendant corporation. Within about a year's time after the investment was made, defendant corporation was adjudicated a bankrupt.

[1] It is the rule in this state that permits issued by the corporation commissioner for the sale of stock must be strictly complied with. Parrish v. American Ry. Emp. Pub. Corp., 83 Cal. App. 298, 256 P. 590. No "thinly-veiled attempt to circumvent the manifest purpose of this salutary legislation [Blue Sky Law] should go unwhipped of justice." People v. McCalla, 63 Cal. App. 783, 220 P. 436, 439. Speaking of the Corporate Securities Act, and evasions of the provisions thereof, our courts have said: "If such subterfuges were permitted, the statute would soon become a dead letter, and the object it was designed to accomplish would be frustrated by the very persons against whose practices it is directed." Domenigoni v. Imperial Live Stock, etc., Co., 189 Cal. 467, 474, 209 P. 36, 39.

As we have stated, on December 1st all the 160 shares (except qualifying shares to incorporators) were issued to Mrs. Sykes, and the transfer of the partnership assets to the corporation was made. No cash whatever was paid for the stock. This constituted a direct violation of the permit to sell for cash. It is true that on the following day Baldwin handed Mrs. Sykes a check for $16,000, but this was immediately returned to Baldwin. Here is what he had to say about it:

"Q. * * * When you gave this $16,000 check of yours, payable to the Trousseau Shop, Inc., it was your intention and the understanding, that you would receive right back— A. You bet your life it was. * * *

"Q. You were not letting go of this money? A. I should say not; no, sir."

There is evidence upon the part of defendants that this $16,000 was loaned to Mrs. Sykes so that she could pay for the stock. No note or any other evidence of the indebtedness was produced.

It is a significant fact that just as soon as this $7,500 was received from plaintiff, defendant Baldwin was on the spot to take $5,000 thereof in payment of one of his notes against Mrs. Sykes. Defendants contend that this stock (sold to plaintiff) was the personal property of Mrs. Sykes, and that she therefore did not need a permit to sell the same. Why was the whole amount deposited in the account of the corporation, and the sum of $2,500 allowed to remain there?

[2] The only reasonable conclusion and inference which can be drawn from the facts in this case is that the stock issued on December 1st was in violation of the terms of the permit, the consideration being not cash, but the partnership business.

[3-7] It is earnestly contended by respondents that there is substantial evidence to support the finding that the stock in question was the personal property of Mrs. Sykes, hence her sale to plaintiff did not come within the purview of the Corporate Securities Act. People v. Pace, 73 Cal. App. 548, 238 P. 1089. The answer is that Mrs. Sykes was a director of the company and present when the unauthorized issue of the stock was made. It does not lie in her mouth to now say that her sale was a private one. She knew that the stock was void, and sold it to an innocent party with this knowledge, and must be held liable for any loss which resulted. Defendants Baldwin and his wife and Gladys Sykes were all directors who were present at the meeting which voted to issue the stock in violation of the permit. They are active participants, and equally liable. O'Connell et ux. v. Union Drilling & Petroleum Co. et al. (Cal. App.) 8 P.(2d) 867. It is true that they did not actually participate in the sale to plaintiff, but the uncontradicted evidence shows that at the meeting of December 1st, when the stock was issued, the directors knew that it was going to Mrs. Mannion. We must assume that the corporation received value in an amount equal to the par value of the stock which it sold to Mrs. Sykes, who had knowledge of the fact that it was issued in violation of the permit. Under such conditions the corporation should share the liability for reimbursement. It does not appear that defendant Sherman M. Sykes was in any manner connected with the issuing of the stock, and he therefore cannot be compelled to reimburse plaintiff.

Manifestly the transaction which took place on December 2d was a sham and was designed and carried out to circumvent the conditions of the permit and thereby make it possible to solicit and obtain from Mrs. Mannion the cash with which to pay Baldwin part of the money he had advanced to the partnership.

We are aware of the rule that where the evidence is conflicting on issues of fact, the finding of the trial court will not be disturbed. There is no pretense, however, that any cash was paid for the stock when it was issued to Mrs. Sykes on December 1st, and consequently the trial court's decision sustaining the legality of the transaction obviously violates the rule enunciated in the cases we have cited, which, as shown, require strict compliance with the terms of the permit.

[8] It is not disputed that stock issued contrary to the terms of a permit granted by the commissioner of corporations is illegal and void, and that the purchaser is entitled to recover the money paid therefor. Tatter-

son v. Kehrlein, 88 Cal. App. 34, 263 P. 285, and cases cited therein.

There is no evidence to show that plaintiff knew that she was buying stock which had been sold in violation of the permit. This contention of respondents is without merit.

Summing up the entire matter, the evidence shows, without substantial conflict, that the stock issued on December 1st was not sold for cash, but that the consideration therefor was the transfer of the assets of the partnership, and hence in contravention of the terms of the permit; that all defendants except Sherman M. Sykes participated in such issue and knew at the time that the 75 shares were to be sold to plaintiff; that the sum of $7,500 paid by plaintiff for such stock was deposited in the bank account of the corporation. We might add that in our opinion the evidence shows that the whole transaction was a bald attempt to circumvent the Corporate Securities Act, so that defendant Baldwin might obtain most of the money which he admitted he knew was coming from plaintiff. The last chapter in the episode was the bankruptcy of the corporation within a year after the stock was purchased.

The judgment is reversed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

125 Cal.App. 344

BELSER v. AMERICAN TRUST CO.

Civ. 8592.

District Court of Appeal, First District, Division 1, California.

Aug. 12, 1932.

Rehearing Denied Sept. 10, 1932. Hearing Denied by Supreme Court Oct. 10, 1932.

1. Evidence ⇐588.

Testimony may be inherently so improbable, or rendered so by other evidence, as to warrant rejection, though court did not see and hear witness (Code Civ. Proc. § 1847).

2. Deeds ⇐208(2).

Plaintiff's testimony that there was manual tradition of deed found in deceased father's safe deposit box *held* not to require credence under circumstances (Code Civ. Proc. § 1847).

Circumstances disclosed that, after father's death, plaintiff inquired as to what his father had done with property in question, and stated that his father had freely talked of selling the property, and there were other circumstances which warranted trial court in disbelieving plaintiff's testimony and concluding that he never had seen gift deed until after safe deposit box had been opened.

3. Evidence ⇐588.

There being circumstances in evidence impairing accuracy of plaintiff's testimony, it was within trial court's province to determine credit and weight to be given thereto, though plaintiff testified by deposition (Code Civ. Proc. § 1847).

4. Deeds ⇐56(2).

Manual tradition of deed does not constitute "delivery," unless coupled with grantor's intent to divest himself of title.

[Ed. Note.—For other definitions of "Deliver; Delivery," see Words and Phrases.]

5. Deeds ⇐208(2).

Finding that decedent did not intend to divest himself of title by his gift deed found in safe deposit box *held* warranted by evidence.

6. Evidence ⇐355(7).
Witnesses ⇐159(5).

Issue being whether deed by deceased was delivered, witness' conversation with deceased after date of deed, and memoranda found among decedent's effects, tending to show decedent's interest in property, *held* admissible on behalf of defendant executor.

7. Evidence ⇐230(3).

When grantor has parted with title, his acts and declarations in disparagement thereof, made in absence of grantee, are inadmissible.

8. Evidence ⇐269(3).

Where issue is whether grantor had parted with title, his subsequent acts and declarations are admissible as bearing on delivery.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Paul A. Belser against the American Trust Company, executor of the last will and testament of Julius Henry Belser, deceased. From a judgment in favor of defendant, plaintiff appeals.

Affirmed.

J. E. White, of San Francisco, for appellant.

Heller, Ehrman, White & McAuliffe and McKinstry & Haber-Peirce Coombes, all of San Francisco, for respondent.

WOODWARD, Justice pro tem.

This is an appeal from a judgment for the defendant in an action wherein plaintiff sought to obtain possession of an unrecorded

deed of gift executed by his father, Julius Henry Belser, and found after the latter's death in a safe deposit box. The sole question involved is whether said deed was delivered by decedent to appellant.

Stripped of unnecessary minutæ, the facts are: During the month of April, 1925, appellant and his wife, Mary E. Belser, decided to purchase certain real property situate in the county of Alameda and described as lot 26 in block lettered F, Lakewood Park, city of Piedmont. The purchase price of said property was $7,750, of which amount Julius Henry Belser paid $7,000 and appellant $750. Julius Henry Belser took title in his name, and immediately thereafter appellant and his wife were given possession of and lived on the premises until Christmas, 1926, when marital differences arose resulting in a divorce. Shortly thereafter appellant moved to Honolulu, while his wife continued to occupy the property until the death of Julius Henry Belser, which occurred on April 18, 1930. When decedent's safe deposit box was opened, there were found therein the gift deed in question, bearing date of October 19, 1926, and the following letter in the handwriting of appellant: "October 20, 1926. My dear Father: I am mailing you today under separate cover the gift deed from you to me for the Ranleigh Way property which I have been keeping about me for some time. As I have no safe place to keep this will you please put it in your safe deposit box as I am afraid I might lose it or have it stolen some time on my work. Do not record this deed as yet for as long as my affairs are still unsettled from my past business experience I do not want any of these creditors to make any further trouble for me. Your loving son, Paul."

On the ground that it is unsupported by evidence and contrary to his own "uncontradicted" testimony, appellant attacks finding No. 2, which, in substance, is to the effect that Julius Henry Belser signed the deed in question without any intention to convey immediate title thereto, or otherwise; that said deed was never delivered to Paul A. Belser, but was retained by the grantor in his own exclusive possession and control until the time of his death.

Before proceeding to discuss the testimony in detail, it may be observed preliminarily that appellant did testify that there had been a manual tradition of the deed; or, in other words, that his father had personally handed him the instrument which he retained for twenty-four hours, and then returned to his father, at the latter's suggestion, for safekeeping only. It is patent, of course, that the trial court disregarded appellant's testimony entirely, and the novel point is made that since appellant, not being a resident of this country, testified by deposition, the court was not afforded an opportunity to observe his demeanor as a witness, and for that reason was bound by his uncontradicted statements.

As early as 1860, the Supreme Court of this state had occasion to pass upon the right of trial judges to reject testimony of an inherently improbable nature. In the case of Blankman v. Vallejo, 15 Cal. 639, 646, the court declared succinctly and incisively: "We do not understand that the credulity of a court must necessarily correspond with the vigor and positiveness with which a witness swears." In recent years, however, the statement of this rule most frequently quoted is found in the case of Davis v. Judson, 159 Cal. 121, 128, 113 P. 147, wherein the court says: "While it is the general rule that the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted by the court as proof of the fact, this rule has its exceptions. The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness' own statement of the transaction; or there may be circumstances in evidence in connection with the matter, which satisfy the court of its falsity; the manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement and influence it to disregard his positive testimony as to a particular fact; and as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy." To the same effect: Caldwell v. Weiner, 203 Cal. 543, 264 P. 1100; California-Calaveras Min. Co. v. Walls, 170 Cal. 285, 303, 149 P. 595; Blanc v. Connor, 167 Cal. 719, 722, 141 P. 217; Estate of Tompkins (Cal. App.) 11 P.(2d) 886; Corcoran v. Ward, 115 Cal. App. 180, 182, 1 P.(2d) 455; Cowan v. Hill, 109 Cal. App. 656, 659, 293 P. 871.

In the light of this rule it is manifest, of course, that we cannot control the court's finding denying credence to appellant's testimony, unless there are no matters or circumstances which in any degree impair, or tend to impair, its accuracy.

Paul A. Belser testified that, about a year and a half after the property had been purchased, he received the following undated letter from his father: "Fairmont Hotel. Dear Paul. I had a talk with my lawyer and he told me to have you write me a letter saying that you were asking me to put this Gvt Deed in my safety box, so as to take care of it for you as you not having a safety box to take care of it he says that if that is not done and anything should happen to me your gift deed would be no good and would haft to be put through court and you could not get anything so you better send me that letter right away hope all are well and that you all are getting

in shape. Send me also the name of the street you are now on or also the way to get there. With love to all. J. H. Belser." In connection with this letter, which was admitted in evidence, appellant testified that on October 20, 1926, two days after receiving the communication, his father called on him at his place of work and personally placed the deed of gift in his hands; that he put the deed in his pocket, and after returning home from his work on said day, wrote and mailed the letter signed "Paul"; that he did not inclose the deed with the letter because he could not find a large envelope; that on the following day he mailed said deed to his father in San Francisco. So far as the evidence discloses, appellant did not communicate the fact of his father's visit to any one, nor does he claim to have seen the deed again until after the father's death. On cross-examination appellant was asked why he had stated in the letter that he had been keeping the deed "about me for some time," when in fact it bore date of October 19, 1926, and could not have been in his possession for more than twenty-four hours. Appellant's reply was that "the wording of the letter is no consequence," and that "some time is any time." It could scarcely be contended that this reply was convincing or unequivocal. If appellant had the deed in his possession at the time he wrote the letter, as claimed by him, his statement to the effect that he had been keeping the deed for some time called for an explanation. Furthermore, the witness admitted that just after his father's funeral he may have stated to Albert J. Callahan: "I wonder what my father did with the Piedmont property?" Further on in the cross-examination we find these questions and answers:

"Q. Do you remember telling Mr. Callahan at the time that this conversation took place which you state was on your way to the Ferry that you had put $1,000. in your father's property and you were going to get your money back? A. Yes, I do. * * *

"Q. Do you remember at the time this conversation took place between you and Callahan, Callahan's wife asked you that you must have a memorandum or paper of some kind to show your interest in the property? A. She never did.

"Q. Don't you remember that you answered her and said this that you had no such paper; this deal was naturally on a father and son basis? A. No, sir, I do not remember. * * *

"Q. Can you state positively you made no statement to Mrs. Callahan? A. No, I cannot state positively.

"Q. You may have made them? A. I may have."

It may be observed parenthetically that these were singular statements to come from one who had received a deed of gift to real property and had returned it to the grantor merely for safe-keeping.

With reference to the same conversation, Albert J. Callahan testified: "Paul said, 'What did my father do with the Piedmont property?' I told him—Oh, I thought for a minute before answering, and then I said, 'Paul,' I said, 'your father told me of that transaction,' and I said, 'You lost all your equity in that because you failed to live up to your agreement with him,' and he came back and said, 'Well, I paid $2,000.00 into that property and I am going to get it back.' I said, 'Why, Paul, you agreed when you were divorced in 1927 that you would have nothing further to do with that property, and you told your father that he could rent the property to your former wife for $35.00 a month,' and Paul said, 'Well, just before I left for Honolulu in 1928, my father told me that all he wanted to have out of the property was the money he had put into it, and that if he sold the property, then I would get everything over and above that.'" According to this witness the appellant did not, during that conversation, make any allusion to the deed of gift, but, on the contrary declared he had asked his father for some writing "but he wouldn't give me anything."

[1-3] While appellant's silence as to the existence of the gift deed, of which he must have known if he actually had it in his possession at one time, is not, standing alone, inconsistent with delivery, nevertheless his inquiry as to what his father had done with the property in question, his statement to Callahan that his father had freely talked of selling the property, together with other evidence and circumstances, may, and doubtless did, cause the trial court to disbelieve his testimony and conclude that he never saw the gift deed until after the safe deposit box had been opened. We therefore cannot hold that there were no matters and circumstances in evidence which impaired the accuracy of appellant's testimony. It was within the province of the trial court to determine what credit and weight should be given thereto. Nor does the fact that appellant testified by deposition alter or change the rule. A deposition is in character parol, and is to be given the same weight as oral testimony. 9 Cal. Jur. 426; 8 R. C. L. 1165. Moreover, the manner in which a witness testifies is but one of the tests for truthfulness relied on by courts and partially enumerated in section 1847 of the Code of Civil Procedure. The testimony of a particular individual may in itself be so improbable, or rendered so improbable by other evidence, as to warrant rejection, even though the trial court is not afforded an opportunity of seeing and hearing the witness.

[4] This case, of course, does not turn on the question of whether there was a manual

tradition of the deed. The physical act of passing a conveyance from grantor to grantee, despite the popular belief of many laymen to the contrary, may be relatively unimportant. "Delivery" is a word of well-defined meaning in law, and implies more than a mere change of possession. It is an indispensable concomitant of manual tradition that the grantor shall intend to divest himself of title. This rudimentary rule of law is clearly and simply set forth in the case of Williams v. Kidd, 170 Cal. 631, 638, 151 P. 1, Ann. Cas. 1916E, 703: "It is essential to the validity of a transfer of real property that there be a delivery of the conveyance with intent to transfer the title, and the true test under which delivery is to be determined is in ascertaining whether in parting with the possession of the conveyance the grantor intended thereby to divest himself of title. If he did, there was an effective delivery of the deed. If not, there was no delivery."

[5] Even if the trial court had been bound by the categorical statement of the appellant that the deed had actually been placed in his hand, there would still be evidence to sustain the finding that there was no intention on the part of Julius Henry Belser to divest himself of title. The letter written by decedent to appellant is suggestive of an attempt to utilize legal form without regard to substance. It was written prior to the execution of the deed. The writer seemed deeply concerned with the disposition of the property in the event of death, and it may be fairly assumed that he executed the conveyance with that thought uppermost in his mind. It is significant that this letter states the kind and character of reply which the writer desired. And it may also be regarded as significant that no mention is made therein of decedent's intention to personally deliver the deed—an act which appellant says occurred two days later. The trial court may well have believed that the gift deed, together with decedent's letter and appellant's reply thereto, prove nothing more than a testamentary scheme wherein decedent made an abortive attempt to transfer his property, effective at death, without a present intent to divest himself of title or to place his deed beyond recall.

Decedent's acts and declarations prior and subsequent to the execution of the deed in question seem entirely consistent with the court's finding as to intent. Mrs. Mary Sagehorn (appellant's former wife) testified that, when the property was purchased in 1925, decedent declared he would take title himself in return for his $7,000, but would execute a deed of gift to appellant; that, as long as he (decedent) lived, the property would have to remain in his name, but at his death the witness or her children would get it without probate. Mrs. Sagehorn testified further that after her divorce she again discussed the property with decedent, and was assured by him that, if she continued her payments of $35 a month, she could occupy the property as long as he lived; that she made such payments regularly out of her alimony, and received receipts designating the payments as rent.

The witness Callahan testified that decedent became seriously ill in December, 1929, and that, accompanied by Mrs. Callahan, he visited him early one morning, at which time the decedent was in tears and declared he should never have bought the Ranleigh property as "Paul failed to live up to his agreement." "Q. He said he bought the property? A. He bought the property. He loaned Paul $7,000.00. I asked him, 'As a mortgage, Grandpa?' He said, 'Oh, no; I haven't a mortgage. I have the property.'"

[6-8] Appellant complains that the court committed error in allowing Callahan over his objection, to relate a conversation he had with decedent in December, 1929, and also in not sustaining an objection to the introduction of certain memoranda found among decedent's personal effects and tending to show his interest in the Ranleigh street property.

We think the point is without substantial merit. Respondent should have laid a better foundation before offering the memoranda, although it is not suggested in appellant's brief that the book entries and other writings were not in the handwriting of decedent. It is true, of course, that, when a grantor has parted with title to property, his acts and declarations in disparagement thereof, made in the absence of the grantee, are inadmissible in evidence; but, whenever in a particular action the issue itself is whether the grantor has parted with title, it is the settled rule of law in this state that his subsequent acts and declarations are admissible as bearing on the question of delivery. Fisher v. Oliver, 174 Cal. 781, 788, 164 P. 800; Williams v. Kidd, supra, 170 Cal. at page 648, 151 P. 1, Ann. Cas. 1916E, 703. We conclude, therefore, that the evidence was pertinent to the issue and properly admitted.

It may be observed that the decision and judgment of the trial court are declared in the findings to be without prejudice to plaintiff to maintain such action as he may be advised, to establish any interest which he may have in the real property in question by reason of any contribution of money made by him as part of the purchase price thereof.

For the reasons herein stated, the judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

SAVAGE et al. v. NORWICH UNION FIRE INS. SOCIETY, Limited.

SAME v. PACIFIC FIRE INS. CO.

Civ. 891.

District Court of Appeal, Fourth District, California.

Aug. 11, 1932.

Rehearing Denied Sept. 8, 1932. Hearing Denied by Supreme Court Oct. 10, 1932.

1. Insurance ⇐558(1).

Insurer's conduct tending to create belief in claimant's mind that notice or proofs of loss will be unnecessary operates as waiver of policy provision requiring such notice or proofs.

2. Insurance ⇐561.

Insurer's going out to determine fire loss and adjuster's statements insured need do nothing more *held* waiver of preliminary proof of loss requirement.

Facts disclosed that insurer's local representative had advised insured that he would take care of the loss under fire policies, that insurers appointed adjuster who took charge of the situation, requested information, inventories, and gave impression he was conducting an impartial adjustment of the fire loss, and never raised any question of formal proof of loss, and that such adjuster stated there was nothing more for the assured to do.

3. Insurance ⇐282(13).

Fire policies *held* not rendered void by provisions requiring insured have sole ownership where persons insured had exclusive possession of personalty covered; only small balance of purchase price remaining unpaid.

Appeals from Superior Court, San Diego County; Eugene Daney, Jr., Judge.

Separate actions by A. J. Savage and another, doing business as the Middlefield Arms Corporation, against the Norwich Union Fire Insurance Society, Limited, and another. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Overton, Lyman & Plumb, of Los Angeles, for appellants.

Edward J. Kelly, of Los Angeles, for respondents.

MORTON, Justice pro tem.

By stipulation of the respective parties, the two above-entitled actions, tried jointly, were consolidated on appeal. Both actions concern contracts of insurance. Respondents A. J. Savage and Helen M. Savage, husband and wife, were engaged in the gun manufacturing business at La Mesa in San Diego county under the fictitious name of Middlefield Arms Corporation. On or about March 16, 1928, appellant Pacific Fire Insurance Company, through its duly authorized agent in San Diego, M. G. White, issued a policy of fire insurance to respondents covering certain merchandise, gun machinery, tools, materials, and parts manufactured or in the process of manufacturing in respondents' manufacturing plant. Appellant Norwich Union Fire Insurance Society on April 19, 1928, through its duly authorized agent in San Diego, M. G. White, issued to respondent a policy of fire insurance covering the frame factory building, fixtures, office and workshop furniture and equipment. At noon on April 30, 1928, a fire destroyed the building and major portion of the personal property therein. According to the evidence, A. J. Savage immediately notified the insurance agent White, who said: "All right, I'll take care of the matter." Several telephone conversations occurred between White and Savage, and in one of these White told Savage that the matter was in the hands of Mr. Thomas, the Pacific Coast Adjustment Bureau's branch manager, and that it would be safe for Savage to deal with him. White had handled Savage's fire insurance for more than twelve years, and had assisted in adjusting a prior fire loss.

It was stipulated by counsel that an investigation of the fire was made by Thomas on behalf of the appellant companies. Five or six days after the fire Thomas called on Savage, looked over the burned property, asked questions about the machinery, and ordered Savage to care for it until he could send out another man. At his request Savage prepared an inventory of his loss, giving the cost and quantity of each article and amount claimed thereon. At the second meeting Thomas secured from Savage and his wife a nonwaiver agreement to the effect that no action taken by the companies investigating the fire or as to fixing the amount of loss should be construed as a waiver of any rights of any of the parties. A small balance was unpaid on the purchase price of a part of the destroyed machinery which had been bought on an installment contract. Savage testified that Thomas told him he desired to investigate this purchase contract, and for that reason needed the nonwaiver agreement; therefore he and his wife signed it.

A. J. Savage was a mechanical engineering expert, and the machinery destroyed was largely precision instruments. He testified: "My business is designing and engineering and manufacturing fire arms and all different types of devices to go with those products." Because of their peculiar nature, it was dif-

ficult to reach an agreement as to values. At one of the conferences with Thomas, about fifteen days after the fire, in order to justify his values on the inventory, Savage brought with him James W. Patten, a gun expert, who knew Savage's plant and had a knowledge of this type of machinery. Regarding this meeting, Savage testified as follows: "Mr. Thomas went into the general and particulars on the loss, and Mr. Patten was a witness and he followed all the details and when it was over I asked Mr. Thomas if there was anything further that he wanted me to do on the papers or the loss or anything and he said, 'Mr. Savage, there is nothing more you need to do. It's all O. K.' and I dismissed the subject because he said that he sent in the report to his home office. * * * There was a dispute between me and Mr. Thomas as to the price items on the inventory. There was no general—particular—I don't remember much in detail. 'Well,' he says, 'this is like a jewelry shop,' he said. 'These are specials.' And Mr. Thomas acted efficiently for his company on that." Savage's testimony was corroborated in full by the testimony of Patten.

Several times Savage called Thomas on the telephone to see how he was getting along with the claim, and was told it was under advisement and to call up occasionally. The last time he called, Thomas told him to see the company's lawyer. Instead, Savage went to his own lawyer. Sixty days had then expired since the fire, and Savage's attorney, finding that no proof of loss had been filed, immediately filed one. Both policies were on the California standard form of fire insurance policy. The provision as to proof of loss in each policy read as follows:

"Duty of Insured in Case of Loss. When a loss occurs the insured must give to this company written notice thereof without unnecessary delay; and shall protect the property from further damage; forthwith separate the damaged and undamaged personal property and put it in the best possible order; and without unnecessary delay make a complete inventory stating as far as possible the quantity and cost of each article, and the amount claimed thereon.

"Within sixty days after the commencement of the fire the insured shall render to the company at its main office in California named herein preliminary proof of loss consisting of a written statement signed and sworn to by him setting forth:— (a) his knowledge and belief as to the origin of the fire; (b) the interest of the insured and of all others in the property; (c) the cash value of the different articles or properties and the amount of loss thereon; (d) all incumbrances thereon; (e) all other insurance, whether valid or not, covering any of said articles or properties; (f) a copy of the descriptions and schedules in all other policies unless similar to this policy, and in that event, a statement as to the amounts for which the different articles or properties are insured in each of the other policies; (g) any changes of title, use, occupation, location or possession of said property since the issuance of this policy; (h) by whom and for what purpose any building herein described, and the several parts thereof, were occupied at the time of the fire.

"If the company claims that the preliminary proof of loss is defective and within five days after the receipt thereof (without admitting the amount of loss or any part thereof) notifies in writing the insured, or the party making such proof of loss, of the alleged defects (specifically stating them) and requests that they be remedied by verified amendments the insured or such party within ten days after the receipt of such notification and request must comply therewith or, if unable so to do, present to the company an affidavit to that effect.

"The insured shall also furnish, if required, as far as it is practicable to obtain the same, verified plans and specifications of any buildings, fixtures or machinery destroyed or damaged; and the insured shall exhibit to any person designated in writing by this company all that remains of any property herein described and shall submit to examination under oath, as often as required, by any such person, and subscribe to the testimony so given and shall produce to such person for examination all books of account, bills, invoices and other vouchers, and permit extracts and copies thereof to be made, and in case the originals are lost certified copies, if obtainable, shall be produced."

Liability under the policies was finally denied by both insurance companies. Plaintiffs filed suit, and alleged that the defendants waived the filing of proof of loss within the time provided by the policies by their statements and their conduct. Each defendant answered, setting up as a special defense the failure of plaintiffs to comply with the terms of the policies by filing the requisite proof of loss, and further that plaintiffs were not the sole and unconditional owners of the property covered by the policies of insurance, and that therefore the policies were void. Judgment was rendered for the plaintiffs, and the defendants appeal.

[1] Appellants contend that in both cases the evidence is insufficient to support the finding that they had waived the filing of formal proof of loss. Respondents pleaded a waiver by appellants of these requirements of the policies. On the general principle of waiver, appellants cite White v. Home Mutual Insurance Co., 128 Cal. 131, 60 P. 666. In that case a waiver was not pleaded. In the instant case the question involved is one of fact to be determined under the law as analyzed and distinguished in Estrada v.

Queen Ins. Co., 107 Cal. App. 504, 290 P. 525, 526. The rule there stated is as follows: "'Any conduct on the part of the insurer which tends to create a belief in the mind of the claimant under the policy that notice need not be given or that proofs of loss will be unnecessary, operates as a waiver of a policy provision requiring such notice or proofs. * * * Thus proof of loss is waived by denial of liability, or by a statement by the adjuster that proofs are unnecessary and that the loss will be adjusted without them, or by a statement by the insurer's agent, after loss, that he would attend to giving notice, followed by the appearance of an adjuster. * * *'" 14 Cal. Jur. 576.

[2] In support of the finding of the trial court, we find evidence that immediately after the fire Savage called White, and White stated to him, "All right, I'll take care of the matter." Shortly thereafter he informed Savage that E. L. Thomas was authorized by both insurance companies to adjust the loss. Thomas inspected the débris from the fire, and ordered Savage to care for it until he sent out another man. He requested a detailed inventory, discussed values of the destroyed machinery, and generally gave the impression that he was conducting a careful, just, and impartial adjustment of the fire loss. Savage furnished him everything he requested, and the only issue between them appears to have been as to values. Finally we have the conversation at which Patten was a disinterested witness. He testified regarding this conversation between Thomas and Savage as follows: "They talked about the fire loss. Mr. Thomas said that he had all he wanted. Mr. Thomas did not state whether or not there was any necessity for Mr. Savage to make any further statements or proofs. He said he had all that was necessary. * * * I remember they were talking about the complete fire loss and that Mr. Savage had filed the statement of loss, which was all that was necessary. When they had talked about the loss Mr. Thomas said that he had all the information necessary and that he would turn in his report to his office the first of the week. All I remember was that Mr. Thomas said that everything was O. K. and that he would turn his report in. I have never seen Mr. Thomas before or since the meeting referred to. I don't remember the date. It was probably about three weeks after the fire at about noon." No question as to the validity of the claim or of the necessary proof arose until after the expiration of the sixty days, when Thomas referred Savage to the company's lawyers. If Thomas did not intentionally mislead Savage, he successfully lulled him into an attitude of reliance and confidence that his rights, as well as those of the companies, were being looked after by him. Appellants did not remain silent and wait for the filing of formal proof of loss. They appointed a representative, who immediately took charge of the situation, requested information, inventories, and never raised the question of formal proof of loss. If the insured must deal with the company's representative at arm's length, the latter should not enter the situation as an impartial adjuster or arbitrator. Savage was assured by White that he could safely deal with Thomas. Savage relied on this assurance, as his testimony shows: "No one was present but Mr. Patten, Mr. Thomas and myself, and Mr. Thomas said, 'Mr. Savage, you needn't do anything more on the matter of these papers.' I didn't file a claim of proof of loss because I trusted Mr. Thomas and relied upon this statement."

The record discloses ample evidence to show that the procedure and conduct on the part of appellants' representative created the belief in the minds of the claimants that the notice and preliminary proof was dispensed with by going on to the determination of the loss and the matter of payment of the claim. Furthermore, he informed claimant that nothing more was required on his part. Carroll v. Girard Fire Ins. Co., 72 Cal. 297, 13 P. 863; Estrada v. Queen Ins. Co., 107 Cal. App. 504, at page 510, 290 P. 525.

[3] Appellants' second point on appeal in the case of Savage v. Pacific Fire Ins. Co. is that respondents misrepresented to appellants as to the ownership of a part of the insured property; therefore the contracts of insurance were void. The policy provided: "Unless otherwise provided for by agreement endorsed thereon, or added thereto, this entire policy shall be void, * * * (b) if the interests of the insured be other than unconditional and sole ownership." The evidence showed the personal property in question to be in the exclusive possession of respondents; only a small balance of the purchase price remained unpaid. Their ownership was actual and substantial. In McCollough v. Home Ins. Co., 155 Cal. 659, at page 662, 102 P. 814, 815, 18 Ann. Cas. 862, we find the rule to be: "An equitable title in the insured is a sufficient compliance with the condition in question. A vendee in possession of property under a valid contract of purchase which he is entitled to enforce specifically, is the holder of such equitable title. * * * And the great weight of authority supports the proposition that such vendee is the 'sole and unconditional owner' within the meaning of the policy, even though a portion of the purchase price may yet remain unpaid."

Under the facts shown, there was sufficient evidence to justify the finding of the trial court on this point.

Judgment affirmed.

We concur: MARKS, Acting P. J.; JENNINGS, J.

125 Cal.App. 545

SUDDEN LUMBER CO. v. BLUE DIAMOND CO.

Civ. 6952.

District Court of Appeal, Second District, Division 1, California.

Aug. 26, 1932.

Rehearing Denied Sept. 23, 1932. Hearing Denied by Supreme Court Oct. 24, 1932.

1. Landlord and tenant ⇨231(1).

Under lease conditioning minimum rental on inability to gain permission to excavate gravel, lessor seeking rent must prove effort to gain permission.

2. Landlord and tenant ⇨182.

Under lease conditioning minimum rental on inability to gain permission, by municipal permit or otherwise, to excavate gravel, lessee *held* not liable for rent while injunction suit was pending against city.

Lease provided that lessor should seek permit from city authorizing lessee to remove sand and gravel, but, if permit were refused and it became necessary to institute legal action to enforce granting thereof, such action should be taken by lessor, and that, if parties were unable to gain permission, either by permit or otherwise, lessee would either begin to pay minimum rental or would quitclaim premises to lessor. Evidence showed that city refused permit, and that Superior Court denied petition for order requiring city to grant permit, after which parties brought suit in federal court and obtained preliminary injunction preventing city from interfering with excavation, and that this suit was pending and undetermined during period for which lessor claimed rent.

3. Appeal and error ⇨882(3).

Appellant *held* entitled to results of carrying respondent's trial theory to proper conclusion.

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by the Sudden Lumber Company against the Blue Diamond Company. Judgment for plaintiff, and defendant appeals.

Reversed.

O'Melveny, Tuller & Myers, of Los Angeles, for appellant.

Philip S. Ehrlich, of San Francisco, and Hunsaker & Cosgrove and Daniel M. Hunsaker, all of Los Angeles, for respondent.

CONREY, P. J.

In this action the plaintiff recovered judgment in the sum of $20,000, found to be due as rent under a written lease executed and delivered by plaintiff to defendant, of described real property in the city of Vernon, in Los Angeles county; together with stated interest, attorney fees, and costs. The defendant appeals from the judgment.

The lease was made for a term of ten years, beginning with December 11, 1926, and carried with it the right to excavate and to take from the premises sand and gravel. The rental was to be determined by the quantities of sand and gravel taken, at a stated price per cubic yard, with the understanding that the minimum payments for any calendar year should be $30,000. Among the contract provisions of the lease are the following:

"It is understood that the above royalty shall be net to lessor, and without the deduction of any charge for expense of operation or otherwise. Lessee shall not be required to pay any royalties until four months after the first day of the month succeeding the date of receiving the permit provided for in the next succeeding paragraph, and such time as lessee is prevented from excavating on said premises by inclement weather shall be added to said four months' period; provided, however, that all sand and gravel excavated during said period shall be charged to the lessee and shall be settled for at the time of said first payment.

"3. Lessor shall forthwith seek a permit from the city of Vernon, state of California, whereby and whereunder the lessee, either as lessee of the owner or as its employee, shall be permitted to excavate in accordance with the terms hereof, and lessee will render all reasonable assistance within its power in the obtaining of said permit and will share equally with the lessor the actual expenses in obtaining said permit, but in the event that said permit is refused and it becomes necessary to institute legal action to enforce the granting thereof, all such action shall be taken by the lessor in its own name and at its own expense.

"4. In the event that lessor or lessee is unable to gain permission, either by permit, or as an employee, or otherwise, to excavate said premises as above provided in paragraph 3, after using all due diligence to secure such right to operate, then and in such event the Blue Diamond Company will forthwith commence the minimum rental payments as above specified, or will forthwith quitclaim said premises to lessor."

The controversy between the parties in this action turns upon the foregoing provisions of the lease. It was alleged by the defendant (paragraph II of first affirmative defense) that the plaintiff never, either by itself or through any other person, obtained any permit from the city of Vernon, or "any other commission from any source whatsoever," giving to the defendant permission to excavate either sand or gravel, or any other substance, from said premises, but, on the contrary that such permit was refused by the city of Ver-

non, and that plaintiff sought through the courts an order requiring the city to give such permit, which order was refused by the courts; and that no permit has ever been given to the defendant under or by virtue of which it was permitted to use said premises for the purposes provided under and by the terms of the lease. By separate affirmative defense it was claimed that, by virtue of a transfer and assignment of the lease on the 7th day of June, 1928, to one Philip S. Ehrlich, which transfer was made by the defendant with the written consent of the plaintiff, the defendant was released from the obligations of the lease, and that in fact no rental ever became due from the defendant.

In its decision the trial court found: "That it is true that plaintiff never, either by itself or any other person, obtained any permit from the said city of Vernon giving to the defendant the permission to excavate either sand or gravel from said premises. That an application for such a permit was filed on February 4, 1927, with the trustees of the said city of Vernon, and was denied by them on April 4, 1927; that plaintiff, in the name and on behalf of defendant, sought through this court an order requiring said city of Vernon to grant said permit; that the petition for said order was denied on April 26, 1927. That defendant was at all times advised of the aforesaid proceedings and of the respective dates of the same." The court further found, and it is conceded to be true, that the defendant has not paid any rent and did not at any time quitclaim said premises to the plaintiff. Respondent rests its right of action for the accrued rent claimed in the complaint upon paragraph 4 of the lease. Its position is concisely stated by counsel for respondent as follows: "Respondent based its complaint upon the proposition that when the permit to excavate was denied by the trustees of the city of Vernon, and when the superior court refused to grant a writ of mandate, and said proceedings were abandoned at the request of appellant, paragraph four of the lease compelled appellant to forthwith quitclaim all rights in the premises or pay rent, and that inasmuch as appellant did not quitclaim, the obligation to pay rent immediately accrued." (Page 7, respondent's reply to appellant's supp. brief.) Appellant, on the other hand (supp. brief, pp. 12 et seq.), contends that the evidence is insufficient to prove that as of May 1, 1927, or as of any other date prior to January 1, 1928, the parties were unable, after completion of all proceedings required by the lease, to obtain the right to operate, and directs attention to the fact that at the end of 1927 litigation was still pending for the purpose of obtaining that right. It may be observed here that by agreement of date January 7, 1928, consented to by both parties to this action, the lease was transferred to a third party, with a reservation that the transfer was without prejudice to any cause of action which respondent might have or claim against appellant by reason of any matter or things which appellant had done or failed to do prior to January 1, 1928, relating to said lease or to any terms and provisions thereof.

Comparing finding X with paragraph 4 of the lease and paragraph 2 of defendant's first affirmative defense, together with plaintiff's allegation that it had done all that was required of it under the lease, it is apparent that the finding does not completely cover the issue as presented by the pleadings. The finding declares that no permit was obtained from the city of Vernon; that an application for the permit was denied by said city on April 4, 1927; and that the plaintiff in the name and on behalf of defendant attempted to obtain from the Superior Court an order requiring that the city grant such permit, and that the petition for said order was denied on April 26, 1927. But as stated in the answer, the defense was not only that no permit was obtained from the city of Vernon and that on the contrary such permit was refused, but also that "plaintiff did seek through the courts an order requiring the said city to give such permit, which order was refused by the courts, and no permit has ever been given to this defendant under or by virtue of which it could or was permitted to use said premises, or any part thereof, for the purposes provided under and by the terms of said lease." It was further alleged that "no permit whatsoever has ever been obtained from any person or authority allowing this defendant to use said premises, as contemplated in said lease." The answer denied performance by the plaintiff, "other than the making of an unsuccessful attempt to get the permit from the city of Vernon, as required by said lease to be obtained by it, the lessor and plaintiff herein."

[1] It should be remembered that the lease not only provided for the obtaining of a permit from the city, but the obligation of defendant to forthwith commence the minimum rental payments or forthwith quitclaim the premises to the lessor was conditioned upon the event "that lessor or lessee is unable to gain permission either by permit, or as an employee, or otherwise, to excavate said premises as above provided in paragraph 3 after using all due diligence to secure such right to operate," etc. Before plaintiff could recover the rent claimed in this action, it was incumbent upon it to prove that it had made all reasonable efforts to gain the necessary permission. Without that proof the plaintiff would have no foundation to sustain the allegation of the complaint that plaintiff had kept and performed its obligations under the lease.

[2] The court did not directly find that as of May 1, 1927, or at all, the parties were unable to gain permission either by permit or otherwise to excavate said premises. The

specific finding is limited to the fact of application for the permit, denial of the application; application for an order of court, and denial thereof. In the light of the evidence, taken together with the pleadings, we are of the opinion that appellant should be sustained in its contention that the trial court failed to find upon the issue of inability of the parties to gain permission for appellant to excavate, either by permit or otherwise; and that, according to the evidence which was before the court, we cannot properly say that the court rightly could have found in favor of the respondent upon that issue. Or, if we agree that this issue was covered by the general finding that plaintiff has performed each and all of the covenants, terms, provisions, and conditions of said lease on its part to be kept and performed, then the evidence does not sustain the finding. If the court had decided, as under the evidence it should have decided, that the attempt to obtain a clear right to excavate for sand and gravel on the leased premises was still an active and undetermined matter, and that there remained a reasonable prospect that by pursuing the pending litigation the required permission would be obtained, then it would follow that no rent had accrued for or during the period prior to January 1, 1928, and that the plaintiff's cause of action herein must fail.

The fact that the provisions of the lease did not absolutely call for a "permit" to be issued by authority of the board of trustees of the city of Vernon, but was open to the alternative of legal settlement of the right by litigation instituted against the city in the event of a refusal of the permit, is made plain, not only upon a reading of the lease itself, but also by the practical construction put upon it by the parties in their subsequent conduct. The evidence shows that, in making the lease, the parties had in mind the fact that under certain existing ordinances of the city, if the ordinances were valid, the proposed excavations could not be made without first obtaining a permit from the city trustees for that purpose; that there was some danger or probability that the permit when applied for would be refused; that it might be necessary to apply for a writ of mandate to compel the issuance of the permit; that the court might refuse to issue the writ of mandate for some reason that would not be determinative of the ultimate question; and that finally it might be necessary to apply in some court of competent jurisdiction for a writ of injunction to prevent the city from interfering with the proposed excavation. The evidence leaves no doubt that this entire course of procedure was contemplated by the parties from the very beginning. In accordance with the plan of procedure, they applied for the permit, and, when it was refused, they applied to the Superior Court for a writ of mandate. When in that proceeding the court sustained a demurrer to the petition for the writ of mandate and declined to issue the writ, these parties by mutual consent abandoned their prosecution of that action, apparently without waiting for any formal judgment to be entered against them. They then applied to the United States District Court for a writ of injunction to prevent the city of Vernon and its officers from enforcing against the Sudden Lumber Company and the Blue Diamond Company, or either of them, the ordinances in question relating to or concerning the said leased premises. Pursuant to an order of said court, a writ of preliminary injunction was issued on the 1st day of August, 1927. On the 1st day of February, 1928, that action was still pending. With its further progress we are not concerned here. It is enough to know that, in accordance with the evidence above mentioned, it was established, beyond controversy, that, although no formal permit for such excavation had been obtained from the city of Vernon, the effort to obtain such a permit or its legal equivalent was pending and undetermined. If the court had so found, the necessary conclusion of law would have been that the plaintiff was not entitled to recover the rent claimed in this action. Or if, on the other hand, the issuance of the preliminary injunction on August 1, 1927, was the equivalent of a permit which would protect the lessee in proceeding with the excavations, then under the terms of the lease no rent would accrue until January 1, 1928, and the claim for rent as accrued during the year 1927 could not be sustained.

[3] Respondent contends that the grounds of appeal now relied upon (and which have been considered herein) are entirely different in theory from the actual defense presented at the trial; and that, therefore, appellant is not entitled to have such new and different theory presented in this court. There are, of course, many decisions which declare the rule to which respondent refers. It is said that "to permit a party who has tried his case wholly on a certain theory, which theory was acted upon by the trial court, to change his position and adopt a different theory on appeal, would not only be unfair to the trial court, but manifestly unjust to the opposing litigant." 2 Cal. Jur. 237. In the case at bar, appellant did object to the evidence offered by the plaintiff to show what was done in bringing the injunction suit, and appellant at that time claimed that there was nothing in the lease which provided for anything except a permit. But the court overruled those objections, and allowed the plaintiff to introduce the evidence. Presumably the plaintiff did this for the purpose of showing that it had done all that was required of it by the terms of the lease. In relation to that matter, therefore, the trial was conducted upon respond-

ent's own theory, and appellant is entitled to whatever may result from carrying that theory to its proper conclusion.

The judgment is reversed.

We concur: HOUSER, J.; YORK, J.

125 Cal.App. 593

DAVIES v. UNION TRUST CO. OF SAN DIEGO et al.

Civ. 927.

District Court of Appeal, Fourth District, California.

Aug. 29, 1932.

1. Mortgages ⇐375.

In foreclosure under trust declaration reciting that certain unpaid sum was due, and which was to be paid by beneficiaries to payees, deficiency judgment against beneficiaries *held* authorized.

Such judgment was authorized in view of the language of the trust declaration reciting that a certain debt was "owing" by the beneficiaries to the payees, "payable" to the payees, as herein designated and containing an unequivocal acknowledgment of a present, existing indebtedness to be paid in certain designated installments, "debt" being defined as that which is due from one person to another, whether money, goods, or services; that which one person is bound to pay to another, or to perform for his benefit; while "owing" is defined as something unpaid, and "payable" meaning to be paid.

[Ed. Note.—For other definitions of "Debt," "Owe," and "Payable," see Words and Phrases.]

2. Pleading ⇐36(3).

Allegations regarding credit purchasers acquired on trust declaration indebtedness *held* not to constitute admission of payment entitling purchasers to release of specified lots covered by trust declaration (Code Civ. Proc. § 1060).

Declaration of trust provided in effect that if no default existed, the parties agreed that parcels or lots might be released by the trustee upon payment by the purchasers of the basic price, and vendor's pleadings admitted that at some time during a certain month the purchasers made a proposal to sell a note and trust deed for a designated credit on the trust indebtedness, which proposal vendors were induced to accept.

3. Appeal and error ⇐931(1).

Appellate court can assume trial court's finding was supported by evidence.

4. Mortgages ⇐310.

Where beneficiaries' right to have lots released from trust declaration depended on demand for release upon trustee, such demand must be made.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by A. E. Davies against the Union Trust Company of San Diego and others, in which defendants filed a cross-complaint. From an adverse judgment, plaintiff appeals.

Affirmed.

L. E. Tripp, of Los Angeles, for appellant.

T. A. Turner, of San Diego, for respondent Carling.

Hamilton, Lindley & Higgins, of San Diego, for respondent Zieglar.

Edward W. Goodman, of San Diego, for respondent Union Trust Co. of San Diego.

JENNINGS, J.

Plaintiff instituted this action on behalf of himself and four other beneficiaries under a certain declaration of trust for the purpose of securing declaratory relief as well as injunctive relief against the trustee in accordance with the provisions of section 1060, Code of Civil Procedure. From a judgment denying the relief sought and in favor of defendants, plaintiff prosecutes this appeal.

The appeal is taken on the judgment roll alone. Therefore, whatever facts may be herein set forth for the purpose of establishing a background conducing to a clearer understanding of the points involved herein are necessarily taken from the findings of the trial court and from the pleadings.

From the record thus provided it appears that prior to August 2, 1926, defendants Harry F. Carling and F. B. Zieglar were the owners of a tract of land in San Diego county. Plaintiff and his four associates proposed to buy the land for the sum of $315,000 intending to subdivide it and hoping that, from the sales of lots and parcels in the subdivision, a sufficient amount would be realized from which to pay the purchase price and yield to them a profit on the undertaking. The owners of the land conveyed the tract to the defendant Union Trust Company of San Diego. No consideration was paid by the company for the conveyance. Thereupon, on August 2, 1926, an elaborate declaration of trust was executed by defendant Union Trust Company and written approval, ratification, and confirmation of its terms were made by the owners of the property and by plaintiff and his associates. In this instrument, the owners, Carling and

Zieglar, were designated "Payees," the former being more specifically designated "1st Payee" and the latter "2d Payee." Plaintiff and his four associates were designated "Class B Beneficiaries." It was provided that the class B beneficiaries should enter into possession of the property and embark upon a sales campaign. The enterprise was not attended with the success which had been anticipated. The sum of $33,527 was realized from the sale of lots in the tract but, as time passed, the class B beneficiaries defaulted in the payment of two installments due to be made on the principal of the purchase price. The first of these installments was due on February 2, 1928, and amounted to $61,500. The second installment amounting to $72,500 was due on February 2, 1929. Interest on the principal sum was not paid as provided. County taxes assessed against the property aggregating approximately $83,000 exclusive of penalties were allowed to become delinquent and further taxes, assessed by the irrigation district in which the property is located amounting to approximately $13,900, were not paid and became delinquent. In this state of affairs, the owners of the property elected to utilize the machinery set up by the declaration of trust for foreclosure of the beneficial interest of the class B beneficiaries. On March 16, 1929, they gave written notice of default and exercised their option to declare all sums secured by the declaration of trust to be immediately due and payable. Thereafter, they gave notice of sale, as required by the trust declaration, announcing that on July 1, 1929, all beneficial interest of all beneficiaries would be sold. The present action was instituted about June 13, 1929. By it, in addition to declaratory relief, an injunction was sought, restraining the Union Trust Company as trustee from proceeding with the proposed sale pending the trial of the action. Plaintiff's prayer for an injunction pendente lite was denied and the sale took place. At this sale the beneficial interest of plaintiff and his associates was sold for the sum of $150,000. At the conclusion of the trial of the action, the court found that, at the time the sale was made, the sum of $267,940.26 was due on the principal and interest of the trust indebtedness. The proceeds of the sale amounting, as above noted, to $150,000 was applied on the amount of principal and interest remaining due on the trust indebtedness, leaving a balance of $117,940.26. The court also found that a total sum of $107,827.80, exclusive of penalties, was required to pay the various taxes which had been allowed to become delinquent. Judgment was thereupon rendered denying to plaintiff the relief sought by him and in favor of defendants Carling and Zieglar on their cross-complaint for the sum of $225,767.96.

[1] The first contention advanced by appellant is that the court was not authorized to render a deficiency judgment in any amount against him. It is urged that, to support a deficiency judgment, it must first appear that there is a personal liability on the part of the one sought thus to be charged. This statement is not challenged by respondents. The problem which is here presented, therefore, is to discover whether there is such personal liability. The solution of this problem depends upon the interpretation of the declaration of trust since it appears that no collateral instrument evidencing the indebtedness mentioned in the trust declaration was executed by appellant. This instrument which commences with a recitation that the Union Trust Company of San Diego has received a deed conveying to it certain particularly described land as trustee for which no consideration was paid by it then refers to a certain debt of $35,000 owing to Carling, first payee, from Zieglar, second payee, evidenced by seven promissory notes of $5,000 each, payment of which may be made personally or from proceeds received from sales of the trust property. The instrument then contains the following language: "Whereas, a certain debt in the principal sum and known as the Principal Indebtedness hereunder, of Three Hundred Fifteen Thousand Dollars ($315,000.00) is owing under this Trust by John B. Zeller, John W. Waybright, A. E. Davies, Ed. F. Gilbert and M. Reiss, Class 'B' Beneficiaries hereunder, to Payees hereunder, payable to said Payees as their interest hereafter appear, and as follows: The sum of $61,500.00 on or before eighteen (18) months after the date hereof; The sum of $72,500.00 on or before thirty (30) months after the date hereof; The sum of $72,500.00 on or before forty-two (42) months after the date hereof; The sum of $108,500.00 on or before fifty-four (54) months after the date hereof; with interest on all deferred payments at six per cent (6%) per annum, payable quarterly; and whereas all of the foregoing indebtedness is secured by the Entire Beneficial Interest hereunder as hereinafter provided, said Beneficial Interest being segregated and divided into Class 'A' and Class 'B' * * *." It is not disputed that the above-quoted language amounts to an acknowledgment of indebtedness, but it is said that it is not a promise to pay the amount specified and that no personal obligation to pay can be made out of it. It must be conceded that in the language above quoted and throughout the instrument studious effort was made to avoid a clear covenant on the part of appellant and his associates to pay the indebtedness which is acknowledged to exist. However, in section 4 of the instrument there is an express covenant on the part of all beneficiaries under the declaration to protect the trust property from loss, damage, liability, and expense, to permit no waste or deterioration and to pay for any improvements that may be made outside the

purview of a certain road district improvement act. Section 6 of the instrument contains a further covenant expressed in the following language: "Provided further that should said Basic Prices, together with any other payments made to Trustee for Payees not equal the instalments of said principal indebtedness as said instalments become due, then all the Beneficiaries hereunder jointly and severally agree to pay such additional sums to Trustee for Payees as may be necessary in order to enable the payment of such instalment to be made; provided, that all Basic Prices shall be paid to Payees in instalments as received by trustee." In section 10 of the instrument is to be found the following language: "Should said property, or any part thereof, or the proceeds from any sale made become liable for payment of any inheritance, income or other tax, lien or assessment, which beneficiaries hereby jointly and severally agree to pay five (5) days before delinquency, Trustee is authorized to withhold and pay said tax, lien, or assessment out of any moneys in its possession for account of the person whose interests hereunder are so liable, unless the same has been paid." Here again is an example of the studious effort obviously made to avoid a definite promise on the part of beneficiaries to pay the taxes. Nevertheless, despite the evasiveness of the terminology employed, we apprehend that it can hardly be contended that there is not a distinct covenant to pay taxes and assessments five days prior to delinquency. We know of no rule of law that requires an acknowledgment of debt to be expressed in the formal phraseology of a promissory note. The word "debt" has a recognized meaning. In Webster's International English Dictionary it is defined as "that which is due from one person to another, whether money, goods, or services; that which one person is bound to pay to another, or to perform for his benefit." The Century English Dictionary defines the term in language practically identical with that above quoted. Bouvier's Law Dictionary defines it as follows: "Debt. In Contracts—'A sum of money due by certain and express agreement,'" citing 3 Bla. Com. 154. In Perry v. Washburn, 20 Cal. 318, 350, it is said: "A debt is a sum of money due by contract, express or implied * * *. The term 'debt,' it is true, is popularly used in a far more comprehensive sense, as embracing not merely money due by contract, but whatever one is bound to render to another, whether from contract or the requirements of the law." It is to be observed that the language of the trust declaration recites that a certain debt is "owing" by appellant and his associates to payees, "payable" to payees. The word "owing" is defined in Bouvier's Law Dictionary as "something unpaid." The word "payable" means "to be paid." We may therefore paraphrase the language of the instrument as follows: Whereas, a certain sum of money in a specified amount is due and is unpaid by certain named individuals to payees, to be paid to them. Thus paraphrased the language contains an unequivocal acknowledgment of a present, existing indebtedness to be paid in certain designated installments. It is our opinion that the trial court was warranted in construing it as amounting in effect to an agreement to pay the sum specified. We are the more persuaded to this conclusion by the language contained in section 6 of the declaration, wherein the beneficiaries jointly and severally agree that if moneys received by the trustee do not equal the installments of the principal indebtedness as they become due, they will pay such additional sums as may be necessary in order to enable payment of such installment to be made. Here is language susceptible of no other construction than that of a definite covenant and promise to pay. It is conceded that, if the declaration of trust is capable of being interpreted as containing a promise on the part of appellant and his associates to pay the sum specified, a judgment against appellant for the balance due after application of the proceeds of the sale of the beneficial interest of all beneficiaries was warranted.

[2-4] The second contention advanced by appellant is that the judgment of the court denying to appellant recovery of lots having a release value of $43,092.77 or a money judgment in this sum is incorrect since it is maintained that the pleadings of respondents, themselves, show that appellant was entitled to the relief stated. In this connection it is pointed out that respondent Carling, in an amendment to the answer originally filed by him and his codefendant Zieglar, admitted that a credit of $55,000 to be applied on payment of the principal and of $5,000 to be applied on payment of interest was allowed by said respondents to appellant and his associates in the month of November, 1927, and that payment of the sum of $21,700.99 had been made prior to this time. The declaration of trust provides that the first installment of principal in the amount of $61,500 shall be made on or before 18 months from August 2, 1926, the date on which the declaration was executed. The due date of this first installment was therefore February 2, 1928. It is alleged in appellant's complaint that lots having a basic release price of $33,527 were released by respondents and since, as contended, respondents by their pleadings admit receipt of $76,619.77 on account of the principal indebtedness prior to and during the month of November, 1927, at which time there had been no default in payment of any installment, therefore, under the terms of section 6 of the declaration of trust, appellant and his associates

were entitled to have released to them lots of a basic value of $43,092.77. Section 6 of the declaration is, in part, in the following language: "Provided no default then exists hereunder, and after all costs, fees, expenses and advances of trustee with interest and all damages sustained by it have first been paid, the parties hereto agree that any and all parcels, lot or lots may be conveyed by trustee free and clear of all obligations upon payment to trustee of an agreed upon sum, known as the basic price, to be calculated for said purpose upon the basis of one hundred twenty-five per cent (125%) of the sum of three hundred fifteen thousand dollars ($315,000.00) for the entire tract of land, said sum to be prorated against the lots of said subdivision according to the area contained therein, it being agreed that said trustee be and it is hereby authorized to convey said lots or parcels of said property upon payment to it for payees of the proportional part of the balance of said basic price." Since, therefore, there had been no default in November, 1927, it is argued that appellant and his associates at that time acquired the right, by virtue of the admitted payment of $76,619.77, to have lots of a basic value, as this term is defined in said section 6, released to them. But it does not so clearly appear that the allegations of the amendment to the answer admit that the payment of $21,700.99 was made prior to November, 1927. The language of the pleading with reference to this payment is as follows: "Deny that said Harry F. Carling * * * have been paid upon the principal of said trust indebtedness owing them, the sum of $76,619.77 or any other sum in excess of $21,700.99." Nor does it conclusively appear that it is admitted in the amendment to the answer that a credit of $60,000 to apply on principal and interest of the trust indebtedness was allowed in November, 1927. It is alleged in the pleading referred to that "on or about November, 1927," appellant and his associates proposed to sell respondents Carling and Zieglar a certain trust deed note and trust deed concerning which certain representations alleged to have been false were made by appellant and his associates upon which representations it is alleged respondents relied and by reason whereof they were induced to enter into the transaction and to accept the note and trust deed at the value of $60,000. While, therefore, it may be conceded that it is admitted by the pleading that, at some time during the month of November, 1927, appellant and his associates made the proposal to sell the note and trust deed for a credit of $60,000, it cannot be conceded that it is therein admitted that the acceptance of the offer by respondents Carling and Zieglar took place in November, 1927. For all that appears it may have taken place at a much later date. It is significant that the court simply found that respondents Carling and Zieglar had acknowledged receipt of payment of the sum of $76,619.77 on account of the trust indebtedness which was derived from proceeds of sales of property under the trust. We are entitled to assume that the court's finding in this regard is supported by evidence presented during the trial of the action. At all events, the contention that the pleadings contain admissions that payment of the specified sum was made at a time when no default existed is not well taken for the reasons suggested. Further, even if it be conceded that appellant's contention in this regard is correct, further difficulty is encountered in arriving at the conclusion that the court erred in refusing to declare that appellant and his associates were entitled to have lots of a release value of $43,092.77 deeded to them or a judgment in money for such amount. In this connection, appellant relies upon the provisions of section 6 of the declaration of trust. The first part of this section, as hereinabove noted, declares that, providing no default exists, the parties agree that any and all parcels, lot, or lots, may be released by the trustee upon payment of the basic price. It is, however, provided in a subsequent portion of section 6 that the trustee is authorized to release any lot or parcel of the property *as and when required* (italics ours) so to do by the class B beneficiaries. It will be remembered that appellant and his associates were designated in the trust declaration class B beneficiaries. It is clear, therefore, that the class B beneficiaries were required to make a demand for the conveyance of lots as a prerequisite to the establishment of a duty on the part of the trustee to release such lots from the trust. Nowhere in the record is there any indication or suggestion that any evidence of such demand was presented to the trial court. It is alleged in the complaint that appellant, on behalf of all class B beneficiaries, had demanded that the trustee release lots in accordance with the provisions of the trust declaration and that at the time of the demand no default existed under the declaration of trust. The answers filed by respondent Union Trust Company of San Diego and respondents Carling and Zieglar contain specific denials that appellant, either for himself or on behalf of his associates, had demanded a release of lots by the trustee. The court found that no demand for the release of lots had been made by appellant on behalf of the class B beneficiaries or for any other person, or for himself. The fact of demand was therefore a fact in issue at the trial, and we must assume that the court's finding that no demand had been made was supported by the evidence produced at the trial. It is obvious that the right of the class B beneficiaries to have lots released from the trust depended upon their making a demand upon the trustee for such release and

the rule is well settled that, under such circumstances, it must be shown that the demand was made. Vickery v. Maier, 164 Cal. 384, 129 P. 273; Danielson v. Neal, 164 Cal. 748, 750, 130 P. 716; Flickinger v. Heck, 187 Cal. 111, 200 P. 1045; California Canneries Co. v. Great Western Lumber Co., 44 Cal. App. 69, 185 P. 1008, 207 P. 908.

The judgment is affirmed.

I concur: MARKS, Acting P. J.

125 Cal.App. 416

ROBINSON v. EL CENTRO GRAIN CO. et al.

Civ. 960.

District Court of Appeal, Fourth District, California.

Aug. 19, 1932.

Appeal and error ⇐773(3).

Delay of five days, after time fixed, in filing brief, where counsel set forth reasonable excuse, did not warrant dismissal of appeal.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action by J. B. Robinson against the El Centro Grain Company. From a judgment for defendant, plaintiff appeals, and defendant moves to dismiss the appeal.

Motion to dismiss denied.

Louis Ferrari, T. J. Bricca, and C. H. White, all of San Francisco, and Gray, Cary, Ames & Driscoll, of San Diego, for appellant.

Harry W. Horton, of El Centro, and Laurence H. Smith, of La Jolla, for respondents.

MARKS, Acting P. J.

This is a motion to dismiss the appeal because the appellant's opening brief was not filed in time. The record shows that appellant was given to and including July 20, 1932, in which to file his brief; that on the morning of July 21, counsel for appellant applied to this court for a further extension of six days, which was not granted because the notice of motion to dismiss had been filed earlier that morning. The motion to dismiss was noticed for Tuesday, August 9, 1932, at 10 o'clock a. m., at which time appellant filed affidavits setting forth a reasonable excuse for his delay. Appellant's opening brief was delivered to the clerk of this court for filing on July 25, 1932.

Upon the authority of the cases of Righetti v. Monroe, Lyon & Miller, 106 Cal. App. 346, 289 P. 650; Fishman v. Silva, 108 Cal. App. 121, 291 P. 430; Tyner v. Axt, 111 Cal. App. 187, 295 P. 97; Toth v. Metropolitan Life Ins. Co., 113 Cal. App. 55, 297 P. 564; North v. Evans, 114 Cal. App. 714, 300 P. 893; and Snodgrass v. Hand (Cal. App.) 13 P.(2d) 769, the motion to dismiss is denied.

We concur: JENNINGS, J.; MORTON, Justice pro tem.

125 Cal.App. 556

MUSANTE v. GUERRINI et al.

Civ. 8100.

District Court of Appeal, First District, Division 1, California.

Aug. 27, 1932.

Rehearing Denied Sept. 26, 1932.

1. Automobiles ⇐168(1).

Skidding of automobile is no defense where it was due to negligence.

2. Automobiles ⇐243(7).

Where negligence is charged, circumstances preceding skidding of automobile may be looked to.

3. Automobiles ⇐245(49).

Evidence as to whether motorist was confronted with apparent imminent danger prior to collision *held* for jury.

4. Automobiles ⇐243(7).

In determining alleged negligence, jury were entitled to consider speed at which automobile was driven (St. 1923, p. 553, § 113, subd. a, as amended by St. 1927, p. 1436, § 30).

5. Automobiles ⇐244(35).

Rate of speed at which automobile was driven is not conclusive as to whether it was driven at careful and prudent speed (St. 1923, p. 553, § 113, subd. a, as amended by St. 1927, p. 1436, § 30).

6. Automobiles ⇐168(2).

If application of brakes was reasonably likely to cause car to skid and collide with others, negligence and violation of Vehicle Act may be found (St. 1923, p. 553, § 113, subd. a, as amended by St. 1927, p. 1436, § 30).

7. Automobiles ⇐244(35).

Jury's implied finding that motorist negligently operated automobile that skidded into another *held* supported by evidence.

8. Trial ⇐295(1).

Instructions must be considered as a whole.

9. Trial ⇐296(3).

Instruction that violation of Vehicle Act proximately causing injury to another, not

contributorily negligent, imposes liability, *held* not error, in view of other instructions (St. 1923, p. 553, § 113, subd. a, as amended by St. 1927, p. 1436, § 30).

The court in other instructions covered skidding of the automobile and defendant motorist's acts in emergency, if any.

10. Appeal and error ⇐1064(4).

Judgment will not be reversed because instructions complained of were inartistically worded.

11. Automobiles ⇐246(2).

Instruction that, if automobile host and another motorist were both negligent, verdict for guest might be against either, *held* error.

12. Appeal and error ⇐882(12).

Party procuring similar instruction cannot complain of instruction that, if codefendant was not negligent, jury should so find, regardless of verdict against other defendant.

13. Trial ⇐296(3).

Instruction to find for motorist if not negligent, regardless of verdict against codefendant, *held* not error, in view of other instructions.

Court instructed jury that they were exclusive judges of the facts, and that, unless liability of defendant motorist was established by preponderance of evidence, verdict should be for such defendant.

14. Appeal and error ⇐1170(9).

One erroneous instruction out of 53 *held* not to have resulted in miscarriage of justice, so as to require reversal (Const. art. 6, § 4½).

The instruction in question was that, if jury found that automobile host and another motorist were both negligent, verdict for guest might be against either, whereas, in such case, verdict should be against both. The jury rendered verdict for guest against the other motorist and for automobile host.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by C. Musante against Ottario Guerrini and Mrs. D. O. Ryan. From judgment for plaintiff, Mrs. D. O. Ryan appeals.

Affirmed.

Myrick & Deering and Scott, of San Francisco, for appellant.

Ingemar E. Hoberg and Joseph Anderson, both of San Francisco, for respondent.

BEAUMONT, Justice pro tem.

[1, 2] On December 2, 1928, C. Musante was riding in an automobile driven by Ottario Guerrini in a westerly direction on a public highway in Alameda county. Mrs. D. O. Ryan, at the same time, was driving an automobile in the opposite direction on the same highway. As the two machines approached each other, that driven by Mrs. Ryan swerved to the northerly side of the road and collided with that operated by Guerrini. Musante was injured. He brought suit against Guerrini and Mrs. Ryan, and a verdict was rendered in his favor against the latter only. Mrs. Ryan has appealed from the judgment on the grounds of insufficiency of the evidence and errors of the court in giving certain instructions.

Appellant contends that the charge of negligence can be predicated only upon the skidding of the automobile to the northerly (wrong) side of the road, and that this was not evidence of negligence. In our opinion, there is no basis for thus attempting to narrow the view the jury was entitled to take of the evidence or the scope this court has of the issue of negligence in considering the appeal. A person may not shield himself against a charge of negligence merely by showing that an automobile operated by him was temporarily beyond his control due to its skidding, if the skidding was the direct result of his own act of negligence. Respondent alleges in general terms in his complaint that appellant was negligent in the operation of her automobile, and that he was injured as a result. It was proper then to consider the circumstances antecedent to the skidding, as well as the skidding itself, to determine whether or not appellant was negligent as alleged. Davis v. Brown, 92 Cal. App. 20, 267 P. 754; Sullivan v. Lutz, 181 Wis. 61, 194 N. W. 25. This is not a case where an automobile comes suddenly and unexpectedly upon a slippery surface. The evidence discloses that the condition which existed at the moment of the skidding had prevailed during the time appellant had traveled at least five or six miles immediately prior thereto.

The evidence shows that, while appellant was operating her car along the highway at the time and place in question, it was raining, and that the surface of the road was wet and slippery; that, at the time of the collision, rain had been falling about an hour and a half; that there was traffic in each direction on the highway. Appellant testified she was driving at a speed of between twenty-five and thirty miles an hour; that she was following another automobile; that in driving along the highway she had kept at a distance of about three car lengths (about forty-eight feet) behind such car; that while she was so traveling the car in front stopped suddenly, and, to avoid striking it, she immediately applied her brakes. This caused appellant's machine to skid to the wrong side of the road, in front of the approaching car of

Guerrini. Appellant testified relative to the condition of the surface of the road as follows:

"Q. Can you recall whether the pavement was wet and slippery all the way from San Francisco? A. I don't know about the entire distance.

"Q. Had it been for a number of miles prior to the accident? A. For a little ways before, but I could not say about the entire distance."

Dennis Ryan, husband of appellant, was riding beside his wife, who was driving. He testified in part as follows:

"Q. What was the condition of the traffic, Mr. Ryan? A. It was very heavy—Sunday evening—and lots of cars on the road. * *

"Q. Were there any cars immediately in front of yours? A. Several of them.

"Q. Any cars immediately behind yours? A. Several.

"Q. About what was the distance between your automobile and the car immediately preceding you? A. In front of us?

"Q. Yes. A. About three car-lengths or a little better maybe.

"Q. For what distance were you traveling along before the accident in that position? A. Well, at least five or six miles. * * *

"Q. What is the make-up generally, of the road? A. It is cement surfaced on the road and oil—

"Q. Between the shoulders what is the character of the pavement? A. Some kind of oil covering the cement.

"Q. Commonly called asphaltum? A. I think that is what it is.

"Q. What is the condition of the highway immediately touching the shoulder of the road? A. Mud and soft dirt. There are ditches on both sides."

Guerrini testified that he was driving on his right-hand side of the highway; that he saw the car traveling immediately ahead of appellant, and that this automobile had just passed appellant's car; that it was traveling at about forty miles an hour, and that it did not slow down or stop; that, after the collision, he talked with appellant, saying, " 'See what you did to me now' "; that she replied: " 'That is my blame and you are a good man and you are going very well otherwise somebody is going to be killed.' " Respondent testified he did not see appellant's car until just before the impact, when it suddenly appeared directly in front of Guerrini's car on the northerly side of the highway.

[3-7] Appellant contends that the record contains no evidence of negligence on her part; that, as stated in her brief on appeal, "Appellant's action in applying the brakes and causing the skidding of her car was not negligent because of the fact that she was confronted with an emergency in the sudden stopping of the automobile immediately preceding her." Appellant cites authority to the effect that " 'one who, without negligence upon his part, is suddenly confronted with imminent danger or seeming imminent danger is not required to exercise that degree of care and skill which is required in the commission of an act after careful deliberation.' " Was there an "emergency" confronting appellant? There was a variance in the testimony as to the circumstances existing immediately prior to the collision. Appellant claimed that the emergency arose because of the sudden stopping of the car immediately in front of her. Guerrini's testimony was that the car did not stop. In view of the conflict of evidence, the question whether appellant was faced with imminent danger or seeming imminent danger was for the jury to decide. Millers Creek R. Co. v. Barnett, 159 Ky. 344, 167 S. W. 402.

Under the evidence herein, the jury, in determining the question of negligence, had a right to consider the speed at which appellant was operating her automobile at the time and place in question. Was she driving at a careful and prudent speed, having due regard to the traffic, surface and width of the highway? Section 113, subd. (a), California Vehicle Act (as amended by St. 1927, p. 1436, § 30). The rate of speed at which a motor vehicle is operated is not alone determinative of whether such vehicle is being driven at a careful and prudent speed. Dam v. Bond, 80 Cal. App. 342, 251 P. 818; Armstrong v. Day, 103 Cal. App. 465, 471, 284 P. 1083. If, under the conditions disclosed by the evidence herein, while driving at a rate of between twenty-five and thirty miles an hour, appellant's car was, upon application of the brakes, reasonably likely to skid and as a result collide with cars of persons lawfully using the same highway, then the jury would have been justified in finding that appellant was not driving at a careful and prudent speed, but that such speed was greater than was reasonable and proper, and consequently in violation of the California Vehicle Act. Davis v. Brown, supra. The implied finding of the jury that appellant was negligently operating her car is amply supported by the evidence, and will not be disturbed.

[8, 9] Appellant complains that the instructions do not properly present to the jury the law regarding proof of negligence, under the testimony. She criticizes instruction XVIII in this respect, claiming, as stated in her brief, she "was entitled to have the jury consider the reasons why her automobile skidded as it did." The instruction thus complained of states, in effect, that driving an automobile in violation of the California Vehicle Act is negligence, and that, if such negligence proximately causes injury, and if the plaintiff

is not contributorily negligent, plaintiff without further proof of negligence may recover. Appellant vigorously argues that such instruction directs the jury that, if they find Mrs. Ryan was on the wrong side of the highway, they must render a verdict against her without considering the "facts and circumstances" which caused her to be in such position, and these, she contends, are that she "was faced with an emergency necessitating the sudden stopping of her automobile." The court in other instructions given at the request of appellant fully and clearly instructed the jury upon the very point of which appellant now complains, to wit, the skidding of her automobile and her acts in an emergency, provided such emergency existed. The instructions are to be construed as a whole. There was no error in the giving of this instruction. Leiner v. Eng-Skell Co., 104 Cal. App. 228, 285 P. 905.

[10] Appellant complains of instructions XIX and XX as being ambiguous and misleading. We find no merit in this contention when these instructions are considered with the other instructions of the court. Instructions XIX and XX are inartistically worded, but a judgment will not be reversed because of inartificiality of instructions.

[11] Instruction XXII is as follows: "If you find that both parties were negligent and that their negligence proximately contributed to any injury sustained by plaintiff, then you are not to compare their negligence or determine which was more negligent or which contributed most to the injury, since both would be then jointly and severally liable and the plaintiff could recover against either one of them, provided, of course, he was free from contributory negligence." An instruction substantially the same as the foregoing has been held to be erroneous. Crabbe v. Rhoades, 101 Cal. App. 503, 282 P. 10. If the jury found that the negligence of both drivers proximately caused injury to respondent, then it should have rendered a verdict against both defendants. Crabbe v. Rhoades, supra.

[12, 13] Instruction XXIII is also attacked. It is as follows: "Each of the defendants should receive separate consideration at your hands, and if you find that Mr. Guerrini was not at fault you should return a verdict in his favor irrespective of the verdict that you return against Mrs. Ryan." Appellant contends that the jury was by this instruction directed to return a verdict against her. At the request of appellant, the court instructed the jury: "If you find from the evidence that Mrs. Ryan was not at fault, you must return a verdict in her favor, irrespective of the verdict that you return against Mr. Guerrini." We are of the opinion that appellant is not in a position to complain of the giving of the instruction. In Varley v. Columbia Taxicab Co. (Mo. Sup.) 240 S. W. 218, 221, the court, in discussing an instruction that was attacked because it did not comport with the petition as to the rate of speed under consideration, said: "As to this defendant it will suffice to say that we find in its instruction No. 4 the same rate of speed mentioned. It asked an instruction against its codefendant bottomed upon the speed ordinance, and phrased it just as plaintiff phrased his instruction. So defendant Columbia Taxicab Company is in no position to urge this as error. Its instruction invited the error, if one there was." Without regard to whether or not this instruction comes within the invited error rule, we believe there was no prejudicial error. In other instructions the court stated it was the jury's duty, unaided by any suggestion of the court, to pass upon all questions of fact; that the jury was to understand that the court in no manner expressed, or desired to express, an opinion that any disputed fact had been or had not been proved; that with the questions of fact the court had nothing to do; and that such matters the jury should determine for themselves. It was further instructed, at appellant's request, that, unless the liability of appellant was established by a preponderance of the evidence, the verdict of the jury should be in favor of appellant. These instructions, and others of a general nature not referred to herein, when construed with the first two mentioned in this paragraph, can be said only to instruct the jury that each defendant was to receive separate consideration at the hands of the jury; and it cannot be fairly said that the jury was instructed to render a verdict against Mrs. Ryan.

[14] The court gave the jury fifty-three instructions. The charge covered all the points upon which appellant requested instruction. One of the instructions has been determined erroneous. Others complained of, when considered with the charge as a whole, properly advised the jury upon the matters contained therein. Examining the entire case, including the evidence, we are of the opinion that there was no miscarriage of justice. Article 6, § 4½, Const.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

BONNEY et al. v. PETTY et al.

Civ. 8222.

District Court of Appeal, First District, Division 2, California.

Aug. 26, 1932.

Rehearing Denied Sept. 24, 1932. Hearing Denied by Supreme Court Oct. 24, 1932.

1. Appeal and error ⇐843(4).

Objection to sufficiency of original complaint need not be considered where superseded by amended complaint, notwithstanding amended complaint was made to conform to proof.

2. Appeal and error ⇐843(4).

Appellate court reviews only sufficiency of amended complaint to state cause of action, absent demurrer to either original or amended complaint.

3. Pleading ⇐408.

Sufficiency of pleading to state cause of action may be raised at any stage of case.

4. Pleading ⇐8(4).

In action for specific performance of contract to convey realty, complaint must allege facts showing fairness to vendor and adequacy of consideration; allegation in statutory terms being conclusion (Civ. Code, § 3391).

5. Pleading ⇐433(3).

After judgment, amended complaint, defective because alleging conclusion, not facts, sustained action for specific performance of contract to convey realty (Civ. Code § 3391; Const. art. 6, § 4½).

6. Pleading ⇐406(5).

In action for specific performance of contract to convey, amended complaint alleging value of property on making contract and damages on breach inferentially stated value of realty at breach, absent demurrer (Civ. Code, § 3391).

7. Pleading ⇐433(6).

After judgment, amended complaint, if defective because not stating value of realty, sustained action for specific performance (Civ. Code, § 3391; Const. art. 6, § 4½).

8. Specific performance ⇐114(1).

In action for specific performance of contract to convey, amended complaint stated facts implying vendor's bad faith (Civ. Code, § 3391).

The amended complaint alleged full compliance on the purchaser's part, that vendor canceled the escrow, evidencing the terms of the contract for conveyance, and that he immediately sold the realty to a third person, thus putting performance beyond his power.

9. Specific performance ⇐121(3).

In action for specific performance of land contract, findings for plaintiffs *held* sustained by evidence.

10. Appeal and error ⇐1011(1).

Appellate court cannot disturb finding on conflicting evidence.

11. Specific performance ⇐128(3).

In action for specific performance of land contract, purchaser's damages properly included difference between agreed price and value at breach; vendor having acted in bad faith (Civ. Code, § 3306).

Appeal from Superior Court, Los Angeles County; Leonard Wilson, Judge.

Action by L. F. Bonney and another against George M. Petty and others. The action was dismissed as to defendants other than George M. Petty, and, from an adverse judgment, he appeals.

Affirmed.

For prior opinion see 11 P.(2d) 20.

William Ellis Lady, of Los Angeles, for appellant.

Evans, Pearce & Campbell, and Wm. H. Campbell, all of Los Angeles, for respondents.

BURROUGHS, Justice pro tem.

This action was brought for the specific performance of a contract to convey real property. The court found that the defendant George M. Petty, the vendor named in said contract, could not specifically perform, and in lieu thereof awarded the plaintiffs damages in the sum of $7,500, and the additional sum of $500, paid to said defendant in pursuance of the terms of the contract. The action was upon motion for a nonsuit dismissed as to the other defendants. The defendant Petty has appealed. He brought the record to this court under the alternative method.

[1-3] The first error upon which the appeal is predicated is the claim that neither the original nor the amended complaint states facts sufficient to constitute a cause of action. As the original complaint has been superseded by the amended one, it is unnecessary to give further consideration to the former. 21 Cal. Jur. p. 213, § 146. This rule applies even where, as in the instant case, the amended complaint is made to conform to the proof. Dieckmann v. Merkh, 20 Cal. App. 655, 658, 130 P. 27. There has been no demurrer filed to either complaint, and our consideration is therefore confined to the sole question as to the sufficiency of the amended pleading to state a cause of action, which question may be raised at any stage of the case.

[4, 5] It is claimed by the appellant that the complaint is fatally defective because in an action for the specific performance of a

contract the plaintiff should allege that the contract is fair, just, and reasonable as to him. There can be no doubt but that such contention is true. The amended complaint does allege, however, "that the said sum of five thousand and no/100ths ($5,000) was an adequate, just, fair and reasonable consideration for said property." Section 3391 of the Civil Code provides that the specific performance of a contract cannot be enforced against a party thereto, "1. If he has not received an adequate consideration for the contract; 2. If it is not, as to him, just and reasonable." In Andersen v. Charles, 52 Cal. App. 290, 198 P. 641, it is held that it is necessary in this character of action that the complaint allege facts showing that the contract is just and reasonable as to the defendant and that the consideration received for the contract is adequate, and an allegation in terms to such effect is but the statement of a conclusion. See, also, 23 Cal. Jur. p. 495, § 53; Salisbury v. Yawger, 184 Cal. 783, 195 P. 682; Miller v. Gusta, 103 Cal. App. 32, 283 P. 946. If at this point we were foreclosed of further inquiry into this question, under the last-mentioned decisions, we would be compelled to order a reversal of this case upon that ground, but in the case of Baker v. Miller, 190 Cal. 263, 266, 212 P. 11, 12, it is said concerning a state of pleadings similar to the one here under consideration: "The only averment in that connection is that 'at or about the date of the contract the estate of said deceased was of the appraised value of $22,753, and said contract was in all respects just and fair and liberal in its provisions in favor of said defendant.' Aside from the statement of the value of the estate, there is not here any attempt to state facts at all—nothing more than the general language of the statute, which amounts to a mere conclusion of law without facts to support it. Joyce v. Tomasini, 168 Cal. 234, 237, 142 P. 67; Stiles v. Cain, 134 Cal. 170, 172, 66 P. 231. If it be contended that the statement of facts in the complaint, including the contract, set out in exact words, together with an allegation of the appraised valuation of the estate, constitute an inferential averment not amounting to an absolute want of facts, the cases relied upon to support the complaint are not in point. They merely hold that if 'no demurrer is interposed, the pleading will be held good after judgment.' Estate of Behrens, 130 Cal. 416, 418, 62 P. 603, 604. Viewed as a whole we feel there is no escape from the conclusion that the complaint is insufficient, and the general demurrer interposed by the defendant should have been sustained." However, after reciting the facts of that case, the court concluded that "the case presented is one which falls squarely within the constitutional inhibition that no judgment shall be set aside for any error as to any matter of pleading, unless after an examination of the entire case, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

[6-8] Although in the case at bar, under the above authorities, the amended complaint is defective, the evidence hereinafter set forth shows that the contract is, as to the defendant, just and reasonable and sustained by an adequate consideration, and the court has so found. After judgment, the amended complaint is sufficient to sustain the action. Objection is also made that the amended complaint is insufficient because it does not allege the value of the property either at the time the contract was made or at the time of its alleged breach. The said complaint does allege the value of the property at the time of the making of the contract as $5,000 and the damage suffered by the plaintiff at the time the contract was breached, as $15,000; this statement we believe, in the absence of a demurrer, inferentially states its value. But we believe that the cause, having gone to judgment, falls within the rule laid down in Baker v. Miller, supra. It is also claimed that there is a failure to allege bad faith; but, taking the entire amended complaint as a whole, it sets forth facts from which bad faith may be inferred. Facts are alleged which show full compliance on the part of plaintiffs, defendant's cancellation of the escrow, and his immediate sale of the property to a third person, thus putting it beyond his power to perform. We think these allegations are sufficient to state a cause of action in that behalf, especially as the evidence is sufficient and there are proper findings of fact.

[9, 10] Objection is also made that material findings and conclusions of law fail to support the judgment. These we will consider after the examination of the evidence.

There is substantial evidence to support the following facts, many of them being uncontradicted: On December 14, 1928, the plaintiffs, as buyers, and defendant Petty, as seller, entered into an agreement whereby the plaintiffs agreed to buy, and the defendant agreed to sell, a certain lot in the county of Los Angeles for the sum of $5,000. The terms of the contract were evidenced by an escrow agreement deposited with the First State Bank of Lawnsdale as the escrow holder. Plaintiffs had paid by check outside of escrow $500 of the purchase price, which was acknowledged in the agreement; $3,000 by check at the time of the execution of the agreement, and under its terms $1,500 was to be paid into escrow on or before January 2, 1929; the balance of the $5,000 was to be used for commissions and other expenses, and was not to be paid into the escrow. The defendant Petty was to deposit in the escrow a deed of the property to be delivered to plaintiffs after recordation upon their payment into

the escrow the sum of $4,250; such sum being the total due after deducting the $500 paid out of escrow and a commission of $250. This deed was deposited in escrow within the time limit required. It is provided in the escrow agreement that the holder is the agent of both parties. Under the buyers' agreement it is provided that the buyers give authority to the escrow holder to use all funds deposited by them to carry out the instructions provided that "on or before January 14, 1929, instruments have been filed for record entitling you to procure assurance of title in the form of a guarantee of title issued by California Title Insurance Company. * * *" The foregoing instructions were accepted and approved in their entirety by the seller. The evidence further shows that on Saturday, December 29, 1928, J. C. Wright, one of the parties to the agreement and a respondent herein, deposited with the escrow a check for $1,511, to pay the balance due, the $11 to pay the escrow charges. This last-named check was drawn on the Huntington Park Bank, a branch bank of the Security First National Trust & Savings Bank at Seventh and Spring streets in Los Angeles. On Monday, December 31, 1928, the Lawnsdale Bank, the escrow holder, sent this check, with others, in a cash letter to the above-mentioned First National Bank above referred to, where it was credited to the account of the Lawnsdale Bank and forwarded to the Huntington Park Bank. The account of J. C. Wright, the maker of the check, amounted to between seven and eight hundred dollars in the last-named bank, and, when the check reached it, the officials telephoned the home of J. C. Wright, and Wright being away from home, his wife directed the insertion at the head of the check—Seventh and Spring—the head office of the Huntington Bank, where Wright had a checking account of about $10,000. This was done, and the check was returned to the Seventh and Spring street bank and received on January 4, 1929.

The escrow bank never knew of this error, which occurred through Mr. Wright having checks of both banks in his pocket and inadvertently using the wrong one, nor was the escrow at any time after December 29, 1928, without credit for the full amount due Petty. The bank of Lawnsdale had credit for the check on January 2d and at all times thereafter. That credit was never changed and the funds were there available to their use. The Lawnsdale Bank credited the money to the escrow, but made the distinction that it was not credited to the seller and could not be credited until certain instruments should have been filed for record and certificates returned; and, by the terms of the agreement of escrow, the bank as holder of the escrow had until January 14th in which to perform these acts and complete the escrow. The buyer had paid and the funds had been properly credited, and, before the limit of time in which to complete the escrow had expired, the seller withdrew his papers and refused to complete his contract. On January 4, 1929, the appellant, Petty, called at the Lawnsdale Bank and inquired if the money was there for him, but was told that there had been no report on the check, and it was suggested that he call next day. He was also advised by the said bank that they had not recorded the deed nor received the certificate of title. Petty left the bank and returned later with a written notice signed by him canceling the escrow.

After demand on Petty to fulfill the terms of the escrow, the plaintiffs commenced this action on January 8, 1929, for the specific performance of the contract or damages in case the first-named relief could not be granted. The case came on regularly for trial March 12, 1929, and on the following day it developed that defendant Petty had sold the property involved an hour before this action was filed, to his attorney, W. E. Lady, for the sum of $7,500, with the understanding between them that, after Lady had received from oil profits from said land the amount of the purchase price, Petty and Lady would then divide any further profits between them. The complaint was thereupon amended, and Lady, together with another party, was brought into the case. The evidence further discloses that for some time prior to the date of the execution of the escrow agreement the property in controversy and the land in that vicinity was being prospected for oil; that considerable excitement had prevailed; that the Standard and other large oil concerns were interested; that, at 3 o'clock on the morning of the day the escrow herein was entered into, a well not far distant from this land had actually developed oil, although, according to the evidence, neither party knew at the time of such development. There was testimony that, at the time of the making of the contract, the fair market value of the land was from $4,500 to $5,000, which was a fair price, irrespective of the oil strike near by. From the date of the escrow until January 4, 1929, when the defendant Petty gave notice of cancellation, the price continued to increase until on the last-named date the market value was fixed by witnesses as being between $12,500 and $17,500. The court found that at the date of the agreement the market value was $5,000, and, when breached, it had a market value of $12,500. The court also found that defendant Petty acted in bad faith. We think the court's finding is justified by the evidence that, without waiting for a report or return on the check, without waiting until January 14, 1929, for the recordation of the deed, and without waiting for the receipt of the certificate of title, as he had agreed to do, he at-

tempted to cancel the escrow, and had then sold the property in such a manner as to prevent the enforcement of the agreement and to still retain, for all practical purposes, one-half of the income of the property. In any event, this was a question of fact to be determined by the court. It is true that some of this evidence is disputed, but it was for the trial court to determine the conflict, and, having done so, its findings thereon may not be disturbed by us.

[11] It appears from the foregoing that the consideration for the contract was adequate; that as to the defendant it was just and reasonable; and that the defendant acted in bad faith. In such cases the proper measure of damage is fixed by section 3306 of the Civil Code as follows: "The detriment caused by the breach of an agreement to convey an estate in real property is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach. * * *" Hansen v. Hevener, 69 Cal. App. 337, 231 P. 361. This rule was followed in the present case. The plaintiff was allowed such detriment plus the $500 paid to defendant Petty out of escrow and which he still retains.

A review of the entire record, including all of the evidence, satisfies us that there has not been a miscarriage of justice. Article 6, § 4½, Const. of Cal. The judgment should be affirmed, and it is so ordered.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

125 Cal.App. 489

BRAREN v. RELIABLE CARPET WORKS, Inc., et al.

Civ. 8305.

District Court of Appeal, First District, Division 1, California.

Aug. 25, 1932.

1. Appeal and error ⇐78(3).

No appeal lies from order sustaining demurrer without leave to amend.

2. Corporations ⇐690.

That California corporation succeeded to business of Delaware corporation did not in itself make California corporation responsible for alleged fraudulent acts previously committed by Delaware corporation in sale of its stock.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Waldo W. Braren against the Reliable Carpet Works, Inc., and others. From the judgment, plaintiff appeals.

Affirmed.

Brooks Gifford and William E. Fox, both of Pasadena, for appellant.

Cooper & Collings and Lewis D. Collings, all of Los Angeles, for respondent Reliable Carpet Works, Inc.

KNIGHT, J.

This action is one of three brought to rescind the sale of corporate stock purchased by plaintiffs from the Reliable Carpet Works, Inc., a Delaware corporation, and to recover the purchase price paid therefor upon the ground that the sales were brought about by fraudulent representations made by the representatives of said corporation; and that the permit issued by the corporation commissioner to sell said stock was under suspension at the time these sales were made. Waldo W. Braren is the plaintiff in the present action, which involves a single sale of stock for the sum of $250; Mary Braren and Edlyn B. Welch are the plaintiffs in the other actions, each of which involves two sales of stock for the sum of $500. The actions were brought against "Reliable Carpet Works, Inc., a Delaware Corporation, Reliable Carpet Works, Inc., a California Corporation, R. D. Cornell, H. L. Cornell, Robert W. Kearney, and H. T. Brookmiller," the individuals named being, so the complaint alleges, "the duly authorized and acting agents" of the Delaware corporation. The California corporation demurred to the complaint in each action, and its demurrers were sustained without leave to amend, and from the rulings made in that behalf plaintiffs have taken these appeals.

[1] The decisions hold uniformly that no appeal lies from an order sustaining a demurrer without leave to amend, and that, if such appeal is attempted, it will be dismissed; that the only method of reviewing such a ruling is by way of appeal from the final judgment, if unfavorable, thereafter entered in the action. Brunson v. Santa Monica, 25 Cal. App. 383, 143 P. 792; Worth v. Witt, 62 Cal. App. 134, 216 P. 90; Riordan v. Zube, 50 Cal. App. 22, 195 P. 65; Sahakian v. City of Los Angeles, 91 Cal. App. 737, 267 P. 571; Bryant v. Kelly, 203 Cal. 721, 265 P. 817; 2 Cal. Jur., pp. 156, 157. In the present cases minute orders were entered on October 1, 1929, the day on which the demurrers were heard, setting forth the trial court's rulings. And later, on October 31, 1929, there was filed in each action a document, signed by the trial judge, entitled "Judgment," which, after re-

citing that the demurrer came on regularly for hearing, "ordered, adjudged and decreed that the said demurrer be sustained without leave to amend with costs of $3.50." A similar document was reviewed in the case of O'Neill v. Hicks, 101 Cal. App. 374, 281 P. 531, and was held to be lacking in the essentials of a final judgment because it contained no adjudication finally and irrevocably dismissing the demurring party from the action; and for that reason the court refused to entertain an appeal taken therefrom.

[2] Notwithstanding the defect mentioned, we have examined into the merits of the appeals here presented, and find no error in the trial court's ruling because there is nothing whatever alleged in the complaints tending to connect the California corporation directly or inferentially with any of the sales of said stock or with any of the transactions about which plaintiffs complain. On the contrary, it affirmatively appears therefrom that all of the charges of irregularity and fraud are directed against the Delaware corporation and its agents; that the permit which it is claimed was suspended covered only the stock of the Delaware corporation; that plaintiffs negotiated for the purchase of the stock of that corporation only, and that the stock thereof was sold and delivered to them; that all fraudulent representations claimed to have been made pertained exclusively to the business of the Delaware corporation, and it is alleged that the same were made by "the defendants, R. D. Cornell, and H. L. Cornell as the duly authorized agents" of that corporation. The only reference to the California corporation is contained in an allegation made on information and belief to the effect that at the time of its incorporation the Delaware corporation conveyed to it, without any consideration, all of its assets, and that the California corporation carried on the business at the same place, with the same equipment, and under the same officers. In this connection plaintiffs cite several cases, notably Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 348, 181 P. 780, and Strahm v. Fraser, 32 Cal. App. 447, 163 P. 680, to the effect that a corporation may not evade its just debts by reorganizing under a new name and continuing the same business with practically the same stockholders and directors. But it is evident that the rule mentioned has no application here, because the present cases are not founded on any such theory, the sole purpose thereof being to recover from certain alleged tort-feasors the amount of money paid to them by plaintiffs as a result of an alleged fraudulent sale of personal property to plaintiffs by said tort-feasors; and, as stated, nowhere in said complaints was it charged, nor is it now claimed, that the California corporation participated in the slightest manner in any of the transactions relating to the alleged fraudulent sales or in the illegal issuance of the stock sold to plaintiffs; or that it received any benefit whatever therefrom. Therefore the mere fact that it may have succeeded to the business of the Delaware corporation would not in itself serve as legal ground for holding it responsible for certain alleged fraudulent acts previously committed by its predecessor in interest in the sale of the latter's stock.

The purported judgment from which the appeal herein was taken is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

125 Cal.App. 785

Mary BRAREN, Plaintiff and Appellant, v. RELIABLE CARPET WORKS, Inc. (a California Corporation) et al., Defendants and Respondents.

Civ. 8306.

District Court of Appeal, First District, Division 1, California.

Aug. 25, 1932.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Brooks Gifford and William E. Fox, both of Pasadena, for appellant.

Cooper & Collings and Lewis D. Collings, all of Los Angeles, for respondent Reliable Carpet Works, Inc.

KNIGHT, J.

The merits of the within appeal were considered and determined in Braren v. Reliable Carpet Works, Inc., et al. (Cal. App.) 13 P.(2d) 972, this day decided. For the reasons and upon the grounds set forth in the decision therein, the purported judgment appealed from herein is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

125 Cal.App. 785

Edlyn B. WELCH, Plaintiff and Appellant, v. RELIABLE CARPET WORKS, Inc. (a California Corporation) et al., Defendants and Respondents.

Civ. 8307.

District Court of Appeal, First District, Division 1, California.

Aug. 25, 1932.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Brooks Gifford and William E. Fox, both of Pasadena, for appellant.

Cooper & Collings and Lewis D. Collings, all of Los Angeles, for respondent Reliable Carpet Works, Inc.

KNIGHT, J.

This is a companion appeal to Braren v. Reliable Carpet Works, Inc., et al. (Cal. App.) 13 P.(2d) 972, and Braren v. Reliable Carpet Works, Inc., et al. (Cal. App.) 13 P.(2d) 973, the merits of which were considered and determined in Braren v. Reliable Carpet Works, Inc., et al. (Cal. App.) 13 P.(2d) 972, this day decided. For the reasons and upon the grounds set forth in the decisions therein, the purported judgment appealed from herein is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

125 Cal.App. 417

UNION TRUST CO. OF SAN DIEGO v. NOVOTNY et al.

Civ. 1035.

District Court of Appeal, Fourth District, California.

Aug. 20, 1932.

Appeal and error ⇐627(2).

Appeal must be dismissed where no bill of exceptions was settled or transcript prepared, and statutory period for filing record had expired (Code Civ. Proc. §§ 650, and 953a; Rules for Supreme Court and District Courts of Appeal, Rule 5).

Appeal from Superior Court, San Diego County.

Action by the Union Trust Company of San Diego against John A. Novotny and another. From the judgment, defendants appeal. On motion to dismiss appeal.

Appeal dismissed.

C. J. Novotny, of San Diego, for appellants.

Stearns, Luce & Forward, of San Diego, for respondent.

JENNINGS, J.

This is a motion by respondent to dismiss an appeal on the ground of failure to file a transcript.

The motion is supported by the certificate of the county clerk, and the facts therein stated are not contradicted. From said certificate it appears that notice of appeal was filed on October 31, 1931, but that no bill of exceptions has been settled as provided by section 650, Code of Civil Procedure, and no transcript has been prepared in accordance with the provisions of section 953a of said Code. The statutory period within which such a record may be prepared and filed has expired. The motion must therefore be granted and the appeal dismissed. Catania v. Guccione, 60 Cal. App. 717, 214 P. 495; People v. Berkeley Chiropractic College, 103 Cal. App. 139, 283 P. 981; rule V of the Rules for the Supreme Court and District Courts of Appeal. It is so ordered.

We concur: MARKS, Acting P. J.; MORTON, Justice pro tem.

125 Cal.App. 418

UNION TRUST CO. OF SAN DIEGO v. NOVOTNY.

Civ. 1036.

District Court of Appeal, Fourth District, California.

Aug. 20, 1932.

Appeal and error ⇐627(2).

Appeal must be dismissed where no bill of exceptions was settled or transcript prepared and statutory period for filing record had expired (Code Civ. Proc. §§ 650, 953a; Rules of Supreme Court and District Courts of Appeal, Rule 6).

Appeal from Superior Court, San Diego County.

Action by the Union Trust Company of San Diego against C. J. Novotny. From the judgment, defendant appeals. On motion to dismiss appeal.

Appeal dismissed.

C. J. Novotny, of San Diego, in pro. per.

Stearns, Luce & Forward, of San Diego, for respondent.

JENNINGS, J.

Motion to dismiss appeal.

In support of its motion to dismiss the appeal herein for failure to file a transcript of the record within the prescribed time, respondent has filed the certificate of the county clerk as required by rule VI of the Rules of the Supreme Court and District Courts of Appeal. The facts set forth in such certificate are uncontradicted, and it therefrom appears that notice of appeal was filed on October 31, 1931, and that neither a bill of exceptions has been settled as provided by section 650, Code of Civil Procedure, nor has a transcript been

prepared in accordance with the provisions of section 953a, Code of Civil Procedure. It further appears that the statutory period within which a record on appeal may be prepared and filed under either method has expired. Respondent's motion should therefore be granted (General Motors, etc., Corp. v. Holman, 63 Cal. App. 17, 217 P. 1086; People v. Berkeley Chiropractic College, 103 Cal. App. 139, 283 P. 981).

The appeal is dismissed.

We concur: MARKS, Acting P. J.; MORTON, Justice pro tem.

125 Cal.App. 457

PEOPLE v. HOPKINS et al.

Cr. 2199.

District Court of Appeal, Second District, Division 2, California.

Aug. 23, 1932.

Rehearing Denied Sept. 6, 1932. Hearing Denied by Supreme Court Sept. 22, 1932.

Burglary ⇐41(1).
Robbery ⇐24(1).

Evidence *held* sufficient to sustain conviction under information charging burglary and robbery.

Appeal from Superior Court, Los Angeles County; R. M. Rankin, Judge.

H. F. Hopkins, Frank Digiovanni, and another were convicted on an information charging burglary and robbery, and defendant last named appeals.

Affirmed.

W. T. Kendrick, Jr., of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

IRA F. THOMPSON, J.

The defendants were accused in an information containing two counts, filed by the district attorney of Los Angeles county, with the crimes of burglary and robbery. The defendant Digiovanni was also accused of the prior conviction of a felony, which he admitted. The jury found all the defendants guilty, but Digiovanni alone prosecutes this appeal from the judgment and from the order denying his motion for a new trial.

Appellant's counsel presents two reasons why we should reverse the judgment. They are: (1) Insufficiency of the evidence to sustain the verdict, and (2) misconduct on the part of the district attorney.

There can be no dispute about the following essential facts: On the evening of September 28, 1931, between 9:15 and 10 o'clock p. m., appellant's codefendants walked into a cider mill located at 2820 East Anaheim street in Long Beach. The two stood on opposite sides of the employee in charge and each pressed the muzzle of a gun against his body, commanding him to get the money. He told them it was in a drawer, whereupon one of them ripped part of the drawer off and took its contents, amounting to between $2 and $3. The employee was then taken out into an alley back of the store and released. In other words, there is no question raised concerning the commission of the crime or participation in it by the defendants Hopkins and Brown. But was Digiovanni a participant? For the purpose of answering this question we now set down the testimony connecting appellant with the offenses.

About the same time that the robbery occurred one Harold Nixon observed a Nash sedan going down Anaheim street without any lights. Approximately fifteen minutes later the witness saw the same automobile parked in front of a café next door to the cider mill. He also testified that after observing the owner of the shop and talking to him for a moment he started for a pool hall a short distance away and noticed two men on the inside of the shop and one in a car—the Nash sedan; that the sedan then moved away from the curb and drove east on Anaheim to Gladys street, at which place it made a "U" turn, coming back west on Anaheim. The license number of the car was 8T2573. Nixon then, in company with one Baumgardner and officer Halford, in another car, followed the Nash around as it continued its apparently aimless circling in the neighborhood of the robbery. They lost sight of it on two or three occasions, but it reappeared. Finally they stopped the Nash on Orizaba street between Tenth and Eleventh, at which time appellant was driving and the defendant Brown was a passenger.

Officer Halford testified that at the time of the arrest appellant was driving and that on the way to the police station the defendant Brown remarked that "he would have to get in communication with Eddie Roberts." At the station the appellant and Brown were questioned by officer Springer. The last named testified that appellant first gave his name as Frank De Young and stated that he had known the defendant Brown for about six years; also that he had borrowed the Nash automobile from one Eddie Roberts, whom he had known for about two months, who was doing "a little bootlegging" and who lived at about 860 South Burlington street, in Los Angeles. He also stated that he (the appellant) owned a model A Ford

sedan which he had left at Roberts' home. This Ford was found parked on Miramar street in Los Angeles, alongside of the property at 250 South Burlington—in front of which was parked a Ford automobile belonging to the defendant Brown. The evidence discloses further that the Nash sedan had been purchased by the defendant Hopkins under the name of Joe Stone. Hopkins had a key to the premises, and no person by the name of Eddie Roberts was discovered thereabouts.

We are satisfied that the evidence recited is ample justification for the jury's conclusion that appellant was a participant. First, there was the aimless driving around of the automobile in the neighborhood of the crime during the time that it was being committed. Second, the appellant was driving one of the identified defendants immediately after the commission of the crime. Third, was the untruthful statement by appellant concerning the ownership of the Nash sedan; and fourth is the fact that the automobiles of both Brown and appellant were found parked near the house rented and occupied by the defendant Hopkins. The jury undoubtedly concluded, as was its right, that the three men had met at this house earlier in the evening, had gone to the scene of this offense in the Nash sedan and that appellant had been elected by them to do the driving and aid them in their "getaway." As was said in People v. Moe, 116 Cal. App. 740, 3 P.(2d) 354, 359: "Every juror knows that to make a quick and therefore a successful 'getaway' the active perpetrators of a crime must have some person, more passive than they in his connection with the offense, occupying and in charge of the car which has brought them to the scene. This is true for the reason that the motor must be started upon the appearance of the direct perpetrators, or must be kept running during their absence. The car must be occupied by such a person to the end that it be not hemmed in by other cars if the scene be in a heavily traveled district, that no occurrence or mishap of any other character shall impair or render inefficient the instrumentality provided for a getaway, and that the occupant of the car may keep a lookout for a possible interference by the police, or for other untoward events likely to interfere with a consummation of the crime and lead to an arrest of the active participants in it, and by some concerted signal apprise them of the danger. These passive but handy participants in the commission of crime are so necessary a part of the paraphernalia of criminal machinery that they have names which distinguish them from those for whom they act as chauffeurs, being called lookouts, lookees or doormen." The jury was warranted in the present case in concluding, as they undoubtedly did, that appellant acted in the capacity so designated.

Nor do we find anything upon which to base a conclusion that the district attorney was guilty of misconduct. The witness who added to his answer that appellant had told him that "he had done time for section 146 C. V. A." was immediately cautioned by the court and the objectionable part of the answer stricken and the jury admonished. We cannot indulge the presumption that the district attorney knew that the revolver could not be identified. Perhaps he had good reason to believe otherwise. Furthermore, after the court had ruled upon the objection the judge instructed the jury to treat the gun as though they had never seen the object. So far as the argument of the prosecution is concerned, we fail to see that it extended beyond the limits of legitimate argument.

Judgment and order affirmed.

We concur: WORKS, P. J.; STEPHENS, Justice pro tem.

125 Cal.App. 402

MONTEREY PARK COMMERCIAL & SAVINGS BANK v. BANK OF WEST HOLLYWOOD et al.

Civ. 8260.

District Court of Appeal, First District, Division 2, California.

Aug. 19, 1932.

Rehearing Denied Sept. 17, 1932.

1. Deeds ⇐56(2).

Deed is effectively delivered if grantor in parting with conveyance thereby intends to divest himself of title.

2. Deeds ⇐58(1).

Bank's transmission of duly executed deed to another bank for purpose of closing escrow, without attaching conditions to delivery to grantees, constituted delivery (Code Civ. Proc. § 1933).

3. Vendor and purchaser ⇐240.

One claiming as bona fide purchaser of lands must aver and prove that he purchased in good faith without notice and for valuable consideration.

4. Deeds ⇐69.

Bank which had deed in its possession for ten days before transmitting it for delivery could not, in cancellation suit, rely upon its own negligence in failing to discover error in amount of property conveyed.

5. Judgment ⇐253(1).

Judgment for damages in excess of amount prayed for is erroneous.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by the Monterey Park Commercial & Savings Bank against the Bank of West Hollywood and others. Judgment for plaintiff, and defendants appeal.

Reversed.

Superseding opinion in 10 P.(2d) 112.

David E. Fulwider, of Hollywood (Harold A. Fendler, of Los Angeles, of counsel), for appellants.

Goudge, Robinson & Hughes and David A. Sondel, all of Los Angeles, for respondent.

JAMISON, Justice pro tem.

This was an action to cancel a certain deed from plaintiff to defendant Leslie Miller for a certain tract of land containing ten acres in Yucaipa Valley and also to cancel a deed conveying the same land from said Leslie Miller to defendants George W. Miller and Elizabeth Miller, or in the event that title to said land cannot be decreed to plaintiff that it recover from defendants the sum of $7,200, that being the reasonable value of said lands.

Judgment was rendered for plaintiff canceling the said deeds and requiring said Millers to reconvey said land to plaintiff within thirty days after its rendition, and in the event of their failure to do this that plaintiff have judgment against them and the defendant Bank of West Hollywood for the sum of $8,000. All of the said defendants filed motions for new trials, and said motions having been denied, they have appealed.

No judgment was taken against defendant Alice A. Dodd.

In October, 1926, defendant Alice Dodd and her husband conveyed to respondent by their deed a five-acre tract of land known as block 82, hereafter also referred to as tract No. 1, and also a tract of land known as block 70, hereafter also referred to as tract No. 2.

Thereafter on January 4, 1927, the said Alice Dodd, acting through her husband, J. D. Dodd, entered into an escrow with appellant Leslie Miller by which she agreed, in exchange for certain property to be deeded to her by said Miller, to convey to him the ten-acre tract designated as tract No. 2.

On January 14, 1927, appellant Leslie Miller and said Alice Dodd entered into another escrow known as escrow No. 258 in which she agreed to convey to said appellant the said five acres embraced in tract No. 1 in exchange for certain property to be conveyed to her by said Miller. Both of these escrows were deposited with appellant Bank of West Hollywood as escrow holder.

On March 25, 1927, respondent wrote a letter to said Bank of West Hollywood, inclosing therewith a deed, wherein respondent was named as grantor and the said Leslie Miller as grantee, conveying to the said Miller the said five acres described as block 82, in which referring to escrow 251A the following instructions were given to appellant: "You are at liberty to use this deed in accordance with instructions from Mr. J. D. Dodd which I understand he has given you in connection with the above mentioned escrow and escrow No. 1058 at the Wilshire National Bank, when you are able to remit to this Bank the sum of $4,000.00, together with two Trust Deeds, one in the amount of $2,000.00 on property located near the town of Artesia, Los Angeles County, the other for $1200.00 on property located on Bentley Avenue, North Pico, Blvd., in the City of Sawtelle."

On April 11, 1927, appellant Bank of West Hollywood wrote respondent as follows, referring to escrow 251A: "We are returning herewith deed from yourselves to Leslie Miller, covering Block 82, according to Map of Subdivision 3 of a part of Yucaipa Valley, County of San Bernardino, State of California, except portions thereof, as this property is being placed in another escrow, and withdrawn from our escrow," and returned therewith respondent's deed to Miller for said block 82. On April 12, 1927, respondent sent this deed to the Wilshire National Bank with instructions similar to those given the Bank of West Hollywood.

On April 14, 1927, appellant Bank of West Hollywood wrote respondent inclosing a deed from respondent to Leslie Miller for the ten acres described as block 70 and, referring to escrow No. 251A, said: "As the report on condition of title covering property shown in enclosed deed shows title in your Bank we would ask that you have same executed and returned to us. Trusting you will give this matter your attention as we are ready to close the escrow."

On April 25, 1927, the said deed having been signed and acknowledged by the officers of respondent bank, it returned said deed to the Bank of West Hollywood with the following letter, referring to escrow 251A: "Enclosed herewith Corporation Grant Deed executed by the Monterey Commercial and Savings Bank in favor of Leslie Miller, a single man. Trusting you will find same correct and satisfactory we are."

One of the officers who signed and acknowledged the last-named deed in behalf of respondent bank was O. R. Clanton, the vice president thereof. He testified that when he signed the said deed he supposed it contained the same description that was contained in the deed sent to the West Hollywood Bank on March 25, 1927, nor had he at any time received any information, from any source, that a deed containing any other description than that contained in the deed of March 25, 1927, had been requested or required of respondent bank.

W. L. Parslow, who was the secretary of respondent bank and as such signed and acknowledged said last-named deed, testified substantially to the same facts as those testified to by witness Clanton.

Upon the receipt by it of said last-named deed, the Bank of West Hollywood caused said deed to be recorded, and delivered it to said Leslie Miller when said escrow No. 251A was closed.

The escrow in the Wilshire Bank was never closed, but was abandoned and the said deed of appellant to Leslie Miller was never delivered to him, but was returned through the mail to respondent.

Respondent never received any consideration for its deed conveying to Leslie Miller the said block 70, consisting of the ten-acre tract.

On February 9, 1927, appellant Bank of West Hollywood wrote the said Alice A. Dodd stating that it had talked with her husband advising him that it would be necessary to have a deed from respondent to close escrow 251A, and also a copy of its articles of incorporation for filing in San Bernardino county, and on March 4, 1927, a copy of said articles was sent appellant bank by respondent for use in connection with said escrow No. 251A.

On or about August 1, 1927, the said Leslie Miller conveyed said block 70 to his parents, George W. Miller and Elizabeth F. Miller. This deed was recorded on August 11, 1927. Respondent claims that it had no knowledge regarding the delivery of its deed for block 70 to Leslie Miller until in January, 1928, and that on the 28th of that month it wrote the Bank of West Hollywood to return said deed or transmit to it the said $7,200 in cash and mortgages. Appellants contend that the findings are not supported by the evidence.

One of the findings is that the Bank of West Hollywood intentionally misled respondent into believing that the deed to the ten acres in block 70 sent it on April 14, 1927, was in fact the deed for the five-acre tract in block 82. We find no support in the evidence for this finding. Nor are the findings that the Bank of West Hollywood at all times knew or should have known that respondent at no time intended to deposit with the Bank of West Hollywood its deed for the said 10 acres in block 70, nor to permit any conveyance of said 10 acres to be made to said Miller, and that the Bank of West Hollywood concealed from respondent the fact that said deed covered the said 10 acres in block 70 instead of the 5 acres in block 82 and concealed from respondent that Leslie Miller had executed a deed to the 10 acres in block 70 to George W. Miller and Elizabeth F. Miller are not supported by the evidence. There are other findings of the court which the evidence fails to support, but we will limit our discussion of them to one more only.

The court found that the conveyance from Leslie Miller to George W. Miller and Elizabeth F. Miller was executed without any good or valuable consideration and that said conveyance was received by them with full knowledge of respondent's rights. That each and all of said Millers, at the time the said deed from respondent to Leslie Miller was recorded, knew that said deed had been deposited with the Bank of West Hollywood upon condition that respondent should receive therefor the said sum of $4,000 and the said trust deed prior to its delivery to Leslie Miller and that at all times the said Millers knew that respondent had received nothing of value for said deed. We find no evidence supporting these findings.

Respondent contends that the deed from it to Leslie Miller for the ten acre tract in block 70, escrow No. 251A, was never delivered to him. While the court found that this deed was delivered by the Bank of West Hollywood to Leslie Miller, there is no finding whether or not respondent delivered said deed to Leslie Miller or caused it to be delivered to him.

The Bank of West Hollywood claims that having informed respondent that escrow No. 251A was ready to be closed and that said deed was necessary for that purpose, and inasmuch as respondent, in its letter enclosing said deed, attached no conditions to its delivery to Leslie Miller in completing the closing of said escrow, it was authorized to make the delivery. Some color is given to this claim of appellant Bank of West Hollywood from the fact that in its letter of February 9, 1927, to Alice A. Dodd it stated to her that it would be necessary to have a deed from respondent for the said ten-acre tract before escrow No. 251A could be closed, and there is a presumption that respondent had knowledge of the contents of this letter from the fact that in this same letter a request was made for a copy of respondent's articles of incorporation and on March 11, 1927, respondent sent a copy of said articles to be used in connection with said escrow No. 251A.

[1, 2] Respondent contends that there was not a delivery of the deed executed by it to Leslie Miller and cites authorities to the effect that a deed placed in escrow is not an absolute delivery, but these cases are not in point for the reason that in all of them a condition was attached to the delivery and it was held that a delivery could not be made until there was a compliance with the conditions.

In the instant case no conditions were attached to the delivery of the deed to Leslie Miller. Respondent had notice that escrow 251A was ready to be closed and that its deed was necessary to close same, without attaching any conditions to its delivery to Leslie Miller it executed the deed and returned it to the Bank of West Hollywood to be delivered to the grantees. The true test under which

delivery is to be determined is in ascertaining whether in parting with the possession of the conveyance the grantor thereby intended to divest himself of title. If he did there was an effective delivery of the deed. Williams v. Kidd, 170 Cal. 631, 151 P. 1, Ann. Cas. 1916E, 703; Hotaling v. Hotaling, 193 Cal. 368, 224 P. 455, 56 A. L. R. 734; Kimbro v. Kimbro, 199 Cal. 344, 249 P. 180. It was stipulated that the deed from respondent to Leslie Miller was duly executed by respondent. Section 1933 of the Code of Civil Procedure provides that the execution of an instrument is the subscribing and delivering of it, with or without affixing a seal. And it has been held that execution includes delivery. Williams v. Kidd, supra; Worthley v. Worthley, 33 Cal. App. 473, 165 P. 714; Van Valkenburgh v. Oldham, 12 Cal. App. 572, 108 P. 42.

[3] Appellants Miller contend that as they are innocent purchasers for value without notice, that judgment should have been rendered in their favor. To entitle one to protection as a bona fide purchaser he must aver and prove that he purchased in good faith, without notice and for a valuable consideration. 25 Cal. Jur. 844; Kenniff v. Caulfield, 140 Cal. 34, 73 P. 803; County Bank of San Luis Obispo v. Fox, 119 Cal. 61, 51 P. 11. The evidence fails to show that appellants George W. Miller and Elizabeth F. Miller paid a valuable consideration, and that their purchase of the ten-acre tract was made in good faith and without notice. Nor is there evidence that Leslie Miller paid a valuable consideration for said tract. The burden was upon them to prove these facts. Kenniff v. Caulfield, supra.

[4] Respondent claims that the deed for the ten-acre tract was signed and executed by two of its officers by mistake; that they thought they were signing a deed for the five-acre tract. It appears that this deed for the ten-acre tract was in the possession of respondent for upwards of ten days before it was sent back to the Bank of West Hollywood. Ample opportunity was therefore given it to learn just what tract was contained in the description of the land. In the absence of fraud or undue influence a party cannot rely upon his own negligence or carelessness. Placer County Bank v. Freeman, 126 Cal. 90, 58 P. 388.

In the case of Greve v. Taft Realty Co., 101 Cal. App. 343, 281 P. 641, 645, Mr. Justice Plummer, delivering the opinion of the court, said: "The third proposition which we have to consider is whether the testimony of two of the officers, that they did not read the agreement and did not intend to bind the corporation, can be given any legal effect. The authorities all seem to be in the negative, a few of which we will cite." He thereupon cited, among others, Silva v. Silva, 32 Cal. App. 115, 162 P. 142; Knox v. Modern Garage, etc., Shop, 68 Cal. App. 583, 229 P. 880; and Gridley v. Tilson, 202 Cal. 748, 262 P. 322.

[5] Respondent had judgment for $8,000. The prayer was for $7,200 only. A judgment for damages in excess of the amount prayed for is erroneous.

We are of the opinion that for the reasons heretofore set forth the judgment should be reversed and it is so ordered.

We concur: NOURSE, P. J.; SPENCE, J.

124 Cal.App. 733

KEY SYSTEM TRANSIT CO. v. CITY OF OAKLAND et al.

Civ. 8192.

District Court of Appeal, First District, Division 1, California.

July 16, 1932.

1. Municipal corporations ⇐57.

Constitutional and statutory provisions, depriving cities of powers respecting public utilities in conflict with those of railroad commission, *held* applicable to cities governed by freeholders' charters (Const. art. 11, §§ 6, 8; art. 12, § 23, as amended in 1911; St. 1911, Ex. Sess., p. xlviii).

2. Constitutional law ⇐12.
Statutes ⇐225½.

Special constitutional or statutory provision on one branch of subject controls general provision relating thereto.

3. Municipal corporations ⇐46.

Effect of election, at which electors voted to relinquish city's control over public utilities to railroad commission, was to surrender all of city's powers over them in conflict with commission's powers (Const. art. 12, § 23, as amended in 1911 and 1914; St. 1911, Ex. Sess., p. xlviii).

4. Municipal corporations ⇐57.

Constitutional amendments and statute *held* not to revest in municipalities powers of control over public utilities (Const. art. 12, § 23, as amended in 1911 and 1914; St. 1911, Ex. Sess., p. xlviii; St. 1915, p. 1274, § 2 (b).

Const. art. 12, § 23, as amended in 1914, provides that powers of counties, cities, etc., respecting public utilities shall cease after passage of laws conferring such powers on railroad commission so far as conflicting with latter's powers, but that section shall not affect such powers relating to local, police, sanitary, and other regulations as majority of municipality's electors vote to retain, while St. 1915, p.

1273, repealing the Hewitt Act (see St. 1911, Ex. Sess., p. xlviii), defines "powers of control" in section 2 (b) (St. 1915, p. 1274, § 2 (b), as all such powers of municipalities to supervise and regulate relationship of such utilities with their customers, but not with general public in matters affecting latter's health, convenience, and safety.

5. Constitutional law ⇐23.

Constitutions must be considered prospective, not retrospective, in operation, unless contrary intention clearly appears.

6. Street railroads ⇐72.

Whether one-man cars shall be operated on traction lines, constituting unified service in several cities and counties, *held* not "municipal affair" beyond railroad commission's control, though such cars are operated over line wholly within one city only (Const. art. 12, § 23, as amended in 1914).

[Ed. Note.—For other definitions of "Municipal Affairs," see Words and Phrases.]

7. Municipal corporations ⇐70.

State has control of public streets and highways, except in so far as relinquished to municipalities.

8. Municipal corporations ⇐70.

Doubt as to whether regulation of use of public street is municipal affair must be resolved in favor of state's legislative authority.

9. Municipal corporations ⇐661(1).

Municipality may regulate operation of vehicles on public streets, in absence of affirmative action by state Legislature or railroad commission exercising power to regulate public utilities, but cannot enact regulations conflicting with those of Legislature or commission.

10. Street railroads ⇐72.

Power to regulate number of men operating street car is germane to subject of regulation and control of public utilities by railroad commission (Const. art. 12, § 23, as amended in 1911 and 1914; St. 1911, Ex. Sess., p. xlviii; St. 1915, p. 1274, § 2 (b).

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Suit by the Key System Transit Company, a corporation, against the City of Oakland and others. From a judgment for plaintiff, the city and certain other defendants appeal.

Affirmed.

C. Stanley Wood, City Atty., Homer W. Buckley, Asst. City Atty., John W. Collier, Deputy City Atty., and Preston Higgins, former City Atty., all of Oakland, for appellants.

Brobeck, Phleger & Harrison, of San Francisco, Chapman, Trefethen & Chapman, of Oakland, and Frank S. Richards, of San Francisco (James S. Moore, Jr., and Kenneth Ferguson, both of San Francisco, of counsel), for respondent.

PER CURIAM.

An appeal by defendant city of Oakland, a municipal corporation, and certain of its officers from a judgment enjoining the enforcement of ordinance numbered 4240, N. S., adopted October 1, 1928, which required all persons operating electric street cars within the city to maintain upon each of said cars while containing passengers a motorman and a conductor.

On December 19, 1928, the district attorney of Alameda county instituted a prosecution against the plaintiff and one of its employees, charging a violation of the ordinance in that they operated a one-man street car on what is known as the "Twenty-Third Avenue street car line," which is wholly within the municipality. A plea of not guilty was entered, and the present action was brought to enjoin the prosecution on the grounds that the municipality was without power to pass the ordinance, and that, assuming it had jurisdiction to regulate the manner of operating cars, the ordinance was an unreasonable exercise of the police power.

The material provisions of the ordinance are:

"Section One. Every person, company or corporation operating street cars within the city of Oakland by means of electricity shall provide and maintain upon each of such cars while containing passengers at least two employees, to wit, a motorman and a conductor, during all the time said car is in motion within said city, each of said employees to be an adult not less than eighteen years of age excepting as hereinafter provided.

"Section Two. The council may grant by ordinance permission to operate one-man street cars over such lines and upon such conditions as it may prescribe after an application made therefor."

The trial court found that plaintiff operates a street railway within the municipality and elsewhere in the counties of Alameda and Contra Costa; that its system is a unified service, operating under franchises granted by various cities and towns, and that different traction division lines, of which the line hereinbefore mentioned was one, together with plaintiff's bus lines, transfer passengers to others both in and without the incorporated area served; further, that on October 15, 1928, plaintiff filed with defendant city its application requesting authority to continue to operate one-man cars over its Twenty-Third avenue and other lines, which the court found

it had been doing for several years previous to the adoption of the ordinance, and that the application was denied on November 13, 1928; that on October 16, 1928, the plaintiff also filed an application with the railroad commission for authority to continue such operation, and on November 3, 1928, after a hearing at which defendant municipality was represented, the commission made its order permitting one-man cars to be operated on said Twenty-Third avenue line and other lines of the company. It was also found that on February 17, 1914, pursuant to the provisions of chapter 40 of the Statutes of California, Extra Session 1911, page 168, defendant municipality submitted to its qualified electors the proposition whether it should retain its powers of control over public utilities; that on that date at an election duly and regularly held a majority of said electors voted not to retain such control, but that the same should be vested in the railroad commission; and thereafter on February 25, 1914, in accordance with the statute a certified copy of the order declaring the result of the election was duly filed with the commission. The trial court concluded that jurisdiction to regulate the operation of railways within the municipality vested exclusively within the railroad commission; that the regulation of plaintiff's lines was a general, not a local, matter; and that consequently the ordinance was void. The court expressly declined to pass upon the second objection made to the validity of the ordinance.

[1, 2] Defendants contend, as stated in their brief, that "the provisions of section 23 of art. 12 of the Constitution of the State of California (prior to its amendment in 1914) and the 'Hewitt Act' (chap. 40, Statutes Extra Session 1911) cannot be held applicable to cities operating under freeholders' charters; in other words, they were designed and intended to apply to all cities other than those having freeholders' charters," and that "sec. 23 of art. 12 of the Constitution, even though by its provisions specifically declared not subject to or limited by any other provision of the Constitution, is nevertheless limited by sections 6 and 8 of art. 11 thereof relating to charter cities." Said section 23, as amended October 10, 1911, provided that the railroad commission should have such power to regulate public utilities as should be conferred upon it by the Legislature, authority to confer such power being declared therein "to be plenary and to be unlimited by any provision of this Constitution"; and that after the passage by the Legislature of laws conferring powers upon the commission respecting such public utilities all powers respecting such public utilities vested in municipal councils or other governing bodies of the cities of the state existing at the time of the passage of such laws should cease so far as such powers conflicted with the powers so conferred upon the commission.

The section contained the provision that "this section shall not affect such powers of control over any public utility vested in any city and county, or incorporated city or town as, at an election to be held pursuant to laws to be passed hereafter by the legislature, a majority of the qualified electors voting thereon of such city and county, or incorporated city or town, shall vote to retain, and until such election such powers shall continue unimpaired; but if the vote so taken shall not favor the continuation of such powers they shall thereafter vest in the railroad commission as provided by law." (See St. 1911, Ex. Sess., p. xlviii.)

Section 82 of the Public Utilities Act (St. 1911, Ex. Sess., p. 62) contains the same proviso; and it has been held that as the result the powers of control over existing public utilities vested in any city were still retained and did not pass to the commission until at an election held for that purpose pursuant to the statute the qualified electors of the city voted not to retain such powers. Title Guarantee, etc., Co. v. Railroad Commission, 168 Cal. 295, 142 P. 878, Ann. Cas. 1916A, 738.

The charter of defendant city grants to the council the power to regulate utilities within the municipality; and it has been held that the provisions of section 8 of article 11 of the constitution with regard to the amendment of freeholders' charters are exclusive. Blanchard v. Hartwell, 131 Cal. 263, 63 P. 349; In re Pfahler, 150 Cal. 71, 85, 88 P. 270, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911; Garver v. Council of City of Oakland, 96 Cal. App. 560, 274 P. 375.

Defendants contend that to give effect to section 23 of article 12 and the Hewitt Act, where a municipality is operating under a freeholders' charter which grants power to its governing body to regulate public utilities, would result in an amendment of the charter in a manner not sanctioned by the Constitution. But section 23 makes provision for the surrender for a specific purpose by the act of its qualified electors of a power vested in a municipality, no distinction being made between cities organized under general laws and those operating under freeholders' charters; and it is manifest from a reading of the two sections that it was not the intention to use the comparatively cumbrous procedure provided for the amendment of charters in ordinary cases rather than the more direct method of determining the will of the electors as provided by section 23. That such was the fact was assumed, if not decided, in the following cases: Oro. Elec. Corporation v. Railroad Commission, 169 Cal. 466, 147 P. 118; City of San Jose v. Railroad Commis-

sion, 175 Cal. 284, 165 P. 967. And, while not controlling, such has been the construction placed thereon by the railroad commission over a long period. Long Beach Chamber of Commerce v. Pacific Elec. Ry. Co., 2 C. R. C. 455; Id., 3 C. R. C. 611.

A special provision on one branch of a subject controls a general provision relating thereto, and will prevail in its application to the subject-matter so far as coming within its particular provisions (Bateman v. Colgan, 111 Cal. 580, 44 P. 238; Civic Center Ass'n v. Railroad Comm., 175 Cal. 441, 449, 166 P. 351); and it is our conclusion that section 23 of article 12 of the Constitution and the Hewitt Act were intended to apply to cities governed by a freeholders' charter as well as to others. This section was amended on November 3, 1914, and provides that: "From and after the passage by the Legislature of laws conferring powers upon the Railroad Commission respecting public utilities, all powers respecting such public utilities vested in * * * the several counties, cities and counties, cities and towns * * * shall cease so far as such powers shall conflict with the powers so conferred upon the Railroad Commission; provided, however, that this section shall not affect such powers of control over public utilities as relate to the making and enforcement of local, police, sanitary and other regulations other than the fixing of rates vested in any city and county, or incorporated city or town, as at an election to be held pursuant to law, a majority of the qualified electors * * * shall vote to retain; and until such election such powers shall continue unimpaired. * * *" On June 7, 1915, chapter 646 of the Statutes of 1915 (St. 1915, p. 1273) was approved. This act, which became effective August 8, 1915, repealed the Hewitt Act, and provided the method to be followed in determining whether the powers of control retained by incorporated cities should be surrendered to the commission. Section 2(b) of the statute provided that: "The term 'powers of control,' as used in this act * * * means all powers of control vested in such municipality or municipalities to supervise and regulate the relationship between such public utilities, or such class or classes of public utilities, and their present or prospective customers, consumers or patrons, but said term shall not be construed to include the powers of control vested in any municipality or municipalities to supervise and regulate the relationship between such public utilities, or such class or classes of public utilities, and the general public in matters affecting the health, convenience and safety of the general public, including matters such as the use and repair of public streets by any public utility, the location of the poles, wires, mains or conduits of any public utility, on, under or above any public streets, and the speed of common carriers operating within the limits of the municipality."

[3, 4] There can be no doubt but that the effect of the election was to surrender all powers of control over public utilities in so far as they conflict with the powers conferred upon the commission; but appellants contend that it may reasonably be concluded from the language of the act of 1915 that in adopting that portion of the constitutional amendment of 1914 which reads "* * * such powers of control over public utilities as relate to the making and enforcement of local, police, sanitary and other regulations, * * *" the people intended to give the words "powers of control" used in the amendment of 1911 the same meaning as that given in said section 2(b) of the Statute of 1915. As stated, the amendment of 1911 declared the right of the Legislature to confer powers upon the commission respecting public utilities to be plenary, and that after the passage of laws conferring such powers "all powers" respecting the same vested in the governing bodies of municipalities should cease in so far as they conflicted with those conferred upon the commission, provided that the section should not affect powers of control over utilities vested in the municipalities which the electors should vote to retain; but if a vote should not favor such retention the same should vest in the commission as provided by law. With this exception neither the amendment of 1911 nor the Hewitt Act referred to the powers to make or enforce local police, sanitary, or other regulations by municipalities. The Statute of 1915 is not as broad as the constitutional provision. It made no attempt to define the term "powers of control" used in the Constitution, but expressly provided that "as used in this statute" the term should have the meaning therein stated. The term as used in the Hewitt Act and in the Constitution both before and after the amendment is plain and unambiguous, and there is nothing in any of the provisions mentioned, whether constitutional or statutory, which indicates an intention to revest in the municipalities any of the powers which had previously been surrendered to the commission.

[5] Constitutions, like statutes, are to be considered prospective and not retrospective in their operation unless a contrary intention clearly appears. 5 Cal. Jur., Constitutional Law, § 12, p. 561. As is said in Cooley on Constitutional Limitations: "This rule is one of such obvious convenience and justice that it must always be adhered to in the construction of statutes unless in cases where there is something on the face of the enactment putting it beyond doubt that the legislature meant it to operate retrospectively. Retrospective legislation, except when designed to cure formal defects, or otherwise operate remedially, is commonly objectionable in

principle and apt to result in injustice and it is a sound rule of construction which refuses lightly to imply an intent to enact it; and we are aware of no reasons applicable to ordinary legislation which do not on this point apply equally well to constitutions."

[6-8] As stated, the trial court found in effect that the plaintiff's traction lines constituted a unified service extending and operating through several cities and counties, and the question whether one-man cars should be operated thereon was not a municipal affair. Whether a surrender of powers previous to the constitutional amendment of 1914 resulted in a relinquishment of all power to make and enforce local police and sanitary measures affecting the health or safety of the general public which might incidentally or indirectly affect the acts of public utilities we need not decide, for while it appears to have been taken for granted in the following cases that an order by the commission within the powers conferred upon it by the Public Utilities Act controls, without regard to the question whether the matter sought to be regulated constituted a municipal affair: Oro Electric Corporation v. Railroad Commission, 169 Cal. 466, 147 P. 118; City of Los Angeles v. Central Trust Co., 173 Cal. 330, 159 P. 1169; Civic Center Association v. Railroad Commission, supra, it has been held that where it is a state and not a municipal affair, and the power conferred upon the commission is cognate and germane to the regulation of public utilities, the commission has exclusive jurisdiction, City of San Bernardino v. Railroad Commission, 190 Cal. 562, 213 P. 980. It has also been held that the term "municipal affair" is not a fixed quantity, but fluctuates and changes with conditions (18 Cal. Jur., Municipal Corporations, § 96, p. 785; Helmer v. Superior Court, 48 Cal. App. 140, 191 P. 1001), and that if a matter is of general concern to the inhabitants of the state outside of such city it is not a municipal affair within the meaning of the constitution. Whyte v. Sacramento, 65 Cal. App. 534, 224 P. 1008; Gadd v. McGuire, 69 Cal. App. 347, 231 P. 754; Sloane v. Hammond, 81 Cal. App. 590, 598, 254 P. 648. The state in its sovereign capacity has the original right to the control of public streets and highways; and except in so far as that control is relinquished to municipalities it remains with the Legislature (Western Union Telegraph Co. v. Hopkins, 160 Cal. 106, 116 P. 557); and while the regulation of the use of public streets is of special interest to the people of a municipality, it does not follow that such regulation is a municipal affair; and if there is a doubt it must be resolved in favor of the legislative authority of the state. Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A. L. R. 1172.

In the case last cited it was held that the regulation of traffic upon the streets of a city is not a municipal affair within the meaning of section 6 of article 11 of the Constitution; and in Re Murphy, 190 Cal. 286, 212 P. 30, that the regulation and control of travel and traffic along public roads, streets, and highways of the state, if ever it was such, has ceased to be a matter of local concern. Atlas, etc., Co. v. City of Burbank, 202 Cal. 660, 262 P. 334. See, also, Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118; Sincerney v. Los Angeles, 53 Cal. App. 440, 200 P. 380; Whyte v. City of Sacramento, supra. So the regulation of the manner of constructing crossings of streets and railroads within municipalities has been determined to be a state and not a municipal affair; and the same is true of the operation of railroads extending beyond the municipality. Civic Center Association v. Railroad Commission, supra; Western Union Telegraph Co. v. Hopkins, supra; City of San Bernardino v. Railroad Commission, supra.

In City of Los Angeles v. Central Trust Co., supra, 173 Cal. at page 327, 159 P. 1169, 1170, it was said that: "The opening, laying out, and improving of streets within a city, and the regulation of the manner of their use, are matters of much greater concern to its inhabitants than to the people of the state at large, and they are clearly municipal affairs, * * *" citing Sinton v. Ashbury, 41 Cal. 531; People v. Holladay, 93 Cal. 241, 29 P. 54, 27 Am. St. Rep. 186; Hellman v. Shoulters, 114 Cal. 136, 44 P. 915, 45 P. 1057; Byrne v. Drain, 127 Cal. 663, 60 P. 433. But neither the quoted decision nor the cases cited therein involved the question of the regulation of the use of streets for traffic purposes, and are not in conflict with the other cases hereinabove cited.

[9, 10] In the absence of any affirmative action by the Legislature, or by the commission acting in the exercise of a power to supervise or regulate public utilities, a municipality may of course adopt regulations respecting the manner of operating vehicles upon public streets; but where the field is occupied by the Legislature, or by the commission acting within its powers, a municipality may not enact regulations which conflict therewith. Ex parte Daniels, supra; In re Murphy, supra; Atlas, etc., Co. v. City of Burbank, supra; Switzler v. Atchison, T. & S. F. R. Co., 104 Cal. App. 138, 285 P. 918. Here the line over which the one-man street car was operated is wholly within the city of Oakland; but this fact is not decisive, as regulations respecting the number of men to be employed in the operation of such cars as well as those governing the speed, or prescribing other precautions to avoid accidents, are essentially regulations controlling travel and traffic on public streets; and, in accordance with the rulings in the above cases, are not matters of purely local concern. Furthermore, the power to so regulate is manifestly "cognate and germane to the subject of regu-

lation and control of public utilities." East Bay, etc., District v. Railroad Commission, 194 Cal. 603, 229 P. 949, 953.

The further claim was made by plaintiff that the ordinance is unconstitutional in that it deprives the company of its property and the use thereof in violation of the Fourteenth Amendment of the Federal Constitution; and this contention finds support in the recent case of Shreveport Railways Co. v. City of Shreveport (D. C.) 37 F.(2d) 910; Id. (C. C. A.) 38 F.(2d) 945; Id., 281 U. S. 763, 50 S. Ct. 462, 74 L. Ed. 1172, involving facts similar to those in the case at bar. This ground of complaint, however, was not passed upon by the trial court; and, we being satisfied for the other reasons stated that the ordinance is void as against plaintiff, it will be unnecessary to consider this question.

The judgment is affirmed.

125 Cal.App. 618

PEOPLE v. FACTOR.

Cr. 2221.

District Court of Appeal, Second District, Division 1, California.

Aug. 31, 1932.

1. Robbery ⇐24(1).

Evidence *held* sufficient to support conviction for robbery.

2. Criminal law ⇐1159(5).

Sufficiency of state's witness' identification of defendant and weight to be given testimony of alibi witnesses were fact questions which appellate court could not review.

3. Robbery ⇐23(1).

In robbery prosecution, value of property taken was immaterial, so that inquiry regarding value on cross-examination was properly excluded (Pen. Code, § 211).

4. Witnesses ⇐383.

Witness cannot be impeached by contradicting him upon collateral matters.

5. Witnesses ⇐383.

Where complaining witness in robbery prosecution had stated on cross-examination that he had not been in financial difficulties, excluding question whether relative had not assisted witness before robbery *held* not error.

6. Witnesses ⇐318.

Where evidence showed defendant spent night preceding robbery at apartment of divorced wife, evidence regarding where defendant slept that night *held* properly excluded where character of divorced wife, defendant's witness, was not in issue (Code Civ. Proc. § 2053).

7. Criminal law ⇐1170(1).

Sustaining objection to question regarding defendant's removal of coat when returning to apartment on morning of robbery, but not asking directly whether defendant was armed, *held* not reversible error.

8. Criminal law ⇐785(8).

Instruction that character of witnesses as shown by evidence should be considered in determining credibility *held* not erroneous.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Morris Factor was convicted of robbery, and he appeals.

Affirmed.

William I. O'Shaughnessy, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

TAPPAAN, Justice pro tem.

The appellant, Morris Factor, was charged by an information with the crime of robbery, duly tried before a jury, and found guilty. He appeals from the judgment entered upon the verdict and from the order denying his motion for a new trial.

[1, 2] The facts, as disclosed by the record, are briefly as follows: On the morning of November 2, 1931, one Anderson, a wholesale jeweler's agent, was alone in his office in an office building in the city of Los Angeles. At about the hour of 9:45 a. m., in response to a knock upon his office door, he unlocked and opened the door and was confronted by two men with drawn guns. They entered the office, closed the door, and forced Anderson to open the safe in the office. One of the men kept Anderson covered with a gun, while the other removed jewelry to the value of some thousands of dollars from the office safe. The men were in the office for some fifteen minutes and a large electric light was lighted during a great part of the time that they were in the office. Anderson was required to sit in a chair, and one of the men, whom Anderson afterwards identified as appellant, sat in a chair some few feet away, unmasked, while the jewelry was being removed from the safe. The robbers bound and gagged Anderson and made good their escape. One of the robbers, the one afterwards identified by Anderson as appellant, carried, while in the office, a gun of somewhat unusual type, a Derringer. A gun of this type was found in appellant's bag when he was arrested some days later in San Francisco, and the box in which the gun had been inclos-

ed; it had the number of the gun upon it; and shells which fitted the gun were found in appellant's trunk in his apartment in Los Angeles. Appellant after his arrest, made various admissions to police officers which could reasonably have been construed by the jury to have been of an incriminating nature. Appellant at the trial denied that he took part in the robbery and attempted to prove an alibi. To this end appellant introduced the testimony of a number of witnesses, which if the jury had elected to believe, would have tended to establish appellant's alibi. There is ample and sufficient evidence in the record to support the jury's verdict finding appellant guilty. The question of the sufficiency of Anderson's identification of appellant and the weight to be given to the testimony of alibi witnesses is one of fact which an appellate court is not at liberty to review upon appeal.

[3, 4] Appellant's first specifications of alleged error present two questions of similar nature, and they can therefore be considered together. Appellant contends that the trial court erred in refusing to permit an inquiry into the value of the goods stolen; not permitting reference to testimony in that regard given at the preliminary hearing; and in refusing to permit examination as to the actual value of the goods stolen when that actual value had been ascertained. It appears from an examination of the record that the matter of the value of the goods stolen was inquired into, both upon the direct examination of the witness and upon cross-examination by appellant's counsel, the ruling to which appellant objects was made during the cross-examination of the witness, when he had been recalled to the witness stand at a later stage of the trial. If it was appellant's theory in the propounding of the question as to value merely to test the credibility of the witness, there is no justification in appellant's contention, as the matter had been inquired into when the witness had previously been examined. If it was appellant's idea to establish a ground of impeachment of the witness, the inquiry was one directed to an immaterial and collateral matter, and, therefore, not proper foundation for his impeachment. The value of the property taken under the circumstances of the instant case was immaterial. Section 211 of the Penal Code which defines robbery contains no requirement relative to the value of the personal property taken. So long as some or any personal property is feloniously taken, the crime is committed, provided that all other elements are present. People v. Stevens, 141 Cal. 488, 489, 75 P. 62.

In the case of People v. Dye, 75 Cal. 108, at page 112, 16 P. 537, 539, the court makes this statement which is pertinent to this subject: "A party cannot cross-examine his adversary's witness upon irrelevant matters for the purpose of eliciting something to be contradicted; and if such matters are drawn out, the court should stop the inquiry there. It is well settled that a witness cannot be impeached by contradicting him upon collateral matters."

[5] Appellant's next ground of appeal involves a ruling of the court sustaining an objection to the following question asked of the complaining witness upon cross-examination by appellant's counsel: "Q. Is it not a fact that one of your relatives, Mr. Pantages, had assisted you materially in the months preceding this robbery?" The witness had just stated in answer to a question of appellant's counsel that "he had not been in financial difficulties at any time since" he had been in Los Angeles. This answer of the witness directly denying that he was in "financial difficulties" was sufficient to enable appellant, if he elected so to do, to question the truth of the witness' statement by competent evidence, and permit the introduction of evidence of the character introduced in the case of People v. Neal, 75 Cal. App. 428, 243 P. 52, cited by appellant. The record fails to show that appellant made any attempt to avail himself of this privilege.

[6] There is no merit in appellant's contention that the court erred in the exclusion of testimony as to where appellant slept on the night preceding the robbery. The evidence shows that appellant spent the night at the apartment of a Mrs. West, who was one of appellant's witnesses on the question of his alleged alibi. Mrs. West was the divorced wife of appellant. It is appellant's contention that this ruling of the court deprived him of the right of showing that no "illicit relations existed between the witness and the appellant" and that "should color her testimony in his favor." The character of the witness was not in evidence or issue, and the prosecution had not sought to impeach her in the proceeding. The court properly excluded the evidence. Code Civ. Proc. § 2053.

[7] The court sustained an objection to a question propounded by appellant's counsel to Mrs. West having to do with whether or not appellant removed his coat, when he returned to her apartment on the morning of the robbery. Appellant avers that by this ruling he was debarred from showing that he was unarmed at this time. The question to which the objection was sustained was "State what he did in that regard," and referred directly to appellant's removal of his coat. Appellant's counsel never asked the direct question as to appellant's being armed at the time. Under the circumstances there was no reversible error in the ruling as made.

An examination of the record fails to disclose any prejudicial comments or statements made by the court during the trial.

[8] Appellant attacked a part of a general instruction given by the court where the following words were made use of: "The char-

acter of the witnesses as shown by the evidence, should be taken into consideration for the purpose of determining their credibility * * *." The question, as presented by appellant, is fully answered in the case of People v. Mohammed, 189 Cal. 429, 208 P. 963, where a similar instruction is upheld.

From an examination of the entire cause, as presented here, we are of the opinion that the record presents no error justifying a reversal of the judgment.

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; YORK, J.

125 Cal.App. 410

AMORE et al. v. DI RESTA.

Civ. 8361.

District Court of Appeal, First District, Division 2, California.

Aug. 19, 1932.

Rehearing Denied Sept. 17, 1932. Hearing Denied by Supreme Court Oct. 17, 1932.

1. Automobiles ⇐244(8).

Evidence supported verdict for plaintiffs in action for death of railway groundman crushed to death against tower truck when struck by automobile.

2. Appeal and error ⇐979(1).
New trial ⇐70.

Trial court may exercise wide discretion in granting new trials for insufficiency of evidence, and its order will not be disturbed, in absence of abuse of discretion.

3. New trial ⇐76(5).

$1,000 *held*, under evidence, inadequate damages for death of railway groundman killed when struck by automobile.

4. Trial ⇐119.

In action for death of railway groundman struck by defendant's automobile, remark of defendant's counsel to jury that railway was paying widow compensation *held* improper (St. 1917, p. 854, § 26, as amended by St. 1927, p. 1213).

5. Appeal and error ⇐977(2).
New trial ⇐9.

Ordinarily, whether issues are severable or so inseparably blended as to require that new trial be granted as to all issues is question for trial court, whose determination will not be disturbed, unless abuse of discretion appears.

6. New trial ⇐9.

In death case, that trial court granted new trial on issue of damages alone *held* not abuse of its discretion (Code Civ. Proc. § 377, and § 657 as amended by St. 1929, p. 841, § 2).

Granting new trial on issue of damages alone did not constitute an abuse of discretion in death case under Code Civ. Proc. § 377, which provides for the award of such damages as under all the circumstances of the case may be just, since the words "all the circumstances" have reference only to the circumstances bearing on the damage sustained by plaintiffs, such as the age of the deceased, his earning power, his probable expectancy, the relationship and extent of dependency of his heirs, and have no reference to the circumstances surrounding the killing.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Josephine Amore and others against Joe Di Resta. Verdict in favor of plaintiffs. From an order granting plaintiffs a new trial, defendant appeals.

Affirmed.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellant.

William M. Abbott, K. W. Cannon, Cyril Appel, and Ivores R. Dains, all of San Francisco, for respondents.

SPENCE, J.

This is an appeal by defendant from an order of the trial court granting plaintiffs a new trial "upon the issue of damages alone upon the ground of irregularity in the proceedings of defendant Di Resta by which plaintiffs were prevented from having a fair trial, and also upon the ground of insufficiency of the evidence to justify the verdict in respect of its amount."

The action was brought to recover damages for the wrongful death of one Joe Amore, who was the husband of plaintiff Josephine Amore, and the father of the two minor plaintiffs, Angelo Amore and Antonio Amore. The Market Street Railway Company had become liable for the death benefit provided by the Workmen's Compensation, Insurance and Safety Act and joined as a party plaintiff. The jury returned a verdict in favor of plaintiffs in the sum of $1,000, and the trial court thereafter granted a new trial upon the grounds above mentioned.

[1] Appellant contends that the trial court erred in granting the motion for new trial upon any ground, as "the record does not disclose a case of liability against defendant." Appellant apparently takes the position that the evidence was insufficient as a matter of law to support a verdict in favor of

respondents. This contention is entirely without merit. It is unnecessary to do more than briefly outline the testimony given by the numerous witnesses called on behalf of respondents. On March 26, 1929, Joe Amore was employed by the railway company as a member of one of its overhead line crews. He was a "groundman," charged with the duty of remaining on the ground to pass up materials to those working aloft and to divert traffic away from the large tower truck which was used by the crew in working on the overhead lines. The truck was painted a very bright red and had a large sign on the rear—"Danger. Keep Back 50 Feet." On the above date, at about 2:45 p. m., the truck was standing on the westerly street car track on Mission street just north of Sickles avenue. It was headed south in the direction of Daly City. Three members of the crew were working aloft while Amore was on the street 15 or 20 feet directly behind the truck facing away from the truck or in a general northerly direction. It was a clear sunny day. Appellant was driving his automobile in a southerly direction along the westerly track at a speed of 30 to 40 miles per hour, although the speed was slightly decreased upon approaching the truck. Amore waved with his left hand for appellant to turn so as to pass the truck on the west side, but appellant continued on, striking Amore, carrying him some 15 to 20 feet, and crushing him to death against the rear end of the tower truck. Amore had attempted to step aside when appellant's automobile was a short distance from him, but failed to get clear of appellant's car. Appellant testified that he did not see Amore or the tower truck until he had struck Amore. He attempted to explain the accident by stating that there was a truck traveling in front of his automobile which obstructed his view of the highway. He testified that this truck turned to the right to avoid a safety zone, and this necessitated his turning to the left to avoid the safety zone and the truck. It is at once apparent that there was ample evidence to support a verdict in favor of respondents. Appellant's explanation relating to another truck obstructing his view was contradicted by many other witnesses, but, even if true, it would not follow that he was absolved from liability. On the contrary, we are of the opinion that the only rational conclusion which the jury could have reached was that the death of the deceased was proximately caused by the negligence of appellant and without fault on the part of the deceased.

[2, 3] We will next consider appellant's contention that it was error to grant the motion on the ground of "insufficiency of the evidence to justify the verdict in respect of its amount." It is well settled that the trial court may exercise a wide discretion in granting new trials on the ground of insufficiency of the evidence and that its order granting or denying a new trial will not be disturbed, in the absence of a showing of abuse of discretion. Minor v. Foote, 100 Cal. App. 441, 280 P. 197; Tumelty v. Peerless Stages, 96 Cal. App. 530, 274 P. 430; Townsend v. Briggs, 88 Cal. 230, 26 P. 108; Mariani v. Dougherty, 46 Cal. 26; 2 Cal. Jur. 908. Although appellant argues that the award of $1,000 was adequate, the trial court was of the opinion that it was not. The evidence showed that Amore was a young man 30 years of age who had been steadily employed by the railway company since 1923 when he arrived from Italy. He came to this country to obtain work to support his family, having the intention of becoming a citizen and bringing his family here to live. He was a kind and loving husband and father, and "was very impatient to have his family with him." He went to Italy to visit his family in 1927 and returned in 1928. His wife was 30 years of age, and his sons were 8 years and 2 years of age respectively. He wrote to his wife twice a week while in this country, and sent her money every month for the support of herself and the children. He was earning the sum of $33.50 per week at the time of his death. The assistant superintendent of overhead lines for the railway company described Amore as a bright and energetic young man in perfect health and a steady worker. The American Experience Tables of Mortality show an expectancy of 35.33 years. It was stipulated that the funeral expenses were $150. We believe that the trial court was correct in its conclusion that the award was entirely inadequate. It necessarily follows that the trial court cannot be said to have abused its discretion in granting a new trial upon that ground.

[4] The conclusion we have reached makes it unnecessary to discuss appellant's contention that there was no prejudicial misconduct. It may be pointed out, however, that the main charge of misconduct arose out of a remark of appellant's counsel during his argument to the jury. He there stated, "Now, the Market Street Railway Company, this big soulless corporation, has paid or is now paying as workmen's compensation to this widow and these minor children the sum of about $5,000." This remark was wholly irrelevant and improper. Section 26, Workmen's Compensation Insurance and Safety Act, Stats. 1927, c. 702, p. 1213; Baroni v. Rosenberg, 209 Cal. 4, 284 P. 1111. We mention it merely because it undoubtedly misled and confused the jury. The inadequate verdict probably resulted, despite the admonition of the court, from a belief on the part of the jury that the widow and minor children would receive the amount awarded by their verdict in addition to the compensation.

[5, 6] The further contention is made that "the trial court abused its discretion in limiting a new trial to the issue of damages alone." By the amendment of 1929 to section 657 of the Code of Civil Procedure (St. 1929, p. 841, § 2), statutory approval was given to the general rule theretofore recognized that a trial court had the power to grant a new trial on the issue of damages alone. Tumelty v. Peerless Stages, supra. Ordinarily, the question of whether the issues are severable or so "inseparably blended" as to require that a new trial, if granted at all, be granted as to all the issues, is a question committed to the discretion of the trial court, and its determination of that question will not be disturbed, unless an abuse of discretion appears. Tumelty v. Peerless Stages, supra. It is appellant's contention, however, that such severance of the issues constitutes an abuse of discretion in death cases under section 377 of the Code of Civil Procedure which provides for the award of such damages "as under all the circumstances of the case may be just." The purport of appellant's argument is that the words "all the circumstances" include the circumstances giving rise to the death as well as the circumstances relating to the damage sustained, and that the issues are therefore "inseparably blended," and cannot be severed. As broad as the language of the section may be, we cannot agree with the appellant's construction. In our opinion, these words have reference only to the circumstances bearing upon the damage sustained by plaintiffs such as the age of the deceased, his earning power, his probable expectancy, the relationship and extent of dependency of his heirs and so forth, and have no reference to the circumstances surrounding the killing. To hold otherwise would mean that an award of damages in a death case might be made to include exemplary damages if the circumstances surrounding the killing were such as to incline the jury to award such damages. The history of said section 377 negatives the propriety of a construction which would permit such an award. As appointed out in Lange v. Schoettler, 115 Cal. 388, 47 P. 139, 140, the present wording of that section relating to damages was adopted in 1874 when the words "pecuniary and exemplary" previously used in the section were deleted. It was held in that case that, under the present wording of the section, exemplary damages could not be allowed, the court saying that the recovery is limited to the "probable pecuniary value of the life of the deceased to the relatives." We are therefore of the opinion that there is nothing in the wording of section 377 of the Code of Civil Procedure which leads to the conclusion that the issues are any more "inseparably blended" in a death case than are the issues in an action brought by an injured person to recover for his injuries. In the present case the trial court exercised its discretion by granting a new trial on the issue of damages alone, and we find nothing to indicate an abuse of discretion.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

125 Cal.App. 554

DILLER et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 8443.

District Court of Appeal, Second District, Division 2, California.

Aug. 26, 1932.

Rehearing Denied Sept. 23, 1932. Hearing Denied by Supreme Court Oct. 24, 1932.

Prohibition ⇐13.

Where insurer paid insurance into court, other defendants could not restrain court from hearing action pending appeal from order dismissing insurer.

Facts were that petitioners, together with insurance company and others, were made defendants in action on policy issued by insurer wherein certain contractors sought to recover for services and materials furnished in reconstruction of buildings on which petitioners held a mortgage; that insurer was granted leave to deposit in court amount in controversy, and was dismissed from action, and appeal was taken from such order. But the order was not a final determination of any issue before trial court, and petitioners could not be injured by hearing the question presented for decision.

Application by William Diller and another for a writ of prohibition against the Superior Court, in and for Los Angeles County.

Alternative writ discharged, and peremptory writ denied.

Willcox & Judson, of Los Angeles, for petitioners.

Everett W. Mattoon, County Counsel, and S. V. O. Prichard, Deputy County Counsel, both of Los Angeles, for respondent.

CRAIG, J.

The petitioners, together with an insurance company and others, were made defendants in an action upon a policy issued by said company wherein certain contractors sought to recover for services and materials furnished in reconstruction of buildings upon which the petitioners held a mortgage. The

insurer at the time of the trial was granted leave to deposit in court the amount in controversy, with interest, and was dismissed from the action, from which order an appeal was taken. The petitioners thereafter objected to the introduction of evidence upon the ground that an appeal was pending, which objection was overruled. They instituted this proceeding in prohibition, praying that the Superior Court be restrained from hearing and determining the action until such appeal be decided. The respondent interposed a demurrer to the application, and it is here contended that the appeal so taken does not constitute a bar to a trial of the issues between the remaining parties upon the merits as to the ownership of the funds.

It is not made to appear that the defendant company had or may have any other interest in the controversy before the trial court than as above stated, nor is it contended that its retention in the case would affect the question as to ownership of the insurance moneys or the amount, if any, which may be due to the plaintiffs or to either of the defendants. It must follow that the order was not, and was not intended to be, a final determination of any issue before the trial court, that it left the issues framed by the pleadings for determination and the entry of final judgment, and that the petitioners could not be injured by the hearing of the question presented for decision below, following which the parties might resort to such other available remedies as the ultimate event might suggest. Title Ins. & Trust Co. v. California Development Co., 159 Cal. 484, 114 P. 838; Gunder v. Gunder, 208 Cal. 559, 282 P. 794.

The alternative writ of prohibition is discharged, and the peremptory writ is denied.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

124 Cal.App. 752

PEOPLE v. O'ROURKE.

Cr. 1214.

District Court of Appeal, Third District, California.

July 18, 1932.

Rehearing Denied Aug. 2, 1932.

Hearing Denied by Supreme Court Aug. 16, 1932.

1. Automobiles ⇐351.

Information charging that defendant operated automobile without license, which had previously been revoked, *held* not demurrable because not stating facts constituting public offense (St. 1923, p. 517, § 73½, as added by St. 1931, p. 2110, § 19¼; p. 531, § 58, as amended by St. 1927, p. 1427, § 15; p. 535, § 74, as amended by St. 1929, p. 567; p. 553, § 112, as amended by St. 1929, p. 537, § 44; Pen. Code, §§ 951–953).

2. Indictment and information ⇐71.

Statute requires merely that language of information be plain, simple, and readily understandable (Pen. Code, §§ 951–953).

3. Automobiles ⇐351.

That information charging defendant with operating automobile without license did not allege facts showing lawful revocation of license *held* not ground for demurrer; lawfulness of revocation being question for determination from evidence (St. 1923, p. 517, § 73½, as added by St. 1931, p. 2110, § 19¼; p. 531, § 58, as amended by St. 1927, p. 1427, § 15; p. 535, § 74, as amended by St. 1929, p. 567; p. 553, § 112, par. 3, as amended by St. 1929, p. 537, § 44; Pen. Code, §§ 951–953).

4. Automobiles ⇐144.

Notice of revocation of defendant's license to drive automobile, mailed to defendant, *held* sufficient (St. 1923, p. 517, § 72½, as added by St. 1929, p. 523, § 25; p. 517, § 73½, as added by St. 1931, p. 2110, § 19¼; p. 531, § 58, as amended by St. 1927, p. 1427, § 15; p. 553, § 112, as amended by St. 1929, p. 537, § 44; p. 567, § 156).

Notice stated in substance that department of motor vehicles had received court record showing defendant's plea of guilty to violation of St. 1923, p. 553, § 112, as amended by St. 1929, p. 537, § 44, relating to the driving of motor vehicles while intoxicated, and stated that defendant's license was revoked. Notice was accompanied by certificate declaring that notice had been inclosed in sealed and stamped envelope addressed to defendant's post office address as shown by departmental records, and deposited in United States post office.

5. Automobiles ⇐144.

Motor vehicle department, in basing revocation of license to drive automobile on court record showing defendant pleaded guilty to driving while intoxicated, need not follow statute requiring hearings (St. 1923, p. 517, § 73½, as added by St. 1931, p. 2110, § 19¼; p. 534, § 73, as amended by St. 1929, p. 560, § 4; p. 553, § 112, as amended by St. 1929, p. 537, § 44; p. 567, § 156).

6. Automobiles ⇐132.

Statute directing that, on conviction of driving automobile while intoxicated, license of driver be suspended until he establishes financial responsibility, *held* constitutional

(St. 1923, p. 517, § 73½, as added by St. 1931, p. 2110, § 19¼).

7. Automobiles ⇨144.

Motor vehicle department's revoking driver's license on conviction of operating automobile while intoxicated *held* not invalid as being imposition of additional penalty or judicial act (St. 1923, p. 517, § 73½, as added by St. 1931, p. 2110, § 19¼; p. 534, § 73, as amended by St. 1929, p. 560, § 4; p. 553, § 112, par. 3, as amended by St. 1929, p. 537, § 44).

8. Automobiles ⇨144.

Statutes providing that on driver's conviction of certain offenses motor vehicle license "shall" be revoked or suspended *held* mandatory (St. 1923, p. 517, § 73½, as added by St. 1931, p. 2110, § 19¼; p. 534, § 73, as amended by St. 1929, p. 560, § 4).

[Ed. Note.—For other definitions of "Shall," see Words and Phrases.]

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

L. J. O'Rourke was convicted on a charge of operating a motor vehicle without having a legal and unrevoked license, and he appeals.

Affirmed.

A. H. Ludeman, of Red Bluff, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PLUMMER, J.

[1, 2] The defendant appeals from a judgment of conviction based upon a verdict following a trial wherein the information filed against him charged an offense in the following language (omitting title): "L. J. O'Rourke is accused by the District Attorney in the County of Tehama, State of California, by this information, of the crime of violation of the provisions of section 74 of the California Vehicle Act, committed as follows: The said L. J. O'Rourke, on or about the 9th day of January, A. D. 1932, at and in the County of Tehama, State of California, prior to the filing of this information, did wilfully and unlawfully drive and operate a motor vehicle upon the public highway, without having at said time, a legal and unrevoked operator's license authorizing him so to do; that prior to the 9th day of January, 1932, on or about the 17th day of November, 1931, the Department of Motor Vehicles of the State of California, did revoke the operator's license of L. J. O'Rourke, which license was numbered 240,486; contrary to the form, force and effect of the statute in such cases made and provided, and against the peace and dignity of The People of the State of California."

To this information the appellant interposed a demurrer, setting forth several grounds, to wit: That the facts stated in the information are not sufficient to constitute a public offense; that the information does not substantially conform to the requirements of sections 951, 952, and 953 of the Penal Code. The demurrer then attempts to raise the question that the information does not set forth facts showing that the department of motor vehicles lawfully revoked the operator's license theretofore issued to the appellant. A mere reading of the information shows that it is sufficient to notify the defendant of the offense with which he was charged. The language is plain, simple, and readily understandable, and that is all that the sections of the Penal Code require.

[3] Defendant is informed that he was driving an automobile, not having an operator's license authorizing him so to do. He is also informed of the revocation of the operator's license theretofore issued to him. Whether it was legally revoked was a question to be determined by the evidence introduced at the trial. The fact of revocation and the time of revocation was definitely stated.

[4] The record shows that on or about the 17th day of October, 1931, the defendant pleaded guilty of the violation of section 112 of the California Vehicle Act, in that he drove an automobile upon one of the highways of the state of California while in an intoxicated condition. Following the judgment rendered upon the defendant's plea of guilty, as just stated, the department of motor vehicles proceeded to revoke the license theretofore issued to the appellant, and notified the appellant of the action taken. The record shows that the notice sent to the appellant was made a part of the records of the department of motor vehicles, and constituted the form of action taken by the department in the matter of such revocation. We quote the same in full:

"November 17, 1931.

"Mr. L. J. O'Rourke, Red Bluff, California.

"Dear Sir: We are in receipt of abstract of court record from the Superior Court of Tehama County directing that on October 17th you appeared before that court on a charge of violation of section 112 of the California Vehicle Act, entered the plea of 'Guilty,' and received sentence thereupon. On account of this conviction and pursuant to the provisions of Section 112 of the act, your license to operate a motor vehicle upon the public highways of this State is hereby revoked.

"You are to surrender your operator's license No. 240,486, by forwarding same to this Department at Sacramento, immediately upon receipt of this letter.

"Very truly yours,

"E. Raymond Cato (Signature)

"Chief, California Highway Patrol.

"Approved: John A. McGilvray (Signature)
"Attorney, Department of Motor Vehicles.
"cc to J. R. Frank, Inspector
"cc to P. D. Red Bluff
"ETL"

"State of California, Department of Public Works Division of Motor Vehicles

"Certificate of Mailing

"The undersigned hereby certifies: That on this 20th day of November, 1931, as an employee of the Division of Motor Vehicles, he deposited in the United States Post Office at Sacramento, California, a copy of the annexed notice, inclosed in a sealed envelope with prepaid postage thereon, addressed to the person to whom the notice is directed, at the address indicated in said notice, which is the post office address of such person as shown by the records of the Division.

"B. A. Travis [Signature]
"Division of Motor Vehicles.

"State of California

"Division of Registration of the Department of Motor Vehicles

"I, Russell Bevans, Registrar of Vehicles, Division of Registration of the Department of Motor Vehicles, State of California, hereby certify that the attached is a true and correct copy of the records on file in the Division of Registration. Attest my hand this 3rd day of February, 1932.

"Russell Bevans,
"Registrar of Vehicles."

The record further shows that the appellant received the notification, but did not surrender his revoked operator's license. The California Vehicle Act does not describe any particular form to be followed by the department in effecting a revocation of an operator's license, but section 72½ of the act (as added by St. 1929, p. 523, § 25) does provide that notice shall be given thereof, and that the service of notice may be made by means of the United States mails. The provisions of section 72½ of the act appear to have been followed in all their details in giving the notice of revocation, and need not further be elaborated upon.

[5] The contention is made upon this appeal that the department should have followed the provisions of section 73 of the act (as amended by St. 1929, p. 560, § 4); that notice should have been given to the defendant of a time and place of hearing; that a hearing should have been held by the department, and then action taken thereon after such hearing. In making this contention, the appellant misconstrues the provisions of section 73. The section, if it were applicable to this case, would uphold the action taken by the department. That section provides: "The division shall forthwith revoke the license of any person, for a period of twelve months, upon receiving satisfactory evidence of the conviction, or of the entry of a plea of guilty and sentence thereupon, or of the forfeiture of bail of any such person, charged with the commission of any of the following crimes: (1) Manslaughter, resulting from the operation of a motor vehicle. (2) Any crime constituting a felony under the 'California vehicle act' or of any other felony in the commission of which a motor vehicle is used. (3) Convictions upon three charges of reckless driving all within a period of twelve months from the time of the first conviction." The remainder of the section applies only to cases where a complaint has been filed before the department, charging an operator of a motor vehicle with certain specified acts, and also with being incompetent to operate a motor vehicle. Under these conditions notice must be given to the person complained against, a hearing had, evidence taken, and the action of the department based thereon.

Section 58 of the California Vehicle Act (as amended by St. 1927, p. 1427, § 15) provides it shall be unlawful for any person to drive a motor vehicle upon a public highway in this state without first having obtained an operator's license. Section 74 (as amended by St. 1929, p. 567) provides that, when any person drives a motor vehicle after his operator's license has been revoked or suspended for certain specified reasons, and then also for any other reason provided in the act, he shall be guilty of a misdemeanor.

Section 156 of the California Vehicle Act (St. 1923, p. 567), as it has read for several years, requires the justice of the peace or police court wherein the conviction is had to forward an abstract thereof to the department, and also directs that the clerk of any court of record, within five days after final judgment of conviction of any violation of the provisions of the act, shall send to the division a certified copy of the conviction.

[6, 7] While counsel have called attention to the sections of the act to which we have referred, and based arguments thereon, the section by which this cause must be determined is numbered 73½ (as added by St. 1931, p. 2110, § 19¼), and reads as follows: "Whenever any person shall be convicted upon a charge of violation of any of the provisions of sections 112 or 141 of the California vehicle act, and time for an appeal shall have elapsed without an appeal having been taken, or after any said appeal has been taken and judgment of conviction affirmed, the clerk of the court in which said judgment was rendered, shall immediately report the facts to the division of motor vehicles, and the division of motor vehicles shall thereupon suspend the operator's or chauffeur's license of the person so convicted, and such suspension shall remain in effect unless and until the person so convicted and whose license is suspended shall give proof of

financial responsibility in accordance with the provisions of sections 36½ and 36¾ of the California vehicle act." That the provisions of this section relative to furnishing proof of financial responsibility before a license can be reissued, though not directly involved in this action, are constitutional, appears by the reasoning found in the case of Watson v. State Division of Motor Vehicles, 212 Cal. 279, 298 P. 481, where a somewhat similar provision found in section 73 of the California Vehicle Act is upheld as being a constitutional exercise of legislative power. This being true, there appears to be no valid objection to any of the provisions of section 73½, and its controlling power of this cause sustained, and the appellant's argument as to the invalidity of any action of the division of motor vehicles based upon the third paragraph of section 112 of the act (as amended by St. 1929, p. 537, § 44), as being the imposition of an additional penalty after judgment by the court, and also as a judicial act, may be disregarded.

[8] Realizing the indisposition in some cases to revoke or suspend an operator's license, the Legislature, by an act approved June 18, 1931 (St. 1931, p. 2099), in re-enacting and amending a number of the sections of the California Vehicle Act, added section 73½, which we have heretofore set forth. The language of section 73½, and also of the provisions of section 73 which we have quoted, are mandatory in form. Section 73 reads: "The division shall forthwith revoke the license of any person, for a period of twelve months." Section 73½ reads: "The division of motor vehicles shall thereupon suspend the operator's or chauffeur's license of the person so convicted," and that the suspension shall remain in force, etc.

The Legislature did not use the permissive word "may," but even that word, where the public interests are involved by the action of a ministerial officer, is often construed to take on the mandatory form. County of Los Angeles v. State of California, 64 Cal. App. 290, 222 P. 153; Stockton Plumbing & Supply Co. v. Wheeler, 68 Cal. App. 592, 229 P. 1020.

In 57 C. J. p. 548, the word "shall" is defined where it relates to a ministerial act from which it distinctly appears that the word is mandatory if the public interests are involved. It is there said: "In common, or ordinary parlance, and in its ordinary signification, the term 'shall' is a word of command, and one which has always, or which must be given a compulsory meaning; as denoting obligation. It has a peremptory meaning, and it is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears; but the context ought to be very strongly persuasive before it is softened into a mere permission," etc.

In the instant case the record shows that the appellant pleaded guilty of the offense of driving an automobile while in a state of intoxication; that a record of the conviction was forwarded to the division of motor vehicles, and the division of motor vehicles thereupon entered the order which we have set forth, and notified the defendant thereof. The circumstance of drunken driving is a fact sufficient to show that the construction of the word "shall" should not be "softened into a mere permission." The public interests and the public safety demand giving to the word "shall," in the sections we have quoted, a mandatory and imperative meaning. The department has no discretion in the matter. It is the duty of the department, upon receiving an abstract of the judgment, to perform the ministerial duty of revocation or suspension; it is in no sense a judicial act; it is purely ministerial and an obligation that cannot be legally avoided. It requires only a recital of the facts to show that public policy and public interest demand the construction which we are giving. Every intoxicated driver of a motor vehicle is a potential killer. The record of deaths on the highways from this cause evidences the insecurity of every man, woman, or child who happens to be there, when confronted by a driver whose judgment is clouded, and tendency to reckless driving immeasurably increased by the use of alcohol. Under such circumstances to hold that the word "shall" is only permissive and requires further investigation after receiving an abstract of judgment showing a violation of section 112 of the California Vehicle Act would amount to a legal travesty. The revocation or suspension of the operator's license is not the imposition of an additional penalty to the judgment of conviction. It is a part and parcel thereof, and under both sections 73 and 73½ of the act, in so far as they are applicable here, constitutes only that part of the legal penalty which the law inflicts as a part of the judgment of conviction.

The judgment is affirmed.

I concur: PRESTON, P. J.

WATSON v. CITY OF ALAMEDA et al.*

Civ. 8078.

District Court of Appeal, First District, Division 2, California.

July 26, 1932.

Rehearing Granted Aug. 25, 1932.

1. Highways ⇐198.
Municipal corporations ⇐756.
Statutes placing liability on cities and counties for negligence with respect to defects in streets should be strictly construed (St. 1923, p. 675, § 2).

2. Municipal corporations ⇐1016.
Legislature in giving right to sue public corporations may impose restrictions on exercise of that right.

3. Municipal corporations ⇐799.
City *held* not liable for injuries to pedestrian slipping on fresh paint which had just been laid to mark pedestrian lane, though no barriers or warning signs were erected (St. 1923, p. 675, § 2).

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Iris D. Watson against the City of Alameda, and others. Judgment for plaintiff, and defendants appeal.

Reversed.

Breed, Burpee & Robinson, of Oakland, for appellants.

Ford & Johnson, of San Francisco (Fletcher A. Cutler, of San Francisco, of counsel), for respondent.

NOURSE, P. J.

Plaintiff sued for damages for personal injuries. The cause was tried with a jury and plaintiff had a verdict for $9,000. From the judgment on the verdict defendant has appealed on typewritten transcripts.

Acting upon instructions from the chief of police, employees of the city of Alameda were engaged in marking out pedestrian lanes at the four crosswalks at the intersection of Park street and Santa Clara avenue in the downtown business section of the city; these lanes were being marked by painting eight-inch lines upon the street pavement, defining each lane nine feet in width. At about 10 o'clock a. m. of February 21, 1930, the lane crossing Park street on the northerly side of Santa Clara had been completed, and, while these employees were marking a similar lane across Santa Clara, and, while the first lines of paint were still wet, the plaintiff crossed this lane over Park street, and, as she reached a point near the easterly curb of Park street, she stepped over the lane and upon the line of wet paint. She slipped upon this paint and fell to the pavement. For the injuries resulting from this fall she sought to hold the city under the provisions of the act of 1923, St. 1923, p. 675 (Deering's General Laws, 1931, Act No. 5619).

On the appeal from the judgment, the defendant emphasizes two points—that plaintiff was guilty of contributory negligence as a matter of law in stepping outside of the marked lane and upon the lines defining the pedestrian traffic, and that she failed to prove notice of the condition as required by the act of 1923. We will limit our consideration to the second point.

Section 2 of that act places a liability for negligence upon counties, cities, and school districts "in all cases where the governing or managing board of such county, * * * or other board, officer or person having authority to remedy such condition, *had knowledge or notice* of the defective or dangerous condition of any such street, * * * and *failed* or *neglected, for a reasonable time after* acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected *for a reasonable time after* acquiring such knowledge or receiving such notice to take such action as may be *reasonably necessary* to protect the public against such dangerous or defective condition."

The complaint upon which this action is based alleged upon information and belief that the city council and the superintendent of streets had knowledge and notice of the existence of the wet paint upon the intersection, and that, prior to the accident, they took no action to remedy the dangerous and unsafe condition of the street, nor to warn or protect the public therefrom. In support of the allegation it was shown that the superintendent of streets instructed the employees to paint the crossing lanes under the orders from the chief of police and from this fact alone plaintiff contended, and the trial court so instructed the jury, that the knowledge and notice required by the statute should be implied to the municipality.

[1] It must be remembered that the provisions of section 2 of the act of 1923 imposing a liability upon public corporations for negligence are a departure from the general rule. Theretofore the settled rule was that such corporations were not liable in such cases while engaged in work in the course of a strictly governmental capacity. Perkins v. Blauth, 163 Cal. 782, 789, 127 P. 50; Winbigler v. Los Angeles, 45 Cal. 36, 38; South v. San Benito County, 40 Cal. App. 13, 16, 180 P. 354. Time and again our courts have held in accord with the general rule that such

liability could arise only from statutory enactment and that leave to sue therefor could be given only by governmental consent. Hence, when the Legislature enacted this statute it was creating a liability where none existed before, and the act was a special statute modifying a general rule of law. As such it requires a strict interpretation—one which gives meaning to all the exceptions and conditions under which the right to sue is granted.

This being so we cannot overlook the express limitations upon this right found in the portions of the act italicized in the quotation above. The reasonableness of these restrictions is apparent. The general rule of nonliability was made necessary because of the facility with which feigned claims were made against the public corporations and because of the insufficient and ineffective supervision over all the public employees whose negligence might cause injuries to others. It was based somewhat upon the old theory that public employees, though paid a compensation, were, nevertheless, engaged in a public service for the benefit of the public. Partly for the purpose of avoiding spurious claims for injuries and partly for the purpose of enabling the public authorities to discover and correct the acts of incompetent employees these limitations were placed in the 1923 act requiring knowledge and notice with a reasonable opportunity to remedy before the corporation itself should be liable. In other words, this statute continues the old principle that a public corporation is not liable for every act of negligence on the part of its servants and agents while engaged in its purely governmental capacity and therein is the all-important distinction between the rules of liability applicable to public and private corporations under the doctrine of "respondeat superior."

[2] The Legislature having the power to withhold the right to sue these public corporations it may, of course, impose restrictions upon the exercise of that right when it confers it. This having been done, it is not for the courts to say that these restrictions are unreasonable, and that, therefore, a party may sue without compliance with the conditions. It is rather for the courts to say that, if those restrictions and conditions are unreasonable, the right to sue was nevertheless granted subject to them and that no right has been granted independent of those conditions.

[3] With this in view, we find that the record here discloses that there was no proof, and no attempt to prove, that any officer "having authority to remedy such condition" had any knowledge or notice of the defective or dangerous condition of the street. The evidence discloses merely that the superintendent of streets, acting upon orders of the chief of police, ordered the painting done. The law presumes that he and his servants performed the work in a careful manner. There is nothing in the evidence to rebut this presumption. Respondent's case seems to be that the city's servants were negligent in failing to erect barriers or warning signs to enable pedestrians to avoid danger. This assumes that the "construction" was inherently dangerous, and that such warning signs were necessary. Neither of these is a fair assumption. The marking of the pedestrian lane was done for the protection of the public and we cannot assume that it was done in a careless manner; that those in charge had reason to believe that pedestrians would depart from the designated lane and walk upon the outer lines; that the freshness of the bright orange colored paint was not in itself a warning to pedestrians; or that any other "sign" would have avoided the accident. It is a matter of common knowledge that a warning that paint is wet is but an invitation to the public to test the truth of the statement.

But, in its final analysis the point is that the statute under consideration imposes a liability under certain restrictions where none before existed, and that, before recovery can be had under it, the claimant must plead and prove a compliance with those conditions. These conditions require that the municipal authorities have a reasonable opportunity after notice or knowledge of the dangerous condition to remedy it. Concededly if this condition arises while work is being done by the city which is *inherently dangerous*, or when the character of the work is such that it would be reasonably certain that injury would occur, such notice or knowledge may be inferred. Likewise when the defect or dangerous condition *had existed for a considerable length of time they* may establish constructive notice. Dawson v. Tulare Union High School, 98 Cal. App. 138, 142, 276 P. 424; Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118; Hook v. City of Sacramento (Cal. App.) 5 P.(2d) 643. Neither of these conditions is present here. We cannot say as a matter of law that the painted lines were inherently dangerous unless we should hold as a matter of law that the city should have anticipated that pedestrians would depart from the safe lane provided for them and attempt to walk upon the fresh paint. And there is no evidence tending to show how long before the accident the lines had been painted, but it is fair to assume from the evidence that it was a matter of but a few minutes.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

125 Cal.App. 465

PEOPLE v. WIGNALL.

Cr. 68.

District Court of Appeal, Fourth District, California.

Aug. 23, 1932.

1. Indictment and information ⇐161(4).

In prosecution for forging will, permitting district attorney at trial to amend information by correcting typographical errors in copies of will *held* not error (Pen. Code, § 1008).

2. Forgery ⇐38.

In prosecution for forging will with intent to defraud, prior will executed by deceased, if properly executed and entitled to probate, was admissible on intent.

3. Criminal law ⇐899.

Overruling objection to evidence could not be urged as error, where counsel's subsequent comments at trial amounted to abandonment of objection.

4. Criminal law ⇐1144(12).

Exclusion of letter introduced in evidence could not be presumed erroneous, where letter was not contained in record.

5. Criminal law ⇐1141(2).

Error cannot be presumed on appeal, but record must make error appear affirmatively.

6. Criminal law ⇐1170(2).

In prosecution for forging will, exclusion of merely cumulative evidence of friendly and confidential relation between defendant and deceased *held* harmless.

7. Criminal law ⇐1168(4).

In prosecution for forging will, refusal to strike testimony of decedent's half-brother that devisee under former will was decedent's daughter *held* not prejudicial error, where there was other evidence of daughter's identity.

8. Criminal law ⇐695(4).

In prosecution for forging will, admitting improper testimony concerning defendant's refusal of offer of district attorney to write copy of will for handwriting experts *held* not error as against objections that testimony led to confession or involved offer of reward.

9. Criminal law ⇐695(4, 5).

Exact ground of objection to evidence must be specified, and grounds not stated are waived.

10. Forgery ⇐44(2).

Evidence sustained conviction for forging will and causing filing thereof.

11. Forgery ⇐44(3).

Evidence *held* insufficient to sustain conviction for offering forged will in evidence in probate proceedings.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

W. Donald Wignall was convicted of forging a will, causing a forged will to be filed, and offering a forged will in evidence in probate proceedings and he appeals.

Affirmed in part, and reversed in part, with directions.

Raymond E. Hodge, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

MARKS, Acting P. J.

In an information filed by the district attorney of San Bernardino county, appellant was accused of the crimes of (1) forging the will of Charles Wellington Scott, deceased; (2) causing the forged will to be filed of record in the office of the county clerk of San Bernardino county; (3) offering the forged will in evidence in a probate proceeding entitled, "In the matter of the Estate of Charles Wellington Scott, deceased." In an amended information, in addition to these three accusations, appellant was charged with two prior convictions of felonies which he admitted. He was found guilty on all three counts of the information, and is here on appeal from the judgment and from the order denying his motion for new trial.

Charles Wellington Scott and appellant had been friends for several years. Scott had come to California because of ill health. He first lived with a relative near Owensmouth in Los Angeles county, later moving to the town of Cucamonga, where he purchased a residence, he and appellant living there together until January 3, 1931, when Scott was removed to a hospital in Los Angeles. He died January 16, 1931.

Appellant caused to be filed in the office of the county clerk of San Bernardino county, and offered for probate, a purported olographic will of deceased dated January 2, 1931. It was admitted to probate on March 2, 1931, and letters testamentary issued to appellant. While the record is not clear upon this point, it would seem that a contest was later instituted and probate of the questioned will denied upon the ground that it had not been wholly written, dated, and signed in the handwriting of the testator. This prosecution followed, with the results which we have indicated.

[1] After the jury had been impaneled and two witnesses had testified, the district attorney offered in evidence the olographic will of January 2, 1931. Counsel for appellant objected to its admission because of a variance between the will and the copies set forth in the information. The district at-

torney asked and was given leave to file an amended information correctly setting forth the purported olographic will. There was no error in this ruling, as the amended information merely corrected typographical errors in the copies set forth in the first information. Appellant was not misled nor prejudiced by the amendments. Furthermore, he was granted time in which to prepare and continue his defense. This procedure is now authorized by law. Section 1008, Pen. Code; People v. Jensen, 82 Cal. App. 489, 255 P. 781; People v. Foster, 198 Cal. 112, 243 P. 667.

[2] Appellant complains of the introduction in evidence of a purported will of deceased which had been drawn on December 23, 1930, basing his objection upon the ground that it was "incompetent, irrelevant and immaterial and as having no bearing upon any of the issues of the case." In view of the state of the record at that time, this objection was correctly overruled by the trial judge. The information charged that the will of January 2, 1931, was forged by appellant with the intent to defraud Lorraine Beulah Scott, the daughter, and Robert Johnson, the brother, of deceased. The will of December 23d made several specific bequests, among which was one to Robert G. Johnson, the same person as Robert Johnson. It also contained a residuary clause dividing the remainder of his estate "among all the heirs," which would include his daughter as a residuary legatee. The olographic will of January 2d bequeathed to Robert G. Johnson $100 and a gold watch, much less than he would have received under the former will, and left nothing to the daughter. It was a part of the people's case to prove, as alleged in the information, that the forgery of January 2d was committed with the intent to defraud the half-brother and the daughter. The will of December 23d was typewritten. It had been prepared by Barbara Wentworth and witnessed by herself and Mrs. J. M. Chadwick. If properly executed and entitled to probate, it became material to prove the terms of this will which was revoked by the forged will in order to prove the intent to defraud.

[3] Miss Wentworth was called as a witness in the court below. From her testimony it was apparent that the will had been properly executed and was entitled to probate. It was then offered and admitted in evidence. Later Mrs. Chadwick was called and testified that she did not sign the will in the presence of deceased nor at his request, and that he did not declare to her that it was his last will. Under this testimony, if taken as true, as it seems to have been by all counsel in the court below, the will had not been duly executed and could not be probated. We have carefully searched the extensive record, and cannot find that appellant moved upon any specific ground to strike the will of December 23d from the record. In fact, during the later days of the trial, in commenting on its introduction in evidence, counsel for appellant said: "It is hearsay, nothing but hearsay, yet I think it is proper hearsay testimony because it goes to a state of mind of the decedent." Again speaking on the same subject, he said: "Technically, I think my objection was wrong, * * * first it (the earlier will) is a part of the res gestæ, and second, that it shows a state of mind of the deceased." This shows an abandonment in the court below of the objection to the introduction of the will of December 23d, and for that reason the overruling of the objection should not be urged as error here.

[4, 5] Appellant complains of the refusal of the trial court to permit him to introduce in evidence a typewritten letter dated December 14, 1930, addressed to him, and which he maintains was written and signed by the deceased. The letter is not in the record, and in its absence we cannot determine its materiality nor whether or not its rejection was error. We cannot presume error. The record on appeal must make error appear affirmatively.

[6] Appellant complains of several rulings of the trial court whereby evidence of the friendly and cordial relations between himself and deceased, the confidence and trust reposed in him by deceased, and the services which he performed for deceased, was excluded. Even if we assume these rulings erroneous, they were not prejudicial. There is ample evidence in the record to show these relations, and the time, care, and attention which appellant gave deceased. The evidence excluded was cumulative of testimony amply showing these relations, which were not denied by the people.

[7] Appellant complains of a ruling of the trial court in refusing to strike the testimony of R. G. Johnson, the half-brother of deceased, that Lorraine Beulah Scott was the daughter of deceased and lived at Corona, N. Y. The witness was permitted to testify to these facts on direct examination without objection. On cross-examination it was developed that he had never seen the daughter. He had seen her picture and had received a telegram from her after her father's death. Appellant moved to strike this testimony on the ground that it was hearsay. This motion was denied. Appellant did not develop any evidence to show that the testimony sought to be stricken was not based on "a declaration, verbal or written," of the deceased. Section 1870, Code Civ. Proc.; Estate of Paulsen, 179 Cal. 528, 178 P. 143. There is other evidence in the record to establish the fact that Lorraine Beulah Scott was the surviving daughter of deceased. It is to be found in the testimony of appellant and in his petition to probate the will of January 2d.

Appellant bitterly complains of the admission in evidence of testimony of a deputy district attorney detailing conversations between the deputy and appellant, and also of testimony of a justice of the peace as to one of these conversations. The evidence of the deputy district attorney contains the following:

"Q. And during the course of that investigation did you have a conversation with the defendant, W. Donald Wignall? A. Yes, sir.

"Q. Where was that conversation? A. The first conversation was in the office of Mr. Mussell, the District Attorney, on November 16th, 1931.

"Q. Who was present? A. Mr. Wignall, the defendant; Mr. Mussell, the District Attorney; Deputy Sheriff Locke and myself.

"Q. Will you please state what that conversation was?

"Mr. Hodge: Objected to on the ground no proper foundation has been laid.

"Mr. Weller: It does not call for a confession, your Honor; it calls for the conversation and acts of the parties in respect to the conversation in question.

"The Court: Very well; on the representation of counsel the objection is overruled. A. Mr. Wignall had been arrested on Thursday, November 12th, and I had brought him down into the District Attorney's office on November 16th, the following Monday, Monday afternoon, about 3 o'clock in the afternoon. As soon as Mr. Wignall was brought in, I told him to sit down in a chair and I said, 'You understand, Mr. Wignall, a complaint had been filed in the Justice Court here in San Bernardino charging you with forging a will. We have not gone into the complete facts of the case as yet; we are just beginning to go to work on the case, and I want to talk to you about the matter, and if you will assist us in determining just what the facts are in connection with the case. We have no desire to prosecute you, or to take any action against you, if you are not guilty, and there is no one that can help us to better determine your guilt or innocence than you can, and we haven't at this time very much of your handwriting, and if you will give us some of your handwriting, it will be a very easy matter to determine whether you are guilty or innocent of the forging of this will.' I said, 'Have you an attorney?' And he said, 'I am making some arrangements; I have not any yet.' I said, 'If you have an attorney, I want him to be here.' I said, 'Understand we are investigating this criminal charge against you. Are you willing to help us as much as you can?' He said, 'What do you want?' I said, 'I will tell you what I will do. If you will sit down here at the desk and write out in your own handwriting the contents of this will, and allow us to submit that to a handwriting expert to determine whether you are guilty or innocent, that will assist us a great deal in determining whether you are guilty or innocent in the matter.' He said he didn't care to do that. I said, 'I will tell what I will do further. Clark Sellers is the handwriting expert employed by you in the will contest. I will go this much further, if you will write this will out in your own handwriting and allow us to submit the matter to Mr. Sellers —'

"Mr. Wissburg: We object to this testimony. It is an attempt at least to lead up to a confession of some sort, an attempt to get the handwriting which will be used against a party if the handwriting met the conditions required by Mr. King.

"Mr. King: I will lay the proper foundation. At the time he was in our office on this particular conversation and discussion, there was no force of any kind used against Mr. Wignall. There was no promise of immunity.

"Mr. Wissburg: Object to that line of testimony.

"The Court: Objection overruled. A. There was no promise of immunity or reward of any kind made to him. Everything that he said and everything that was done in that conversation was free and voluntary upon the part of Mr. Wignall. With that foundation I will proceed with the conversation I had with him. Going back a little bit—I said to Mr. Wignall, 'If you will sit down here and write out in your own handwriting the contents of this will, we will submit the handwriting to Mr. Clark Sellers of Los Angeles, and if he will give us an opinion that that handwriting and that will is not your handwriting, we will dismiss the case immediately and you will be released.'

"Mr. Wissburg: We further object on the ground that he did offer a reward or promise. Out of counsel's own mouth he condemns himself. He states he said, 'If you will do certain things we will do certain things,' and it comes within the exception of the rule as applied to this particular line.

"Mr. Weller: That could not possibly be considered a reward in the sense it is mentioned in the Penal Code.

"Mr. Wissburg: It was an inducement, if he would write out those things, 'We will do certain other things.'

"The Court: That is not the proposition. If he would write out a copy of the will in question, the same to be submitted to Mr. Sellers, and Mr. Sellers pronounced the will not in the handwriting of defendant, the case would be dismissed.

"Mr. Wissburg: We submit this as an inducement for the purpose of getting him to write out the will, and if perchance there

might be some resemblance he would either be dismissed or prosecuted. It comes absolutely within the rule.

"The Court: Objection overruled. A. He refused to do that. I said, 'Mr. Wignall, I will make one more proposition to you. If you will sit down here and write out in your own handwriting the contents of that will, we will submit that handwriting to any three recognized handwriting experts in the state, we will allow you to pick the experts, and the state will pay the bill for the investigation and it will cost you nothing, and if any one of those three experts say it is not in your handwriting, we will release you and dismiss the case.' He refused to do it. He said, 'If you will put that down in black and white, in writing, I might do it.' I said, 'You know mighty well if we tell you here we will do that, we will do it; and furthermore, there are too many witnesses for us to back up on a proposition of that kind.' He absolutely refused to do it.

"By Mr. Weller: Did you later have another conversation with Mr. Wignall concerning the same subject matter? A. Yes. The next day I was in the Justice Court before Judge Holbrook in the morning around nine or ten o'clock, and at the conclusion of the hearing that took place there at that time, Mr. Wignall, in an informal way—court had adjourned, and Mr. Wignall and myself and the Judge and the reporter were around the Judge's desk, and Mr. Wignall was proclaiming his innocence, and I said 'Judge, I will tell you the proposition I made to him and see what you think about it.' At that time there was no promise of immunity and no threats, and everything that was done was done freely and voluntarily. I said, 'Judge, here is the proposition I made to Mr. Wignall, and I make the proposition to him again at this time in your presence.' I said, 'Mr. Wignall, if you will stand here before the Judge and write in your own handwriting the contents of this will, we will have myself, the Judge, or yourself, submit that to your own handwriting expert, Mr. Sellers, that you employed in the will contest, and if Mr. Sellers will give us an opinion that that will is not in your handwriting, I will ask the court right now to dismiss the case upon Mr. Sellers' opinion.' He said, 'You will not put that in writing?' And I said, 'Here is the court reporter that can take down everything I say,' and I said to the reporter, 'You take down exactly what I say,' and I said, 'I will say it to you again.' I said, 'Mr. Wignall, if you will give me the contents of this will in your handwriting, and you pick any three handwriting experts in this state, I don't care who they are, I will let you do the picking, and I will let your attorney take the writing and submit it to those experts, and if any one of these three say this will is not in your handwriting, we will dismiss the case and release you at once, and I will now ask the judge to release you upon the receipt of an opinion from any one of those handwriting experts that this will is not in your handwriting.' Judge Holbrook then took it up and said, 'Anything the District Attorney's office says in that respect I know they will carry out, and if they don't, I will, and if Mr. King won't do it, the Court will see that this case is dismissed upon that condition.' And Mr. Wignall turned around and backed out, and said he wouldn't do it."

[8, 9] A study of the testimony quoted leaves the strong impression that at the time of these conversations the deputy district attorney was not satisfied as to the probable guilt of appellant, and, to assist in the investigation of the charges then pending in the justice's court, wanted to secure a copy of the will in appellant's handwriting. We know of no rule of law that would require the appellant to copy the will under the circumstances existing at that time. He had not then offered himself as a witness in his own behalf. People v. Chapman, 55 Cal. App. 192, 203 P. 126; People v. Mayen, 188 Cal. 237, 205 P. 435, 24 A. L. R. 1383; sections 688, 1323, Pen. Code. It should be observed that, on at least one of the two occasions on which the conversations were had, "Mr. Wignall was proclaiming his innocence." Where a defendant denied his guilt, accusatory remarks made in his presence are not admissible for any purpose. People v. Lapara, 181 Cal. 66, 183 P. 545; People v. Goltra, 115 Cal. App. 539, 2 P.(2d) 35; People v. Ayhens, 16 Cal. App. 618, 117 P. 789. The testimony of the district attorney should not have been offered in evidence. People v. Teshara, 134 Cal. 542, 66 P. 798; People v. Goltra, supra. Counsel for appellant did not make his objections to this testimony upon proper grounds. The trial court is entitled to have the precise legal ground of the objection to evidence specified in the objection as, "The efficacy of an objection, as a general rule, depends upon the precision with which it is made." 8 Cal. Jur., § 517, at page 503. "The defendant is deemed to have waived all grounds of objection not stated by him." People v. Sellas, 114 Cal. App. 367, 300 P. 150, 155.

[10] We have carefully examined the entire record, and find that there is ample evidence to support the verdicts of guilty under the first two charges in the information. The evidence of appellant and that of Mrs. Marie Budd, one of his principal witnesses, tends strongly to support the judgment on these counts. They both testified that they were familiar with the handwriting of the deceased, and that they had never seen any of his handwriting that looked anything like that of the forged will.

There is no merit in any of the other contentions of appellant relating to the two

charges of forging the will and offering it to be filed in the office of the county clerk. There has been no miscarriage of justice in the conviction of appellant under these two charges.

[11] There is no evidence in the record sustaining his conviction on the third count wherein he is charged with offering the forged will in evidence in the probate proceeding. This is not mentioned in the testimony of any witness and is not covered by any admission or stipulation of counsel. A copy of the forged will is before us. It contains no indorsement which would even tend to indicate that it had ever been introduced in evidence in any probate proceeding. Its only indorsement is "Filed Feb. 16, 1931 Harry L. Allison Clerk By M. L. Aldridge, Deputy." This is the date it was filed with the petition for its probate. This date is material under the second charge of filing, but not under the third, of offering it in evidence.

The judgment under the first two counts of the information and the order denying the motion for new trial under those two counts are affirmed. The judgment under the third count whereby appellant was adjudged guilty of offering the forged will in evidence in the probate proceeding is reversed, with directions to the trial court to proceed with a new trial on this count if the district attorney of San Bernardino county be so advised.

We concur: JENNINGS, J.; HARDEN, Justice pro tem.

125 Cal.App. 641

BLACK v. BRUNDIGE et al.

Civ. 8285.

District Court of Appeal, First District, Division 1, California.

Sept. 2, 1932.

As Modified on Denial of Rehearing Oct. 1, 1932. Hearing Denied by Supreme Court Oct. 31, 1932.

1. Partnership ⇐29.

Contract provision that contract shall not constitute partnership is not conclusive as to partnership's existence (Civ. Code, § 2395 [repealed, St. 1929, p. 1896]).

2. Partnership ⇐30.

Provision for sharing certain profits as compensation for one party's use of another's money does not of itself determine that "partnership" exists (Civ. Code, § 2395 [repealed, St. 1929, p. 1896]).

[Ed. Note.—For other definitions of "Partnership," see Words and Phrases.]

3. Partnership ⇐218(3).

Whether partnership existed *held* question of fact for trial court (Civ. Code, § 2395 [repealed, St. 1929, p. 1896]).

4. Partnership ⇐55.

Evidence *held* to sustain finding that no partnership existed between builder and lender of money for purchasing lots (Civ. Code, § 2395 [repealed, St. 1929, p. 1896]).

While certain conduct of builder and lender, subsequent to execution of agreement, was in harmony with alleged partnership relation, by far the more substantial portion was inconsistent therewith. Under agreement, lender agreed to acquire lots in builder's name and did acquire them for $19,500, and builder agreed to finance building of houses by means of first mortgages upon lots and improvements and to pay to lender $5,000 from proceeds of sale of each of five lots, such indebtedness to be evidenced by deeds of trust. About four months after money had been provided for purchase of property and deeds had been executed in favor of builder, the builder and wife executed instrument declaring that spouses relinquished any community rights in the property, and that builder held property in trust for lender.

Appeal from Superior Court, Los Angeles County; James W. Bartlett, Judge.

Consolidated actions by E. E. Black (doing business as the Black Lumber Company) and others, against Roy S. Brundige and Ludwig G. B. Erb. Judgment was had in favor of plaintiffs against defendant Brundige alone, and was refused against defendant Erb, and plaintiffs appeal.

Affirmed.

Culver & Nourse, Harold J. Richardson, and Richard J. O. Culver, all of Los Angeles, for appellant E. E. Black.

Irl D. Brett, of Los Angeles, for appellants Beverly Bldg. Material Co. and H. W. Ayers.

R. L. Horton, of Los Angeles, for appellant Hammond Lumber Co.

Flint & MacKay, William A. Bowen, and Samuel H. London, all of Los Angeles, for respondent Ludwick G. B. Erb.

BEAUMONT, Justice pro tem.

In 1925 Roy S. Brundige was a builder of houses in the vicinity of Los Angeles. There were five lots in Beverly Hills he believed desirable for his business. The value of these lots was $25,000, but they could be purchased for $19,750 cash. He interviewed Ludwig G. B. Erb, respondent herein, for the

purpose of obtaining funds with which to buy the lots. A contract was entered into on September 16, 1925, between respondent and Brundige. This agreement stated that Brundige had applied to respondent for money with which to purchase certain lots, describing them. Respondent agreed to acquire the lots (five) in Brundige's name, for the erection of houses thereon. Brundige agreed to finance the building of the houses by means of "first" mortgages upon the lots and improvements, and further agreed to pay or cause to be paid to respondent $5,000 from the proceeds of the sale of each lot. Five promissory notes, bearing interest at 7 per cent. per annum, each secured by a trust deed, were to evidence this indebtedness. Each trust deed was to be subject to a first mortgage not to exceed $6,500. The mortgage note in each instance was to mature thirty days after the date of maturity of the note secured by the deed of trust on the same lot. The agreement contained a provision as follows: "And in further consideration, and as a further and additional compensation for the use of said money to be furnished by the said Ludwig G. B. Erb to the said Roy S. Brundige as aforesaid, it is agreed, by and between the parties hereto as follows: After the deduction of all proper charges connected with the purchase and sale of any of said lots, the first one thousand ($1,000) dollars derived from the sale of any of said residences and lots shall be paid to the said Ludwig G. B. Erb, and the next one thousand ($1,000) dollars so derived shall be paid to the said Roy S. Brundige, and thereafter out of all sums so received there shall be paid fifty (50) per cent thereof to each of the parties hereto." It was further agreed that the contract should be placed in escrow, and that the parties should execute the necessary escrow instructions to carry out the agreement. The contract also provided: "It is especially understood and agreed, by and between the parties hereto that nothing contained in this agreement shall for any purpose whatsoever be construed or interpreted to constitute a partnership between the parties." Respondent thereafter supplied the money and had five deeds covering the lots executed in favor of Brundige. Brundige then procured loans on four of the lots in the amount of $10,500 on each lot, said indebtedness being evidenced in each instance by a note secured by a deed of trust. The money was so obtained from Syndicate Company, a corporation. Four trust deeds, subject to the prior incumbrances in favor of the Syndicate Company, each securing a note payable in installments, with a fixed maturity date for the final payment, were executed by Brundige and wife in favor of respondent. Three of these trust deeds, each covering a separate lot, were dated January 14, 1926, and recorded January 16, 1926. Each was for $5,000. The fourth described the two lots remaining, secured a note for $10,000 payable to respondent, and was recorded November 28, 1925.

On October 24, 1925, Roy S. Brundige and Claudia A. Brundige, his wife, executed an instrument designated "Affidavit and Relinquishment." This stated that the lots above mentioned had been conveyed "to facilitate and make possible a profit to be derived by the said Roy S. Brundige from the construction of residences thereon and subsequent sale thereof," and that they had been purchased from funds of respondent. It further declared that "Whereas, the said Roy S. Brundige and Claudia A. Brundige are husband and wife; and whereas, we jointly and severally desire to relinquish any and all community or other rights in and to said lots or improvements erected or to be erected. * * *" Then follows the statement that the property was acquired and was being held as Roy S. Brundige's separate property in trust for respondent, and that the Brundiges had no interest in the funds with which it was acquired; that the lots were acquired for the sole purpose of carrying out the terms of the agreement, and that they had no interest in or claim to the said property.

After the arrangements provided for in the escrow instructions were completed, the deeds were delivered to Brundige and subsequently recorded. The proceeds from the deeds of trust were paid to Brundige. He had the sole control thereof and made all disbursements. The cost of the construction of each house was about $20,000. The original plan had called for the expenditure of only $7,500. This appears to have been the basis for procuring larger sums under the first trust deeds than originally agreed upon. Respondent gave no instructions concerning operations. Brundige had sole charge of the construction of the buildings. Certain materials were purchased on credit. The credit arrangements were made solely by Brundige. No credit was sought or given because of respondent's connection with the situation. All labor was hired by Brundige and all materials were purchased in his name. Respondent's name did not appear in any of the transactions, nor does it appear that he had been consulted about any of these. Each lot on which a house was erected had a sign on it with the following: "Open for inspection. Built by Roy S. Brundige." Brundige apparently encountered financial difficulties in this building operation and it became necessary for him to refinance it. He arranged to do this. Respondent released his trust deeds in order that Brundige might obtain additional money for his construction work. The sum of $25,000 was so obtained from Standard Mortgage Corporation. Brundige then paid respondent $9,750, and he and his wife executed two notes, one for $6,000 and another for $4,000, secured by trust deeds on the property, in favor of respondent. The two trust

deeds were recorded. The cash thus received and the two notes represented the amount respondent had actually advanced in Brundige's behalf. Respondent wrote a letter from New York, about May 13, 1926, addressed to Brundige, in which he referred to the houses in question as "our houses." Appellant Black testified that Brundige introduced respondent to him, calling respondent his partner. Brundige testified, in substance, that he did not remember whether or not he had done this and explained by saying that he had referred to respondent as an "associate, or partner or a man interested with me"; and that he had never considered him such. He also testified there was no understanding between him and respondent that respondent should pay any part of the losses that might result from these building operations.

This action, though originally one for foreclosure of materialmen's liens and for the recovery of the value of materials furnished Brundige and respondent as partners, was tried solely on the latter basis, the lien claims having been eliminated by stipulation. Judgment was had against defendant Brundige alone. The court found there was no partnership existing between Brundige and respondent. This appeal is taken solely on the ground that the evidence is insufficient to sustain this finding.

[1, 2] We have before us a contract that clearly provided there was to be no partnership. This provision, however, is not conclusive that there was no partnership. "Mere words will not blind us to realities." Martin v. Peyton, 246 N. Y. 213, 158 N. E. 77, 78. There is a provision for sharing certain profits as compensation for the use of respondent's money. This of itself does not determine that a partnership existed. In O. Krenz C. & B. Wks., Inc., v. England, 109 Cal. App. 747, the court at page 752, 293 P. 689, 692 said: "Moreover, it has been held that it is the sharing of profits *as such* [italics ours] which constitutes prima facie evidence of a partnership, and that the relation is not established by a mere promise to pay a share of the profits as compensation for services (Coward v. Clanton, supra [122 Cal. 451, 55 P. 147]), or for the use of property (Nofsinger v. Goldman, 122 Cal. 609, 55 P. 425; Vanderhurst v. De Witt, 95 Cal. 57, 20 L. R. A. 595, 30 P. 94). * * *" "Passing on the contract as a whole, an arrangement for sharing profits is to be considered. It is to be given its due weight. But it is to be weighed in connection with all the rest. It is not decisive. It may be merely the method adopted to pay a debt or wages, as interest on a loan or for other reasons." Martin v. Peyton, supra.

Referring to the Code section under consideration herein (repealed, St. 1929, p. 1896), the court in Martin v. Sharp & Fellows C. Co., 34 Cal. App. 584, 588, 168 P. 373, said: "By section 2395 of the Civil Code, a partnership is defined to be 'the association of two or more persons, for the purpose of carrying on business together, and dividing its profits between them.' Under this definition, a mere participation in profit and loss does not necessarily constitute a partnership, for, as said in Dwinel v. Stone, 30 Me. 384, 'there must be such a community of interest as empowers each party to make contracts, incur liabilities, manage the whole business, * * * a right which, upon the dissolution of the partnership by death of one, passes to the survivor, and not to the representatives of the deceased.' To like effect are Coward v. Clanton, 122 Cal. 451, 55 P. 147, Vanderhurst v. De Witt, 95 Cal. 57, 20 L. R. A. 595, 30 P. 94, and Nofsinger v. Goldman, 122 Cal. 609, 55 P. 425, in the former of which it is said that profit sharing is not the true test of partnership. The association must be for the purpose of *jointly carrying on the business.*" To the same effect are O. Krenz C. & B. Wks., Inc., v. England, supra, and the cases therein cited.

Appellant contends that the instrument designated "Affidavit and Relinquishment" showed that the intention of the parties from the first was to establish a partnership, and that a partnership was in fact created; that if this is not true, the latter instrument created a partnership relation. We believe this contention is not successfully maintained. At the time of the execution of this instrument, the carrying out of the terms of the contract was in abeyance. Respondent had provided the money for the purchase of the property, $19,750, and the deeds had been executed in favor of Brundige. This status prevailed for about four months. Respondent had Brundige and wife execute the instrument as a matter of precaution until the arrangements were completed. This may not have been necessary, as appellant argues, but respondent deemed it a proper precautionary measure. Brundige's testimony was that respondent's attorney "mentioned the fact that I held title to the property, to those lots, in myself and my wife's name, but that it may be possible for my wife to claim a community ownership, in case anything happens to me she may claim owning the property." When said arrangements were completed and the deeds to Brundige were recorded, then respondent had his trust deeds recorded, thus securing the payment of the amounts provided for in the original agreement.

[3, 4] Certain conduct of Brundige and respondent subsequent to the execution of the agreement is in harmony with the alleged partnership relation, but by far the more substantial portion is inconsistent therewith. Whether or not a partnership existed was a question of fact for the trial court. Stenian v. Tashjian, 178 Cal. 623, 174 P. 883; Dennis

v. Kolm, 131 Cal. 91, 63 P. 141; O. Krenz C. & B. Wks., Inc., v. England, supra. Viewing the evidence as a whole, we cannot say it is insufficient to sustain the finding attacked.

Judgment affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

125 Cal.App. 442

LO PRESTI v. MANNING et al.

Civ. 8328.

District Court of Appeal, First District, Division 1, California.

Aug. 23, 1932.

1. Gifts ⇐28(3).

Life insurance policy may be made subject of gift, and donee may acquire vested interest therein.

2. Gifts ⇐28(3).

Gift of life insurance policy must meet all requirements of law in regard to making of gift (Civ. Code, § 1147).

3. Gifts ⇐45.

One seeking to establish validity of parol gift must allege facts which, if proved, would tend to establish all elements of completed gift (Civ. Code, § 1147).

4. Gifts ⇐49(1).

Claim to gift asserted for first time after alleged donor's death is received with caution.

5. Gifts ⇐49(1), 82(1).

Donee must establish completed gift by clear and convincing evidence, whether it be gift inter vivos or causa mortis.

6. Gifts ⇐15, 18(1).

There can be no gift without intention to give, and delivery, either actual or constructive, of thing given.

7. Appeal and error ⇐900.

On appeal, every presumption is in favor of regularity of judgment.

8. Appeal and error ⇐909(5).

Where judgment was for subsequent beneficiary of life policy, appellate court *held* required, in absence of showing to contrary, to assume that insured reserved right to change beneficiary.

9. Insurance ⇐586.

Where life policy reserves right to insured to change beneficiary, interest of designated beneficiary prior to insured's death is mere expectancy of incompleted gift, subject to revocation at insured's will.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Louis Lo Presti against Catherine C. Manning and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

J. Maxwell Peyser, of San Francisco, for appellant.

H. A. Van Der Zee, of San Francisco, for respondents.

LAMBERSON, Justice pro tem.

The action is one to recover proceeds of life insurance policies in the sum of $5,000.

The second amended complaint sets forth two causes of action. In the first it is alleged that the plaintiff was the father of Marion Thomas Lo Presti, who died on May 22, 1930, leaving a widow, the defendant Margaret M. Lo Presti; that the defendant, Catherine C. Manning, is the mother of said Margaret M. Lo Presti; that on the 26th day of May, 1930, said defendants received the sum of $5,000 from the Equitable Life Assurance Society of the United States, for the use and benefit of plaintiff, who has made demand for the payment of the same to himself, such demand being refused.

The second cause of action repeats the allegations of the first, and then alleges in substance that the deceased entered the employ of the Howard Automobile Company, a corporation, in November, 1923, and thereupon became insured as an employee of said corporation under a form of group insurance; that appellant was named as the beneficiary in the policies or certificates of assurance, and it was agreed between decedent, his employer, and the Equitable Life Assurance Society, that said beneficiary, upon the death of the insured, would receive the sum of $5,000; that thereafter said certificates remained with, and were held under the control of, the Howard Automobile Company, and were effective only so long as decedent remained in the employ of said corporation, and at no time would the decedent ever have or receive manual possession of said certificates; that at and after the time of the issuance of certificates of assurance, Marion Thomas Lo Presti, by parol gift, transferred and assigned all his right, title, and interest in the certificates to plaintiff, who has ever since been the owner thereof; that in December, 1929, the insured became seriously ill and was removed to a hospital; then to the home of defendants, with whom he lived until his death. Then follow allegations of fraud and undue influence, practiced by defendants upon the insured during his illness, by which defendants induced and procured the insured to sign an "Assignment of Bene-

ficiary." Among other matters, the complaint alleges that the policies were at all times, prior to the transfer, in the custody and control of defendant Margaret M. Lo Presti, and on April 4, 1930, she presented the certificates so assigned to the assurance society with intent to defraud plaintiff of his rights, and thereafter, on May 26, 1930, received the sum named in the certificates from said society; that, had it not been for the false and fraudulent acts, conduct, and representations of the defendants, who unduly influenced the mind of the decedent, the beneficiary would not have been changed, and such transfer of the beneficiary was without the consent of plaintiff.

The respondents demurred to the amended complaint upon the ground that neither of the causes of action set forth therein stated a cause of action, and that the allegations of the complaint were uncertain. The court sustained the demurrer with leave to amend. Plaintiff and appellant declined to avail himself of the opportunity to amend, and from the judgment thereafter entered in favor of defendants has perfected this appeal.

[1, 2] While a life insurance policy may be made the subject of a gift, and the beneficiary to whom the gift has been made may acquire a vested interest therein, such transaction must meet all the requirements of the law in regard to the making of a gift. A verbal gift is not valid, unless the means of obtaining possession or control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee. Civ. Code, § 1147. As heretofore indicated, the complaint alleges that the certificates were always with and under the control of the employer of the decedent, and were effective only so long as the decedent remained in such employ; at another place, the complaint alleges that the certificates were at all times prior to the change of beneficiary in the custody and control of the defendant Margaret M. Lo Presti, who presented them to the assurance society, presumably for the purpose of having the name of the beneficiary changed.

[3-6] One seeking to establish the validity of a gift by parol must allege facts which, if proved, would tend to establish all of the elements of a completed gift, as defined in our codes. It is the policy of the law to receive with caution the claim to a gift asserted for the first time after the death of the alleged donor. It is therefore incumbent upon the donee to establish a completed gift by clear and convincing evidence, whether it be a gift inter vivos or causa mortis. There can be no gift without an intention to give, and a delivery, either actual or constructive, of the thing given. "There must be both a purpose to give and the execution of this purpose. The purpose must be expressed, either orally or in writing, and it must be executed by the actual delivery to the donee of the thing given, or of the means of getting possession and enjoyment thereof. It is the fact of delivery that converts the unexecuted and revocable purpose into an executed and complete gift." Mutual Benefit Life Insurance Company v. Clark, 81 Cal. App. 546, 551, 254 P. 306, 308.

The allegations of the complaint do not meet the foregoing requirements. Not only was there not a delivery of the property, actual or symbolical, but the certificates appear to have remained either in the control of the Howard Automobile Company, or in the control of the defendant Margaret M. Lo Presti, from the date of their issuance until after the death of the assured.

In Mutual Benefit Life Insurance Company v. Clark, supra, the court said: "Where the policy of insurance names a third person as beneficiary, the policy is then a contract made for the benefit of a third person, and the third person is called the 'beneficiary.' The beneficiary is not a party to the contract, and is not the owner thereof, and, where a policy of insurance reserves to the insured the right to change the beneficiary, the interest of a designated beneficiary, prior to the death of the insured, is that of a mere expectancy of an incompleted gift, subject to revocation at the will of the insured. Waring v. Wilcox [8 Cal. App. 317, 96 P. 910], supra; Hoeft v. Supreme Lodge, etc., 113 Cal. 91, 33 L. R. A. 174, 45 P. 185; New York Life Ins. Co. v. Daley, 25 Cal. App. 376, 143 P. 1033; Supreme Council, etc., v. Gehrenbeck, 124 Cal. 43, 56 P. 640; New York Life Ins. Co. v. Dunn, 46 Cal. App. 203, 188 P. 1028; McEwen v. New York Life Ins. Co., 23 Cal. App. 694, 139 P. 242; New York Life Ins. Co. v. Bank of Italy, 60 Cal. App. 602, 214 P. 61; Hopkins v. Northwestern Life Assur. Co. (C. C. A.) 99 F. 199."

[7-9] In the absence of a showing to the contrary, we must, under the rule that every presumption is in favor of the regularity of the judgment, assume that the insured reserved the right of revocation and change as to the beneficiary named. "Where a policy of life insurance reserves to the insured the right to change the beneficiary, upon written request therefor, the interest of a designated beneficiary prior to the death of the insured is that of a mere expectancy of an incompleted gift, subject to revocation at the will of the insured." McEwen v. New York Life Ins. Co., 23 Cal. App. 694, 699, 139 P. 242, 244; New York Life Ins. Co. v. Daley, 25 Cal. App. 376, 143 P. 1033; Blethen v. Pacific Mut. Life Ins. Co., 198 Cal. 91, 243 P. 431.

Probably the most frequently cited case upon this subject in this state is that of Hoeft v. Supreme Lodge, K. of H., etc., supra, in which the court said: "The beneficiary's in-

terest is the mere expectancy of an incompleted gift, which is revocable at the will of the insured, and which does not and cannot become vested as a right until fixed by his death. If it is said that a devisee under a will has, during the life of the testator, a like naked expectancy, it may be freely conceded that it is so; but to the heirs and devisees is confirmed a right of action for fraud, etc., by the provisions of the Code. Otherwise they, too, would come within the scope of the general principle that a right of action for fraud is personal and untransferable. One cannot be defrauded of that in which he has no vested right. A vested right is property, which the law protects, while a mere expectancy is not property, and therefore is not protected."

See, also, Shoudy v. Shoudy, 55 Cal. App. 447, 203 P. 437, in which the policy of insurance was actually delivered to the beneficiary.

The policy provided that the assured had the right to change the beneficiary by indorsement. The court held that the testimony fell far short of establishing in the plaintiff such a vested interest as would prevent the exercise by the assured of the right reserved to him in the policy of insurance to change the beneficiary.

We are of the opinion that the foregoing authorities support the judgment of the lower court, and that it should be affirmed. It is so ordered.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

125 Cal.App. 429

BROWN v. BROWN et al.

Civ. 932.

District Court of Appeal, Fourth District, California.

Aug. 22, 1932.

1. Pleading ⇐8(11).

In wife's suit to cancel husband's deed to son, allegations that property conveyed was community property *held* not demurrable as stating legal conclusion (Civ. Code, § 164).

2. Pleading ⇐18.

In wife's suit to cancel husband's deed to son, allegation that property was community property *held* not subject to special demurrer for uncertainty as to title ownership (Civ. Code, § 172a).

Such allegation was not subject to attack for uncertainty as to whether title was in husband or in husband and wife, because such objection goes to the failure to allege facts rather than to uncertainty, and because the failure of the wife to disclose in whom the record title to the property stood was not a defect fatal to her cause of action, since she is entitled to the aid of equity to protect her inchoate expectancy in community real property, irrespective of whether record title was in her husband alone or in both her husband and herself.

3. Pleading ⇐192(2).

Failure of complaint in wife's suit to cancel deed to community property to allege facts that would enable defendant to raise statutory bar by demurrer rather than by answer *held* not ground of demurrer (Civ. Code, § 172a).

4. Husband and wife ⇐267(8).

For statute to bar wife's suit to avoid husband's instrument affecting community property after instrument was recorded for year, title to community property must stand in husband alone (Civ. Code, § 172a).

5. Appeal and error ⇐1040(10).

Failure to sustain objection to immaterial allegation respecting homestead declaration in wife's suit to cancel husband's deed to community property *held* not reversible error (Civ. Code, § 172a).

6. Appeal and error ⇐1039(15).

Defendant could not complain of court's permitting codefendant to withdraw answer, where defendant had already defaulted and asked for no relief after judgment.

7. Appeal and error ⇐879.

Errors complained of by purchaser from defendant in suit to cancel deed, having notice of action, and not having endeavored to make himself party to record, *held* not reviewable (Code Civ. Proc. § 409).

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action by Alta Blanche Brown against George B. Brown, A. F. Brown, and another. From a judgment for plaintiff, defendants A. F. Brown and another appeal.

Affirmed.

A. F. Brown and J. Edgar Ross, in pro. per.

Ray D. Johnson, of El Centro, for respondents.

JENNINGS, J.

This action was instituted by plaintiff for the purpose of securing a decree canceling a certain deed executed by her husband, George B. Brown, to his son, A. F. Brown. It is alleged in the complaint that plaintiff and her husband, who was joined as a defendant in the action, have been the owners in fee sim-

ple of the real property covered by the deed at all times since January 27, 1926, the date of their marriage; that said real estate was at all times since the date of marriage the community property of plaintiff and her husband; that the husband alone executed the deed whose cancellation is sought; and that the said deed was recorded in the office of the county recorder of Imperial county, the county wherein the real estate is situated. To the complaint thus drawn defendant A. F. Brown, grantee named in the deed, interposed a demurrer, both general and special. This demurrer was overruled, and, the demurrant having failed to answer, judgment was entered decreeing the deed executed by the husband to be void, and that the property sought to be conveyed thereby is community property of plaintiff and her husband. From the judgment thus rendered, defendant A. F. Brown and J. Edgar Ross, to whom A. F. Brown had conveyed the property subsequent to the institution of this action by plaintiff, have prosecuted this appeal. The appeal is presented on the judgment roll alone.

[1] Appellant A. F. Brown complains that the court erred in overruling the demurrer interposed by him to respondent's complaint. Inasmuch as no answer was filed by this appellant, and consequently no trial on the merits resulted, this court has no guide other than the complaint itself by which to determine whether it is so radically defective that it fails to support the judgment or is so uncertain, ambiguous, and unintelligible as to render its meaning incapable of ascertainment. Hawley Bros. v. Brownstone, 123 Cal. 643, 647, 56 P. 468. As heretofore noted, the complaint alleges (1) that plaintiff and her husband, at all times since a certain date, have been wife and husband; (2) that, at all times since the date of marriage they have been the owners in fee simple of the real property to which the deed was executed; (3) "that said property has been at all times since the said 27th day of January, 1926, the community property of said plaintiff and the defendant George B. Brown." It is contended that the last-mentioned allegation is vulnerable to the attack made upon it by appellant's demurrer. This demurrer launched a special attack upon the complaint for uncertainty in failing to set out facts from which it can be ascertained whether or not the property possesses the character of community property and whether record title to the property was held by the husband alone or by husband and wife. The principal objection to the allegation that the described property is community property is that the allegation is the statement of a purely legal conclusion and not a statement of ultimate fact. Authority is not wanting to sustain the contention thus advanced. In Dye v. Dye, 11 Cal. 163, it was held that a demurrer was properly sustained to a complaint by a wife against her husband for a division of common property which contained the bare allegation that the property described in the complaint was common property. The court expressed the opinion that the allegation amounted to no more than the statement of a legal conclusion. In arriving at its decision, the court cited certain decisions of the courts of the state of New York wherein it was held that the bare allegation of ownership of property without the statement of any facts conveying information as to the manner by which the pleader became the owner amounted to the statement of a conclusion of law, and was therefore fatally defective. The correctness of the decision in Dye v. Dye, supra, was questioned in Gimmy v. Doane, 22 Cal. 635, 638, where, in an action brought by a wife to set aside an alleged fraudulent conveyance of property by the husband to his mother, the complaint merely stated that the property was common property without stating the particular facts showing that it was entitled to such character. In affirming a judgment in the wife's favor, the court said that: "Where a statute gives a right of action, where none existed before, the complaint in such case should show 'that the offense or act charged to have been committed or omitted by the defendant is within the provisions of the statute, and all the circumstances necessary to support the action must be alleged,'" but that the rule requiring averment of all circumstances entitling the complainant to the benefit of a statute does not apply to statutes regulating the rights of persons to property and not relating to remedies, and that the statute prescribing what shall be common property is a mere regulation of a right of property, and cannot properly be said to provide a new right of action. It must, however, be observed that in Gimmy v. Doane, supra, the court took occasion to remark that the objection to the averment respecting the character of the property should have been taken by demurrer as was done in Dye v. Dye, supra, which would have enabled the plaintiff to amend, and that, not having been so taken, it came too late on appeal from a judgment rendered upon a trial of the case on the merits. Section 164, Civil Code, provides that all real property in California acquired by either spouse or by both after marriage other than real estate acquired by either spouse by gift, devise, or descent is community property. This statute is purely declaratory of property rights, and does not attempt to provide a right of action. The reasoning of the court in Gimmy v. Doane, supra, is therefore well in point upon the objection of appellant A. F. Brown that the court erred in overruling his demurrer. Furthermore, we are of the opinion that, in an equitable action brought by a wife for the purpose of protecting her expectancy in community property, the question of the character of the

property which she seeks to have restored to the community is one of ultimate fact, depending for its solution upon the existence of purely probative facts respecting the time and manner of its acquisition. In Payne & Dewey v. Treadwell, 16 Cal. 220, 242, in an action of ejectment, an allegation in the complaint that plaintiffs are the owners in fee as tenants in common, and have the lawful right and are entitled to possession of the premises, was upheld over an objection raised by demurrer that such allegation was one not of fact but of a legal conclusion. The court pointed out that seizin in the plaintiff of some estate in the premises is a necessary issuable fact that must be proved to entitle plaintiff to the relief sought. The fact of seizin is said to be the ultimate fact which must be shown to warrant recovery. This ultimate fact is to be established by proof of conveyances from a paramount source of title or by evidence of prior possession, but proof of such conveyances or of prior possession merely establishes facts contributing to the final necessary fact that the plaintiff is the owner of some estate in the premises. The rule thus established has received consistent approval by the Supreme Court of California in a long line of decisions, among which may be noted the following: Gartlan v. C. A. Hooper & Co., 177 Cal. 414, 423, 170 P. 1115; Robinson v. City of Glendale, 182 Cal. 211, 213, 187 P. 741; Cuneo v. Lawson, 203 Cal. 190, 193, 263 P. 530. It is further to be observed that the complaint in the present action contains no allegations of facts from which it is alleged that it follows that the property is community property. There is no attempt made to deraign title in respondent. The allegations are simply that respondent and her husband have owned the property at all times since the date of marriage, and that it is community property. We conclude that the allegation respecting the community character of the property was not subject to attack by general demurrer.

[2-4] We are likewise of the opinion that the above-described allegations were not subject to attack by appellant's special demurrer. Particular objection is made that the complaint is uncertain, in that it cannot be discovered whether record title to the property was in the husband or in husband and wife. Strictly speaking, the objection thus made goes to the failure to allege facts rather than to uncertainty. The failure of the complaint to disclose in whom the record title to the property stood is not a defect fatal to plaintiff's cause of action, since she is entitled to the aid of equity to protect her inchoate expectancy in community real property, irrespective of whether the record title was in her husband alone or in both her husband and herself. Section 172a, Civil Code, which declares that a wife must join with her husband in executing a deed to community real property, establishes the foundation for an action by a wife to protect her expectancy in such property. This section contains two important limitations upon the right of a wife to equitable relief where the husband alone has executed an instrument affecting the title to community real property. Both of these limitations depend upon the holding of record title to community real property by the husband alone. The first of these limitations is contained in the proviso which declares that the sole lease, contract, mortgage, or deed of the husband, holding the record title to community real property, to a lessee, purchaser, or incumbrancer, in good faith without knowledge of the marriage relation, shall be presumed to be valid. The failure of the complaint herein to disclose by whom the record title to community real property was held could not affect the rights of appellant A. F. Brown, since, in order that he should come within the protecting ægis of the proviso, it would have to appear that he was a purchaser or incumbrancer in good faith without knowledge of the marriage relation. The presumption of validity declared by the proviso under consideration is a rule of evidence qualifying the wife's right to equitable relief, and places upon one who claims the benefit of it the burden of establishing the facts required to be shown in order that the presumption shall be effective as to him. The second limitation is one that affects the institution of an action to avoid any instrument executed by the husband alone affecting the title to community real property standing of record in the name of the husband alone. It provides that no such action shall be commenced after the expiration of one year from the filing for record of such instrument in the office of the county recorder in the county in which the land is situate. In order that this limitation shall be effective, therefore, it must appear that the record title to the community real property stands in the name of the husband alone. This limitation is in effect a statute of limitation, and, in accordance with a well-established rule of pleading, may be raised by demurrer where the complaint shows upon its face that the action is barred. But the failure of a complaint to allege facts that would enable a defendant to raise the bar of the statute by demurrer rather than by answer is not a valid ground of demurrer. That the complaint herein shows on its face that the cause of action is barred by section 172a, Civil Code, was made a ground for the demurrer interposed by appellant A. F. Brown, but the objection thus raised was not well taken, for the reason that the complaint did not show on its face that the title to the real property involved in this action stood in the name of the husband alone.

[5] It was also made a ground of demurrer that a paragraph of the complaint which alleged that the husband, George B. Brown,

had made and recorded a homestead declaration to the property is uncertain for various reasons specified. If the allegation respecting the making and recording of the homestead declaration by the husband could be regarded as an allegation material to respondent's cause of action, more careful consideration of this ground of demurrer would be warranted. However, since it clearly appears that the complaint was one by a wife for the equitable relief afforded by section 172a, Civil Code, the allegation respecting the making and recording of a homestead declaration is superfluous and immaterial. The wife's cause of action was complete, irrespective of whether the husband had or had not properly executed and recorded in the proper county a declaration of homestead covering the property involved in this action. If, therefore, it be assumed that the objection to the allegation mentioned was valid, nevertheless, so far as this particular objection is concerned, no reversible error was committed by the trial court in declining to sustain it.

[6] It is further contended as a ground for reversal of the judgment that the court permitted the answer filed by appellant's codefendant, George B. Brown, to be withdrawn. In its findings of fact the trial court found "that defendant George B. Brown has withdrawn his answer on file herein and has petitioned this court to grant the prayer of plaintiff's complaint." In the brief of appellant it is suggested that the trial court permitted the defendant George B. Brown to withdraw his verified answer and to substitute therefor another pleading denying the truth of all the allegations contained in his answer. The record herein does not contain any such pleading as counsel for appellant maintains was permitted to be filed as a substitute for the answer. In addition to the above-quoted language of the findings, the following statement appears in the record under the title "Judgment": "And said defendant George B. Brown having heretofore filed in the record of this cause a withdrawal of his answer and in open court petitioned that the prayer of plaintiff's complaint be granted."

It is pointed out by appellant A. F. Brown that the answer originally filed by his codefendant George B. Brown contained an allegation that said defendant, in return for valuable consideration, had transferred whatever interest he had in the land to appellant more than a year prior to the filing of the action. The record appears to bear out the statement, since it is alleged in the answer originally filed by defendant George B. Brown that on the date alleged in respondent's complaint he executed and delivered, for a valuable consideration, to appellant A. F. Brown a quitclaim deed to the property which conveyed no interest other than the separate interest of defendant George B. Brown. It is said that, by its action in permitting the answer to be withdrawn without notice to appellant, the trial court lent its aid to the perpetration of a fraud upon appellant A. F. Brown, since it is contended that it is a fair assumption that this appellant relied upon the allegations contained in the answer of his codefendant when he elected to stand on his demurrer and test the sufficiency of the complaint on appeal rather than to file an answer and submit the case to trial on its merits. The important element in this line of reasoning rests in the fact that the trial court permitted the answer of appellant's codefendant to be withdrawn without notice to appellant A. F. Brown. The record shows that appellant's demurrer was overruled on December 20, 1929, and that appellant was allowed 10 days within which to answer the complaint. The judgment recites that the matter came on for hearing on February 21, 1930, and the court specifically found that the default of appellant A. F. Brown had been duly and regularly entered for failure to answer the complaint. At the time the trial court permitted the answer of defendant George B. Brown to be withdrawn, appellant A. F. Brown was in default for failure to answer, and he was not entitled to have notice of the court's action in passing upon the application of his codefendant for permission to withdraw his answer. Appellant was at liberty to stand upon his demurrer to the complaint and to test its sufficiency by appeal as he has done. He might have answered the complaint and presented his defense to the action on the merits. Even after his default to answer had been entered and judgment rendered against him, he was not foreclosed from moving the court for relief. He has done neither of these things, and is therefore in no position to complain of the court's action in permitting his codefendant's answer to be withdrawn. It is apparent that no fraud was committed upon him, and therefore his objection that the court lent its aid in the perpetration of a fraud upon him is untenable.

[7] In this appeal, as heretofore noted, J. Edgar Ross has joined. Since he was not made a party to the action, and did not at any time make an appearance of any character in the suit, some explanation is necessary in order to present any justification for his attempted appeal from the judgment. In its findings the trial court found that notice of the pendency of the action was recorded in the official records of the recorder of Imperial county on December 6, 1929, and that the attempted conveyance of the property involved in this action by appellant A. F. Brown to J. Edgar Ross by a deed which was recorded in the office of the county recorder of Imperial county on December 23, 1929, was made after recordation of the lis pendens. It is then adjudged that the deed from appellant

A. F. Brown to J. Edgar Ross is null and void. It is to be observed that the court did not find on what date the deed from A. F. Brown to J. Edgar Ross was executed, but the court did find that it was made subsequent to the date on which the lis pendens in the action was recorded. The court's judgment decreeing the deed from appellant A. F. Brown to J. Edgar Ross to be void affords the justification for the latter's joinder in this appeal, since it is urged that it clearly appears from the record that he is a party aggrieved by the judgment, and therefore entitled to complain of it, although prior to the rendition of the judgment he had not appeared in the case. At first blush this position appears to possess merit. The judgment which was rendered without notice to appellant Ross purports to divest him of whatever right or interest he had acquired in the property without affording him an opportunity to present any defense thereto. However, since the court made a specific finding that notice of the pendency of this action was filed on a certain date and that the conveyance to appellant Ross was made subsequent to the recordation of the lis pendens, Ross took the deed from his grantor with constructive notice of the pendency of an action brought for the purpose of nullifying the title of his grantor (section 409, Code Civ. Proc.). Having such notice, appellant Ross might properly, prior to the rendition of judgment, have sought permission of the court wherein the action was pending to be allowed to intervene therein. In the event of a refusal by the court to grant such application, this appellant would have been entitled to prosecute an appeal from the order denying him the right to intervene. Stern & Goodman Inv. Co. v. Danziger, 206 Cal. 456, 274 P. 748. In default of such action, he might have made himself a party to the record by moving the trial court to set aside the judgment which he now complains injuriously affects his rights in the property involved, and, in the event of a denial of his motion, might, on appeal from this court's order denying his motion, have had the judgment reviewed, not only for excess of jurisdiction, but for error. Elliott v. Superior Court, 144 Cal. 501, 509, 77 P. 1109, 103 Am. St. Rep. 102. However, it appears that in no fashion did appellant Ross seek to make himself a party to the record. Furthermore, it is to be remembered that whatever interest appellant Ross has in the property involved herein was acquired from appellant A. F. Brown, an original defendant in this action, and that A. F. Brown suffered judgment to be taken by default against him, thereby admitting that he had no valid claim upon or interest in the property if the complaint was not obnoxious to the demurrer which he had interposed. Hibernia, etc., Society v. Churchill, 128 Cal. 633, 61 P. 278, 79 Am. St. Rep. 73; Martin v. Lawrence, 156 Cal. 191, 193, 103 P. 913; Stern & Goodman Inv. Co. v. Danziger, supra. We are therefore impelled to the conclusion that, appellant J. Edgar Ross not having in any manner endeavored to make himself a party to the record herein, no errors of which he complains are reviewable on this appeal. Geary v. Stafford, 98 Cal. App. 84, 275 P. 865; Smith v. Mingramm, 104 Cal. App. 95, 285 P. 354. As he was not a party to this action, and has not made himself a party to the record, he is not thereby foreclosed from seeking the aid of equity in vacating a judgment affecting his rights in the property, assuming that as to him the judgment is void by reason of lack of jurisdiction. Postal, etc., Co. v. Superior Court, 22 Cal. App. 770, 779, 136 P. 538.

For the reasons stated, the judgment is affirmed.

We concur: MARKS, Acting P. J.; HARDEN, Justice pro tem.

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SCHUDEL et al. v. HERTZ.

Civ. 8542.

District Court of Appeal, First District, Division 1, California.

Aug. 27, 1932.

Rehearing Denied Sept. 26, 1932. Hearing Denied by Supreme Court Oct. 24, 1932.

1. Easements ⇐36(1).

One claiming right of way under statute providing that realty transfer passes easements attached thereto must prove existence of way that was being obviously and permanently used for benefit of property conveyed at time transfer was agreed on or completed (Civ. Code, § 1104).

2. Easements ⇐36(1).

Lot owners claiming easement of roadway on ground that their predecessor had such easement had burden of proving existence of roadway meeting requirements of statute (Civ. Code, § 1104).

Lot owners had the burden in such case of meeting the requirements of Civ. Code, § 1104, and proving the existence of a roadway that was being obviously and permanently used for the benefit of their property, then owned by their predecessor, at the time their predecessor purchased the strip over which the roadway was claimed.

3. Appeal and error ⇐1011(1).

Court's finding based on conflicting evidence is conclusive.

4. Easements ⇐5.

To establish roadway by prescription, it was unnecessary to show roadway was "laid out."

5. Easements ⇐8(1).

To establish roadway by prescription, it was necessary to show there was definite way adversely used for prescriptive period.

6. Easements ⇐36(1).

Parties claiming prescriptive rights have burden of proving all elements necessary to establish such rights.

7. Easements ⇐6.

Adjacent owners' passing over another's uninclosed lot used by adjacent owners and public generally on week ends, over no well-defined roadway, *held* insufficient constructive notice of claim of prescriptive easement.

8. Easements ⇐5.

Claim of roadway by prescription and under statute providing that realty transfer passes easements attached thereto does not include claim of roadway by necessity (Civ. Code, § 1104).

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Alfred Schudel and others against Lilly Alice Hertz. From the judgment for defendant, plaintiffs appeal.

Affirmed.

J. S. Hutchinson and Forrest H. Bailey, both of San Francisco, for appellants.

Henry E. Greer, of San Rafael, and Eric J. Rosenstirn, of San Francisco, for respondent.

BEAUMONT, Justice pro tem.

In 1915 Walter Rueger purchased certain lots of Muir Woods Park subdivision 6 in Marin county. These were part of what is known as the "Lapachet" property. In 1921 Joseph Mischke acquired other lots thereof, and later Alfred Schudel, Ernest Schudel, and Gustav E. Kirchner became the owners of yet others of these lots. All of said Lapachet lots are adjacent to lot 53, designated as the "O'Hair" property, on the northeast. This last-mentioned lot fronts in a southeasterly direction on Marin View avenue. Rueger acquired a strip ninety feet wide off the northeasterly portion of lot 53 and adjoining all said Lapachet lots. This strip was purchased in three separate parcels, the first thereof in August, 1919; the second in November, 1921; and the third in January, 1922. In 1922 Mischke acquired from Rueger the portion of the ninety-foot strip which adjoins his Lapachet lots, and in May, 1927, the Schudels and Kirchner jointly purchased the part adjacent to their Lapachet lots. In June, 1927, Lilly Alice Hertz, through purchase, acquired the Lapachet lots theretofore owned by Rueger as well as his remaining part of the ninety-foot strip. In March 1928, Mrs. Hertz purchased from P. E. O'Hair Realty Company the remainder of lot 53. Later Mrs. Hertz fenced her property. Action was brought by Mischke, the Schudels, and Kirchner against Mrs. Hertz to quiet title to an easement for right of way across lot 53 to Marin View avenue, a public highway. Judgment was for defendant, and from this plaintiffs appealed.

In appellants' opening brief easement is claimed on two grounds, to wit: Under the provisions of section 1104 of the Civil Code and by prescription, but that brief contains no specification of errors, and fails to point out any ground upon which the judgment should be reversed. This is referred to by respondent, and in appellants' reply brief certain alleged insufficiencies of evidence and erroneous conclusions are designated. Some of the grounds for reversal are indefinite, but we shall endeavor to consider all that are germane to the issue. Appellants contend that the evidence is overwhelmingly in favor of the allegations of the complaint. The question is, not whether the evidence would have supported a decision in favor of appellants, but whether the decision which was made finds support in the evidence.

The evidence shows that all of the Lapachet property in question is very rough; that lot 53 was owned by P. E. O'Hair until it was transferred in June, 1922, to P. E. O'Hair Realty Company; that it consists largely of a grassy knoll, and that, until fenced by respondent shortly before the commencement of this action, was uninclosed and uncultivated land of approximately three acres; that appellants and Rueger, their predecessor in interest, sometimes drove and walked upon and across lot 53 to reach their property, and at other times they arrived there by other ways. Appellants' testimony is that, though access thereto was originally had by foot along the trails, it was later reached by the use of automobiles. Walter Rueger testified that, before and at the time he completed the purchase of the parcels of lot 53 which comprise the ninety-foot strip, he drove across said lot to reach his own property over a well-defined road; that he continued to use this road until he disposed of his interest in the property; that he had claimed a right of way across said lot because Emile Lapachet had told him before he purchased the ninety feet that he (Rueger) was entitled to such right of way. Appellants testified that they used the above-mentioned road until a fence was erected by respondent. Dr. Gustav Kirchner, one of the appellants, testified regarding the roadway in question as follows:

"Q. Now at the time that you purchased

Lots 159, 160 and 161, was there a road leading from that property to Marin View Avenue? A. There was a place where driving was done. It was practically around this hill, but it was not used every day; people up there usually are there only week ends. * * *

"Q. Well, you have described the character of the road across there when you first began to own it; later on was that road more definitely marked? A. When I first began to know it, it showed traces of having been worked some time before, but in this section in one winter season the weeds grow so fast that the soil is quickly overgrown, but when I began to clear out the road there I had to make no measurement or not to make any guess at it. I simply followed what was evidently a road before, because it began to lead out in the level here and I followed that same way."

Joseph Mischke, one of the appellants, testified as to the existence of the road in 1922. He was asked, "And that road was well marked on the ground was it?" His answer was, "It was marked enough that a person could not really miss it."

In opposition to the foregoing, Emile Lapachet, who acted as agent of the grantor in the sale of the ninety-foot strip to Rueger, testified that the property in question, including the Lapachet lots, was located in what was known as a "Hiker's Paradise"; that this property was sold for hillside cabin sites; that the subdivision in question was laid out for such purpose; that access was to be had over trails, and that the purchasers acquired their property with a view of reaching it by such means; that some years after the subdivision was so laid out the public generally began to use lot 53 for parking automobiles and for picnic purposes; that there were numerous automobile tracks in various portions of the lot, but there was at no time a road across the lot; that there was no definite line of travel leading from the property of appellants or their predecessor to Marin View avenue. He denied that he had told Rueger that the latter was entitled to a right of way across lot 53, but testified that some months after Rueger had completed the purchase of the ninety-foot strip Rueger told him he would like to have a right of way across lot 53, and asked him (Lapachet) to interview O'Hair for the purpose of obtaining it. Wesley M. Nelson testified that he had a conversation with Rueger in the year 1927, while Rueger still owned part of the property, and that Rueger then told him that he had no right of way across lot 53, and that he claimed none. Respondent testified that she was first upon the property in the early part of 1927, and that there was no roadway across lot 53 at that time; that appellant Kirchner told her he had no right of way over lot 53, and that he wrote her a letter in January, 1928, to the effect that he had been informed she had purchased the remaining part of lot 53, and that he was convinced that she would grant appellants the privilege of driving over her property (lot 53). Alfred Hertz, husband of respondent, also testified he was on the property in question about the year 1927, and that there was no roadway across it. The evidence also shows that the grantor, P. E. O'Hair, and his successor, P. E. O'Hair Realty Company, did not use lot 53 in any way for travel, and had not laid out or constructed any roadway across or upon any portion of said lot.

Portions of the court's findings relative to the description and use of the property in question are as follows: "The Court finds, that Lot 53, during all of the time that the whole of, or any portion of it, was owned by P. E. O'Hair or the P. E. O'Hair Realty Company, and until on or about the 25th day of October, 1928, was open, uninclosed land; that at any place thereon for a distance of 200 feet along said Marin View Avenue one could drive with an automobile or truck onto Lot 53; that during all of said time it was a pasture ground for cows; many people used it as a picnic ground; drove out there and parked their machines, it was a natural place to park, a portion of it was level and over the steeper parts there was a cow trail which people followed, trucks delivered lumber and material, and delivery wagons drove across it; people used it as a common parking place; there were tracks across it in all directions. * * * And the Court further finds that there never was at any time or at all, or now is a right of way either marked out or constructed across any part of the premises of defendant. * * * That no roadway whatever across said Lot 53, or any part thereof, was ever laid out by said Walter Rueger, or any other person."

[1-3] It is essential that one whose claim for a right of way is based on section 1104 of the Civil Code must prove the existence of a way that was being obviously and permanently used for the benefit of the property conveyed at the time the transfer was agreed upon or completed. Grimmesey v. Kirtlan, 93 Cal. App. 658, 270 P. 243, 245; Beem v. Reichman, 36 Cal. App. 258, 171 P. 972. In Jersey Farm Co. v. Atlanta Realty Co., 164 Cal. 412, at page 415, 129 P. 593, 594 the court stated with reference to said section: "It is a direct recognition of the principle long established and fully recognized by this court (Cave v. Crafts, 53 Cal. 135; Quinlan v. Noble, 75 Cal. 250, 17 P. 69), that principle being that where the owner of two tenements sells one of them, or the owner of the entire estate sells a portion of it, the purchaser takes the tenement or portion sold with all the benefits and with

all the burdens that appear at the time of the sale to belong to it as between it and the property which the vendor retains. It is this general principle which is given full recognition by section 1104. * * * If it be a burden obviously cast upon the land at the time of the segregation of the title, it remains a burden upon that land in favor of the other parcel, and it is an 'easement' within the meaning of section 1104. * * *" The burden, therefore, was upon appellants to prove the existence of a roadway that would meet the requirements of the section as to use at the time of their predecessor's purchase of at least one of the parcels which comprise the ninety-foot strip. As to whether there was such roadway rests in a conflict of evidence. The court's finding against appellants' allegations that such existed will not be disturbed.

[4-7] As to prescription: Appellants allege "that immediately upon acquiring title to the * * *" first-purchased parcel of the ninety-foot strip, "Walter Rueger laid out a road from the said property so purchased on said 30th day of August, 1919, across said Lot 53 to the said Marin View Avenue," said road being described by metes and bounds. Then follow allegations of user of this road for the necessary period. The court found specifically that no road was so laid out. Appellants attack this finding. There was no evidence to support the allegation in so far as the term "laid out" is generally used. Whether such roadway was so laid out is not essential. It is necessary to appellants' claim of easement by prescription, however, to show that there was a definite way across lot 53 (19 Cor. Jur., p. 899; Vestal v. Young, 147 Cal. 721, 82 P. 383; Matthiessen v. Grand, 92 Cal. App. 504, 268 P. 675, and that this was adversely used for the prescriptive period. The burden was upon appellants to prove the existence of all the elements necessary to establish a prescriptive right. Costello v. Sharp, 65 Cal. App. 152, 157, 223 P. 567; Matthiessen v. Grand, supra. In Tarpey v. Veith, 22 Cal. App. 289, 134 P. 367, 369, it was held that mere user was insufficient to establish such right. The court therein said: "Such user must be accompanied by a claim of right communicated to the owner of the land, or it must be shown that the user was so continuous and so openly and notoriously adverse to the owner as to create a presumptive knowledge in the owner that the person using the land was doing so under a claim of right." Appellants produced no evidence of actual notice. On the other hand, respondent's witness, Donald O'Hair, an officer of the P. E. O'Hair Realty Company, testified he had been in general charge of the business of the company since June, 1922, that no one had communicated to him any claim for a right of way over the property in question, and that he had never heard that any person claimed such right. Considering the evidence upon which it may be said the court based its findings, it is shown that lot 53 was uninclosed; that portions thereof were used by appellants and their predecessor in common with the public; that it was so used generally at "week ends" only; that travel was had thereupon in various directions, but that there was no well-defined roadway across said lot. In Clarke v. Clarke, 133 Cal. 667, 66 P. 10, 11, plaintiff brought action to quiet title to an open lot, and defendant, in his answer, claimed a right of way by prescription. The court in that case said: "The defendant and his tenants were in the habit of passing over the uninclosed strip of land when going to or from their business. The question as to whether or not the use was under a claim of right, or a mere matter of neighborly accommodation, was a question of fact to be determined by the court in the light of the relations of the parties, their conduct, the situation of the property, and all the surrounding circumstances. The court below saw the witnesses, heard them testify, and found the facts against defendant. Defendant testified that he used the way and claimed the right to use it, but it does not appear that any such claim was ever made to plaintiff or to his grantor. It is not sufficient that the claim of right exist only in the mind of the person claiming it. It must in some way be asserted in such manner that the owner may know of the claim. The fact that the owner knew of the travel and occasional use of the property does not even raise a presumption that such use was hostile or under claim of right. If any party who is allowed by silent permission to pass over the lands of another, nothing being said as to any right being claimed, after five years, without showing that he ever communicated such claim in any way to the owner, can thus gain title by prescription, it would be a blot upon the law. An owner could not allow his neighbor to pass and repass over a trail, upon his open, uninclosed land without danger of having an adverse title successfully set up against him." In Watson v. Board of County Com'rs, 38 Wash. 662, 80 P. 201, 202, the court held that, in order to establish a prescriptive right of way over unoccupied lands, the use must at least be such as to convey to the owner "reasonable notice that a claim is made in hostility to his title." The use that was made of the property in question was not such that it constituted constructive notice of a claim of right. The evidence amply sustains the finding of the court that there was no adverse user. 19 Cor. Jur. pp. 898–901, and notes.

Appellants complain of the court's finding regarding the claim for right of way for a pipe line across lot 53. They allege that such

line was laid by Walter Rueger. The court's finding is to the contrary. It found that the pipe line was constructed by the Marin municipal water district, and this is supported by the testimony of the witness Rueger. The evidence shows that it was constructed and maintained by the water district.

[8] As heretofore stated, appellants in their opening brief clearly rely on a right of way by prescription and under the provisions of section 1104, Civil Code. There is no claim made therein for a right of way of strict necessity. Respondent calls this to the attention of the court, and appellants reply that this is necessarily included in the construction of the section. We do not so understand. It is true that in construing said section it has been said that, in order to bring an easement within its provisions, it must be shown that such easement was "necessary for the reasonable enjoyment of the part sold" (Grimmesey v. Kirtlan, supra; Beem v. Reichman, supra), but, where so held, it has been referred to as only one of the necessary elements of proof under the section (Jones on Easements, § 145). We have hereinbefore referred to the opinion of the court in Jersey Farm Co. v. Atlanta Realty Co., wherein Mr. Justice Henshaw stated that the section contemplates a burden obviously cast upon land at the time of the transfer. The court in Cheda v. Bodkin, 173 Cal. 7, 158 P. 1025 calls attention to the distinction between an action for right of way of necessity and an action under section 1104. In that case it was said at page 13 of 173 Cal., 158 P. 1025, 1028: "The complaint contains an allegation that the flow of water from the Molinari ranch to the Foster ranch was 'necessary for the full enjoyment, use, and benefit of said Frank Foster ranch,' and appellants cite numerous authorities to the effect that this is not a sufficient pleading of strict necessity. These citations include Kripp v. Curtis, 71 Cal. 62, 65, 11 P. 879; Correa v. Higuera, 153 Cal. 451, 17 L. R. A. (N. S.) 1018, 95 P. 882; Cassin v. Cole, 153 Cal. 677, 96 P. 277; and Bully Hill, etc., Co. v. Bruson, 4 Cal. App. 180, 87 P. 237. The cases cited do not support the contention of appellants. The authorities refer to rights of way of necessity, but respondent was not seeking to have the court decide that a right of way of necessity existed. The plaintiff's pleading was to the effect that at the time of the severance of the ownership of the two ranches by the deed of Mrs. Laydon to her mother there was an open and notorious use of the water which was appurtenant to the Foster ranch and a burden upon the Molinari ranch." We are of the opinion that the question of whether or not appellants are entitled to a way of strict necessity is not included in the construction of section 1104 of the Civil Code, relied upon by appellants.

The court's findings are supported by the evidence, and its conclusions of law logically follow from the findings. The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

125 Cal.App. 535

LADD v. MATHIS et al.

Civ. 8227.

District Court of Appeal, First District, Division 2, California.

Aug. 26, 1932.

Rehearing Denied Sept. 24, 1932. Hearing Denied by Supreme Court Oct. 24, 1932.

1. Chattel mortgages ⇐287.

Deficiency judgment entered, without notice, over five years after foreclosure, on affidavits that mortgaged chattels were valueless, *held* not void for want of jurisdiction (Code Civ. Proc. §§ 685, 726).

Deficiency or personal judgment in question was not a new and independent judgment, but was an order merely to allow plaintiff in foreclosure suit to collect on her judgment therein without useless procedure of issuing order of sale and foreclosing security, which had become valueless.

2. Chattel mortgages ⇐287.

Where sale is ordered and sheriff or commissioner, after attempted sale of valueless mortgaged property, returns order unsatisfied, clerk may enter deficiency judgment for full amount.

3. Execution ⇐75.

Execution issued three days after docketing of deficiency judgment granted, without notice, over five years after foreclosure, on basis of affidavits that mortgaged chattels were valueless, *held* valid (Code Civ. Proc. § 685).

4. Fraudulent conveyances ⇐233.

Under findings that property was fraudulently assigned, judgment creditor *held* entitled to lien thereon.

Court found that assignment of note and trust deed in question by judgment debtors to their son was made without valuable consideration and with intent to defraud creditors; that subsequent assignment by son to his assignee in consideration of attorney fee claimed by assignee was made with fraudulent intent; and that assignee knew of original fraudulent transfer, and had collected on note more than amount which was due to him.

5. Appeal and error ⇐907(2).

Finding *held* presumably supported, where bill of exceptions omitted evidence on which finding was based.

6. Trial ⇐395(3).

Where defendants, to show inadequate consideration for property sold on execution, alleged value thereof, finding respecting value *held* within issues (Code Civ. Proc. § 462).

Since answer of defendants in action to have a note and trust deed applied on a deficiency judgment raised issue of value of certain property previously sold on execution, it was duty of court to make finding thereon, in view of Code Civ. Proc. § 462, providing that statement of any new matter in answer in avoidance or constituting defense or counterclaim must be deemed controverted by opposite party.

7. Appeal and error ⇐1039(6).

Where allegation in cross-complaint respecting property value was based on defendant's ownership, and court found against such ownership, cross-defendant's failure to deny allegation of value *held* immaterial.

Appeal from Superior Court, Los Angeles County; Charles F. Cook, Judge.

Action by Mary A. Gansert Ladd against John Mathis, for whom Ellis F. Mathis, as administrator of his estate, was substituted, and others, wherein Ellis F. Mathis and others filed a cross-complaint. Judgment for plaintiff, and cross-complainants appeal.

Affirmed.

Superseding opinion in 11 P.(2d) 76.

Thomas A. Sanson and Thomas T. Robinson, both of Los Angeles, for appellants.

E. R. Simon, of Los Angeles, for respondent.

BURROUGHS, Justice pro tem.

Plaintiff, Mary A. Gansert Ladd, brought this action for the purpose of having applied on a deficiency judgment held by her, a certain trust deed note, hereinafter referred to as the "Cole trust deed note," and the trust deed securing the same, which trust deed and note plaintiff claimed had been theretofore fraudulently conveyed by the judgment debtors, John T. Mathis and Theodosia Mathis, to their son Ellis Mathis, and by him fraudulently conveyed to the defendant Thomas Tyler Robinson, the present holder. Defendants appeal from a judgment in favor of plaintiff.

The facts not in dispute are as follows: In December, 1918, defendant John T. Mathis, being indebted to one Charles Britten Ladd, executed a promissory note, in the amount of $480, payable September 1, 1919, to said Charles Britten Ladd. Said note was secured by a chattel mortgage on a certain band of horses, twenty head all told. Both note and mortgage were signed by John T. Mathis, Theodosia Mathis, and Ellis Mathis, said last named being the son of said John T. Mathis and Theodosia Mathis and at the time of signing said instruments a minor of the age of eighteen years; the note and mortgage were subsequently assigned by the payee to his wife, Mary A. Gansert Ladd. Default judgment in a foreclosure suit on said note and mortgage was entered and docketed September 24, 1919, for the principal sum of $505.88, attorney's fees $40, and costs $82.60, and interest and "judgment over any deficiency after said sale and return."

In December, 1924, defendants John T. Mathis and Theodosia Mathis sold and exchanged all property then held by them for three certain trust deeds and notes, which said notes and deeds were assigned to Ellis F. Mathis, their son, two of said trust deeds and notes being herein referred to as the "Yorston trust deed note" and the "Cole trust deed note." February 20, 1925, a deficiency judgment (without notice of any kind to the defendants therein named) was granted in said foreclosure suit for the full amount of the judgment, and docketed February 25, 1925. Said deficiency judgment was granted on the evidence of four affidavits to the effect that the security given by said chattel mortgage was valueless. Thereafter, on execution issued February 28, 1925, a certain note and trust deed herein referred to as the "Yorston trust note," then standing in the name of Ellis F. Mathis, and being one of the trust deeds assigned to him as aforesaid, was levied upon and on April 15, 1925, at sheriff's sale, sold to Charles Britten Ladd, plaintiff's husband, for $150, of which sum $30.50, was credited on the deficiency judgment.

Defendants were not advised of the fact of the deficiency judgment having been granted nor of the levy and sale of the Yorston trust deed note before April 17, 1925. Sometime thereafter, defendant Ellis F. Mathis, on request of his parents, assigned that certain trust deed and note herein referred to as the "Cole trust deed note" to defendant Thomas Tyler Robinson. At some time in the early part of the year 1925 and before the last-named assignment was made, Mrs. Emma C. Relf had purchased the property described in the Cole trust deed and assumed the debts thereon, being about $2,300.

On August 12, 1925, the sheriff of Los Angeles county returned an alias writ of execution, setting forth thereon that he had served the same upon Emma C. Relf and Thomas Tyler Robinson, that the same was wholly unsatisfied, with added costs of $30.25.

On August 25, 1925, defendant Ellis F. Mathis, in said action of foreclosure above mentioned, after due notice, came into court and moved to vacate, annul, and set aside the judgment of foreclosure, deficiency judgment, and execution sale. The motion was

duly presented, argued, and denied and no appeal was taken therefrom.

It was stipulated in open court by counsel for the respective parties that the said instrument designated deficiency judgment and docketed in book 575 at page 371 of judgment records of said court had been obtained ex parte and without notice of any kind being given to the defendants therein named, and that no steps of any kind had been taken by or on behalf of plaintiff in said action of foreclosure from the date of filing of the foreclosure decree in September, 1919, until the filing of the affidavits and securing of the purported deficiency judgment on February 20, 1925.

In September, 1925, the complaint in the case at bar was filed. The defendants, Mathis, by their answer and cross-complaint, deny and allege as follows: Allege fraud in the procurement of the note and mortgage on which foreclosure was had; that the defendants Ellis Mathis and Theodosia Mathis were not served with summons and copy of the complaint in said foreclosure action; that cross-defendants (plaintiffs) maliciously conspired and caused the sheriff's sale to be held in such a manner that none of the defendants Mathis had notice thereof; deny having made any assignments with intent to defraud creditors; allege a consideration from Robinson for the transfer of the Cole trust deed note, in that John Mathis was indebted to said Robinson for attorney services; allege the value of the Yorston trust deed note to have been at the time of the sale $2,918.27 (the amount remaining unpaid thereon), and that defendant Ellis Mathis was the sole owner thereof. They ask the court to vacate and set aside the decree of foreclosure, deficiency judgment, and execution sale, and for damages in the amount of $10,000.

An amendment to the complaint was filed by which defendant Emma C. Relf was brought in and said defendant, answering, made application to be allowed to pay into court the regular monthly payments due from her on the Cole trust deed note, and thereafter payments to the amount of $1,000 were made to the clerk of the court before judgment was rendered herein.

Plaintiff, in answer to the cross-complaint, sets out the facts on the motion made in said foreclosure action on August 25, 1925, supra, and alleges that the order and decision of the court denying said motion is a final determination of the issues raised under the cross-complaint and is a bar to the prosecution of the alleged cause of action therein set forth. During the pendency of the action, defendant John Mathis died and Ellis F. Mathis, as administrator of his estate, was substituted. The appeal is before us on a bill of exceptions.

[1, 2] Appellant claims that the so-called deficiency or personal judgment which was entered February 25, 1925, is void because entered without jurisdiction. However, such order was not a new and independent judgment but was an order merely to allow the plaintiffs to collect on their judgment without the useless procedure of issuing an order of sale and foreclosing the security, which had become valueless. While a case directly in point has not been called to our attention, in the case of Toby v. Oregon Pac. R. R. Co., 98 Cal. 490, 33 P. 550, where a receiver was appointed pendente lite, upon a showing after trial and before entry of decree that the mortgaged property was deteriorating in value, the court ordered a sale and after confirmation of sale entered a decree reciting facts awarding judgment for the amount of the debt and interest, requiring the receiver to pay the amount in his hands upon such judgment to the plaintiff, and awarding execution for the balance. The opinion of the court is summarized in the syllabus as follows: "The object of section 726 of the Code of Civil Procedure, in regard to the foreclosure of mortgages upon real or personal property, is to inhibit a personal action to recover a debt secured by mortgage; to confine a recovery in such cases to one action; to make the mortgaged property the primary fund out of which satisfaction is to be had, and to give the plaintiff a personal judgment for such balance as may be found due after the exhaustion of the mortgaged property; but it is not necessary to give effect to the evident intent of the law-makers, that there can be no deficiency judgment without a sale under a decree of foreclosure and a formal return by the sheriff, but whenever an application of the primary fund and a deficit remaining exist, and can only be reasonably ascertained by other means, these facts are not to be ignored because made apparent in a different way." At page 495 of said opinion in 98 Cal., 33 P. 550, 552, it is said: "The contention of appellant that there can be no deficiency judgment without a sale, and formal return by the sheriff, seems to me too technical to give effect to the evident intent of the lawmakers in many cases." And further: "Suppose, in the present case, the steamship mortgaged had been lost by perils of the sea, pendente lite. Would the plaintiff have been without remedy? Or can it be claimed that the court would have been forced to the useless expedient of foreclosing the mortgage, ordering a sale, and awaiting the return of the sheriff, before a deficiency judgment could be docketed? Would it not rather be said that the court, having obtained jurisdiction of the parties and of the subject-matter, would, under the rules of equity, proceed, under the altered circumstances, and in view of the fact that the security was exhausted, to do justice by the entry of judgment for what would then become the deficiency, viz. the full amount due?"

In Parker v. Parker, 203 Cal. 787, 793, 266

P. 283, 285, the court says: "It is further urged that the original order for the issuance of the execution is void as having been made without notice to the defendant. It has been the law of this state since 1861 that the court, under section 685 of the Code of Civil Procedure (which was a continuance of section 214 of the Practice Act), has power ex parte to order the issuance of an execution on a judgment which has become final more than five years before the application. * * *" It was further said: "But the failure of the plaintiff to disclose the true situation did not go to the jurisdiction of the court to act on the ex parte motion. If the defendant, as judgment debtor, had good cause to show against the issuance and enforcement of process, he had his remedy by a motion to vacate the order and to recall the execution."

In Redlands Hotel Association v. Richards, 125 Cal. 569, 58 P. 152, 153, after referring to Toby v. Oregon Pac. R. R. Co., supra, the court said: "Under the equitable construction thus given to the statute, it may be that the court, upon proper proof that plaintiff's mortgage was valueless because the property was insufficient to pay and discharge the prior mortgage, could have found that fact, and directed a deficiency or personal judgment against the defendants, without selling the mortgaged property. * * *"

In the case of Rein v. Callaway, 7 Idaho, 634, 65 P. 63, 64, it is said: "In this state, as in the state of California, the mortgaged property becomes the primary security, and the personal obligation of the mortgagor a secondary one. The mortgagor, under our statutes, is personally liable only after foreclosure, and then only for the balance shown to be due by the return of the sheriff, unless it is made to appear that the property has been destroyed or otherwise become valueless without the fault of the mortgagee."

Under these authorities we are of the opinion that the court did acquire jurisdiction to enter the judgment. It could not be successfully claimed that had an order of sale been made and the sheriff or commissioner, after an attempted sale of the valueless property, returned the order unsatisfied, that the clerk could not have entered a deficiency judgment for the full amount. Such a proceeding is of constant occurrence. We therefore hold that the court did acquire jurisdiction to make the order.

[3] It is also claimed that the execution issued was void because issued more than five years after the entry of the original judgment of foreclosure. However, the execution was issued three days after the deficiency judgment was entered and we believe it would be a strained construction of the law to say that such issuance must be subject to a formal order of the court, except the one contained by implication in the entry of the deficiency judgment, which was entered three days previously. It is also a part of the record that succeeding the entry of the deficiency judgment and the issuance of the execution herein, the appellants made a motion to vacate and set aside said deficiency judgment and recall the execution and after a hearing thereon the motion was denied. No appeal was taken therefrom and the same is now final. In California Jurisprudence, vol. 11, at page 50 it is said: "The proceeding to have execution issued after five years is usually by motion supported by affidavit. The affidavit, however, does not have to stand the test applicable to a complaint. While the court may in a proper case direct that notice of motion be given, notice is not required in the absence of such direction, and is not necessary to constitute that due process of law which is guaranteed by the Constitution of the United States. If the debtor has a good defense or any cause to show against the enforcement of process, he has a plain and speedy remedy in a motion to vacate the order and recall the execution." In Doehla v. Phillips, 151 Cal. 488, 91 P. 330, it is held that the proceeding provided for in section 685 of the Code of Civil Procedure is not a new action but is a subsequent proceeding in the original action. We think the same rule applies to the foregoing proceedings to obtain a deficiency judgment where the security has become valueless. We find nothing in the record to indicate that the court was without jurisdiction; besides, the defendant has already had his day in court.

[4] Appellants urge that the transfer of the Cole trust deed and note to the defendant Thomas Tyler Robinson, at the most, only constituted a preference and cannot be attacked except through bankruptcy proceedings, or under the State Insolvency Law (St. 1895, p. 131).

The Cole trust deed note was one of the three trust deeds and notes which the court found had been fraudulently transferred to Ellis F. Mathis. The court further found that the Cole trust deed and note had been fraudulently transferred by Ellis F. Mathis to Thomas Tyler Robinson.

The court found that the assignment to Ellis F. Mathis was made without valuable consideration of any kind; that said assignment was made with the purpose, design, and intent of John T. Mathis, Theodosia Mathis, and Ellis F. Mathis to cheat, hinder, delay, and defraud creditors, and the plaintiff in particular; that the later assignment by Ellis F. Mathis, under direction of his father, John T. Mathis, and in consideration of $1,000 attorney fee claimed by Thomas Tyler Robinson, was made by John T. Mathis, Ellis F. Mathis, and Thomas Tyler Robinson with the purpose and intent to hinder, delay, and defraud creditors; and that Thomas Tyler Robinson also knew of the fraudulent trans-

fer of said note to Ellis F. Mathis. The court further found that the appellant Thomas Tyler Robinson had collected $1,050 on said trust deed note, which was more than was due to him. The court found as a fact that the said Robinson took and held title to said trust deed and note as a trustee for John T. Mathis and Theodosia Mathis, who were the beneficial owners thereof.

The findings of the court specifically sustain every allegation of fraud as made by plaintiff against the defendants, and find the allegations of fraud made by defendants against plaintiffs and cross-defendants to be untrue. In 12 California Jurisprudence, at page 1013: "A creditor receiving a preference may take only enough money or property to satisfy his debt. If the value of the property transferred exceeds the amount of the debt it is, therefore, evidence of a fraudulent intent, and the transaction should be subjected to the closest scrutiny. If there is an actual fraudulent intent in giving and taking the property, the transfer is void as against the other creditors of the debtor." We think the trial court correctly gave to plaintiff a lien on the Cole trust deed and note and on the payments thereon which had been made into court.

[5] It is contended by the appellants that the execution sale of the Yorston trust deed note should have been set aside because of a grossly inadequate consideration. Appellants claim that the admitted value of said trust deed note is the sum of about $2,918.27, the sale price being $150.

In the joint answer of the defendants Mathis to the amended complaint it is alleged as affirmative matter that the amount due and unpaid on said trust deed note was the sum of $2,918.27, or thereabouts, and that the actual market value thereof was, at the time of the sale, and at the time of the filing of the answer, the unpaid balance as above set forth. In the cross-complaint of the defendants Mathis there appears in substance the same allegation of value and this allegation is not denied in the answer of the plaintiffs to the cross-complaint.

The court, in response to the affirmative defense, specifically found that the actual value of said trust deed and note at the time of the sale or thereafter was not the unpaid balance due thereon, but was the sum of $150. The evidence upon which this finding is based is not contained in the bill of exceptions and therefore we must accept the findings as sustained by the evidence.

[6] It is claimed by appellant that this finding is clearly outside of the issues raised by the pleadings and therefore a nullity. In presenting this question the appellants rely upon the rule stated in Welch v. Alcott, 185 Cal. 731, 198 P. 626, that a material allegation of a complaint which is not denied by the answer requires no finding thereon and a finding contrary to such undenied allegation should be disregarded. The facts in the cases cited by appellant differ from the facts in the case at bar. In this case the answer to the amended complaint made by all of the defendants Mathis alleges the value of said note and trust deed as a part of their second or affirmative defense and for the purpose of the action such allegation is deemed denied by the plaintiff. Section 462 of the Code of Civil Procedure says: "The statement of any new matter in the answer in avoidance or constituting a defense or counterclaim, must, on the trial, be deemed controverted by the opposite party." This statutory provision is cited in 21 California Jurisprudence, at page 163, § 113, where it is said: "The law thus raises an implied replication, which takes the place of a reply, and relieves the plaintiff of any further pleading." This text is supported by many California cases cited thereunder. In 24 California Jurisprudence, at page 938, § 183, it is said: "Under the same system of express findings now provided for, full findings, unless waived, are required on all material issues. * * * The requirement applies not only to issues raised by denials of the allegations of a complaint, but to issues raised upon affirmative defenses in the answer or upon a cross-complaint." Taylor v. Taylor, 192 Cal. 71, 81, 218 P. 756, 51 A. L. R. 1074. It is therefore clear that the answer of all the defendants having raised the issue of the value of the trust deed note, it was the duty of the court to make a finding thereon, and the evidence upon that issue not having been brought to this court, the presumption must prevail that the finding is sustained by the evidence. The finding is clearly within the issues.

[7] The allegation of value set out in the cross-complaint was based upon an allegation of the sole ownership of defendant Ellis F. Mathis in and to said trust deed and note. The court specifically found against the said allegation of ownership and under such finding the value of the note in so far as the cross-complaint is concerned became an immaterial issue, and the failure of plaintiffs and cross-defendants to deny this allegation of value, as therein set out, in their answer to the cross-complaint was not material and had no bearing on the issue as formed by the amended complaint and answer thereto.

We believe the foregoing disposes of all the material points raised by appellants.

The judgment is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

125 Cal.App. 153

In re BARREIRO'S ESTATE.

BARREIRO et al. v. BANK OF ITALY NAT. TRUST & SAVINGS ASS'N.

Civ. 885.

District Court of Appeal, Fourth District, California.

July 29, 1932.

1. Executors and administrators ⇐15.

Office of executor held by bank *held* to descend by operation of law to successor banking corporation, where sale and consolidation took place (St. 1909, p. 87, § 31a, as added by St. 1913, p. 152, and amended by St. 1921, p. 181; St. 1909, p. 95, § 31, as amended by St. 1921, p. 1373, § 15).

Facts were that bank which was originally appointed executor sold its business, including its trust department, to bank having trust powers and authorized to do business as trust company in state, but that, before sale was completed, purchasing bank and another bank consolidated, and the consolidated bank had trust powers and was authorized to transact business as trust company in state. Subsequently superintendent of banks approved sale of executor bank to consolidated bank, and later the consolidated bank sold all its assets to state bank which had trust powers and which was later converted into a national bank.

2. Banks and banking ⇐237.

Where state bank reorganizes into national bank its identity is not necessarily destroyed (12 USCA §§ 35, 36).

3. Banks and banking ⇐233.

Transition of state bank into national bank carried with it office of executor of will by operation of law (12 USCA §§ 35, 36, 248).

4. Executors and administrators ⇐14.

Testator has right to nominate executor, and probate court will appoint nominee, in absence of legal disqualification (Code Civ. Proc. § 1365).

5. Constitutional law ⇐56.
Executors and administrators ⇐15.

Provisions of Bank Act under which office of executor descends by operation of law to successor banking corporation do not violate constitutional provisions vesting original jurisdiction of probate matters in Superior Court (St. 1909, p. 95, § 31, as amended by St. 1921, p. 1373, § 15; St. 1909, p. 87, § 31a, as added by St. 1913, p. 152, and amended by St. 1921, p. 181; Const. art. 6, § 5, as amended in 1924).

6. Executors and administrators ⇐55.

Executor was required to take charge of property of estate of deceased as it existed at time of death.

7. Executors and administrators ⇐60, 465.

Where there is no ancillary administration, domiciliary representative may administer on stock of foreign corporation and may be required to account for funds in foreign jurisdiction of which it takes possession (Civ. Code, §§ 657, 658, 663, 946).

8. Executors and administrators ⇐506(3).

In hearing on executor's account, evidence warranted finding that estate had not been damaged nor confronted with loss because of failure to have ancillary letters of administration taken out in Republic of Mexico, where deceased owned stock in Mexican corporation (Civ. Code, §§ 657, 658, 663, 946).

9. Executors and administrators ⇐513(3).

Orders settling executor's accounts were not subject to review where they had become final, appeal not having been taken.

10. Executors and administrators ⇐35(1).

Large family allowances made under court orders, due to mistake in estimate in value of property of estate, furnished no grounds for removal of executor (Code Civ. Proc. § 1626).

11. Executors and administrators ⇐35(1).

That persons who were guardians of estates of minors were trust officers of executor of will did not require removal of executor (Code Civ. Proc. §§ 1365, 1626, 1751).

12. Executors and administrators ⇐35(1).

Litigation involving divorced wife's petition for partial distribution of estate arising out of mutual mistake indulged in by all attorneys connected with estate and proceedings furnished no ground for removal of executor (Code Civ. Proc. § 1626).

13. Executors and administrators ⇐35(8).

Executor's advancements through honest mistake to deceased's divorced wife, where she owned portion of property taken over by executor, *held* not ground for removal of executor (Code Civ. Proc. § 1626).

14. Executors and administrators ⇐506(3).

Evidence warranted court's finding that inventory and appraisement returned and filed in proceeding respecting executor's annual account was greatly in excess of actual value of property.

15. Executors and administrators ⇐35(8).

Executor's withdrawal of surplus of Mexican corporation in which deceased owned stock in itself furnished no ground for removal of executor (Code Civ. Proc. § 1626).

16. Executors and administrators ⇐507(2).
Probate judge could reserve rulings on allowance or disallowance of any portion of executor's account, where evidence was unsatisfactory and incomplete.

17. Appeal and error ⇐901.
Error is not presumed, and appellant must show error on appeal.

18. Executors and administrators ⇐475.
Value of use of property could not alone be taken as standard for estimating market value in determining whether executor's account should be surcharged with loss on sale.

19. Executors and administrators ⇐506(3).
Evidence warranted court's finding that no loss resulted to estate from executor's sale of certain property in Mexico.

20. Executors and administrators ⇐506(3).
Under evidence, court properly found there was no loss requiring surcharge of executor's account in executing renewal lease to tenant in accordance with option given in original lease.

21. Executors and administrators ⇐510(11).
There being no evidence to contrary, appellate court could not disturb trial court's finding that amount paid by executor to certain person to take care of business connected with Mexican property was reasonable amount.

22. Executors and administrators ⇐104(1).
Executor paying claim of fifth class before paying succession taxes and federal estate and income taxes bearing higher rate of interest *held* not accountable for difference in interest under evidence.

23. Executors and administrators ⇐96.
In proceeding respecting executor's annual account and for removal of executor, *held* that executor's entering into contract with deceased's divorced wife and attempting to have her execute trust agreement which might have benefitted minor heirs did not prejudice either estate or minor heirs.

24. Appeal and error ⇐843(1).
Rulings reserved for future hearing and determination were not before appellate court on appeal.

25. Executors and administrators ⇐55.
Property owned by deceased's divorced wife should be removed from possession of executor, and expense of maintaining her portion should not be charged to estate.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

The Bank of Italy National Trust & Savings Association, as executor of the estate of Benigno Barreiro, deceased, filed a fourth annual account, to which objections were filed by Maria Teresa Barreiro and others, minors, by Charles A. Brinkley and another, guardians of their estates, and removal of the executor from office was asked. From the orders made, the minors appeal.

Orders modified, and, as modified, affirmed.

Jesse George and C. A. Brinkley, both of San Diego, for appellants.

Wright & McKee and C. M. Monroe, all of San Diego, for respondent.

MARKS, J.

Benigno Barreiro, citizen of the United States, resident of San Diego, died testate on June 4, 1925, leaving as heirs his three minor children, Maria Teresa Barreiro, Benigno Barreiro, Jr., and Oscar Barreiro. He had been divorced from his wife, Gertrudis Marquez Barreiro, on December 29, 1923. The decree of divorce was silent as to any division of the community property, leaving them tenants in common with an equal interest therein.

Benigno Barreiro owned property in California and in Mexico, and conducted a considerable mercantile business in the latter country originally under the name "Barreiro & Co." In 1920 he organized a Mexican corporation, the Compania Mercantil Internacional, S. A., hereafter referred to as the "Compania Internacional," through which he transacted his mercantile business in Mexico and which held the legal title to his property in that country. At some date, probably early in 1922, he discontinued the operations of the Compania Internacional except for the purpose of its liquidation. Victoriano Sanchez was appointed its liquidator with the apparent object of collecting in and distributing its assets and otherwise winding up its affairs. Accounts receivable and promissory notes of the total face value of about $30,000 (whether in Mexican money or that of the United States is uncertain) came into his possession. As far as the record discloses, no accounting was obtained from him by the deceased, and none has been made to the executor. Miguel Gonzales purchased the other and remaining personal property of this corporation for $250,000, payable part in cash, the balance being evidenced by promissory notes. The certificates of stock of the Compania Internacional have not been found, but it is probable that Mr. Barreiro owned all of them with a community interest in his wife.

Mr. Barreiro organized another Mexican corporation, the Compania de Inversiones de la Baja California, hereafter referred to as the "Compania," to which was deeded all of the Mexican real estate of the Compania Internacional, except one lot in the city of Mexicali, title to which remained in the original

corporation. After 1922 the business of Mr. Barreiro in Mexico consisted mainly of leasing the real estate there.

The capital stock of the Compania was divided into one thousand shares of the par value of $100 each, Mexican money, which would be equivalent to $50 in money of the United States at the rate of exchange prevailing at that time. All of the stock was issued to bearer and was found in the possession of Mr. Barreiro at the time of his death. He evidently assumed that he owned all of the corporate stock, as he disregarded the rights of his divorced wife in the interest which she took at the time of the divorce as tenant in common with him.

Deceased left two testamentary instruments which have been construed as his last will and a codicil thereto and have been admitted to probate as such. They were offered for probate by the Southern Trust & Commerce Bank, a California banking corporation, with its principal place of business in San Diego, together with a petition for its appointment as executor, which petition was granted. The bank immediately qualified and entered upon the discharge of its duties with Norman R. Morison, its trust officer, assuming active charge of the affairs of the estate.

On the same day that the will was admitted to probate, Norman R. Morison was appointed sole guardian of the estates of the minor children. He qualified and acted as such guardian until May 12, 1927, when his resignation was accepted, and Dean M. Plaister, an official of the Bank of Italy National Trust & Savings Association, was appointed and qualified and continued to serve until January 17, 1929, when he resigned and Robert L. Cardenas and Charles A. Brinkley were appointed in his stead. They qualified and are now acting in such capacity. Mrs. Barreiro is the appointed, qualified, and acting guardian of the persons of the minors.

The Southern Trust & Commerce Bank was sold to the Bank of America. The Bank of America consolidated with the Liberty Bank, and was known as the Liberty Bank of America. The Liberty Bank of America was sold to the Bank of Italy, which was converted into a national banking association known as the Bank of Italy National Trust & Savings Association.

A first executor's account was filed by the Southern Trust & Commerce Bank; a second by the Liberty Bank of America; and a third by the Bank of Italy National Trust & Savings Association, all of which were settled, and the orders settling them were allowed to become final. The Bank of Italy National Trust & Savings Association filed a fourth annual account to which objections were filed by the minors, and removal of the executor from office was asked. After a lengthy contest, the trial court ordered a full and detailed account of matters not directly covered in any of the other accountings. Amended and supplemental accounts were filed to which the minors objected, and another extended hearing was had. The trial court settled certain portions of the account, overruling objections to some of its items, and reserving its rulings on others. It virtually surcharged the executor's account with certain expenditures which it held were illegally made, but not with the full amount which the minors sought to have charged against it. The removal of the executor was refused; the court holding that it had succeeded to the office originally occupied by the Southern Trust & Commerce Bank.

On November 13, 1929, the trial court filed findings of fact and conclusions of law in which the various changes from the Southern Trust & Commerce Bank to the Bank of Italy National Trust & Savings Association were found in detail, and it was concluded therefrom that the Bank of Italy National Trust & Savings Association had succeeded to the office of executor and was then the duly qualified and acting executor of the estate. On November 21, 1929, a judgment was filed in which the following appears: "Now, Therefore, it is ordered and decreed that the Bank of Italy National Trust and Savings Association by reason of successive transfers and mergers and by operation of law has become and now is vested with the office of executor of the last will and testament of said Benigno Barreiro, deceased. That the petition for the removal of the Bank of Italy National Trust and Savings Association from the office of executor of the last will and testament of said Benigno Barreiro, deceased, be and the same is hereby denied."

After the filing of the amended and supplemental accounts and objections thereto, a hearing was had, and this question of the succession of the Bank of Italy National Trust & Savings Association as executor was again considered by the trial court, for it again made and filed findings of fact and conclusions of law on June 27, 1930, in accordance with those of November 13, 1929, and incorporated in this judgment a paragraph similar in effect to the one we have quoted from the judgment filed on November 21, 1929. The judgment of June 27, 1930, is the one attacked on this appeal as well as the minute order of November, 1929.

Appellants' specifications of error upon which they rely for a reversal of the judgment contain the following: "Appellants maintain that the Honorable Superior Court erred in the following particulars, viz.:

"One: In finding and holding that the Bank of Italy National Trust and Savings Association lawfully succeeded to the office of Executor by means of the series of pur-

chases and sales set forth in Finding IV of the Findings of November 13, 1929, without appointment or letters, and without having taken the oath of office, and in recognizing it as anything other than an intermeddler required to account as such.

"Two: In finding and holding that the so-called Mexican corporation, Compania de Inversiones de la Baja California, S. A., ever had a separate existence apart from the decedent, Benigno Barreiro, during his lifetime and apart from the Executor after his death.

"Three: In holding under the facts found that the said Corporation, Compania de Inversiones de la Baja California, was legally organized on July 9, 1926, by the Executor, or at all, and holding that all or any of the irregularities, defects or illegalities in the said reorganization and conduct of the said Compania have been waived by the appellants, and that no damage has or will result to the appellants from said reorganization.

"Four: In finding and holding that the Estate of the decedent has not been damaged or prejudiced, nor put in jeopardy of damage and prejudice by the failure of the Executor to have ancillary administration of the estate in Mexico."

"Six: In refusing to discharge the Executor Banks as required by section 1626 of the Code of Civil Procedure, even if it ever had a status as executor, for acts of waste, mismanagement, neglect, and embezzlement actually found by the court, and other like acts established by the evidence and which should have been found by the Court."

"Eight: In refusing to surcharge the Fourth Account as supplemented and amended, for losses suffered through waste, neglect, and embezzlement in the following sums in addition to the amount of the actual surcharge ordered, viz: (a) In the sum of $8799.-63 overpayments to and embezzlements by Manuel Lujan, instead of the sum for which it was actually surcharged on that account amounting to $4732.95 net. (b) In the sum of $16,986.00 principal of the so-called Cardinale notes and interest thereon at seven per cent. per annum from the date of said notes, September 18, 1924, for negligently failing to collect said notes. (c) In the sum of $6500.00 principal of the Alfred H. (Ed.) Johnson note and interest at seven per cent from the date of the death of the decedent, outstanding and uncollected and now uncollectable. (d) In the sum of $14,000.00 for failure to collect from Victoriano Sanchez, liquidator of the Compania Mercantile Internacional. (e) In the sum of $35,000.00 loss on the sale of the Tia Juana real property, fractional portions of lots 9 and 10, block 40, Tia Juana, Mexico, according to old plat thereof sold to Mariano Escobeda and the Compania Commercial S. A. for $35,000.00 less than the fair market value. (f) In the sum of $13,895.00 spent in speculation on the mining claims. (g) In the sum of $500.00 per month from the date of the death of the decedent, loss suffered from the renewal of the leases with the Compania Commercial owned by Miguel Gonzales after he had offered to surrender and cancel them. (h) In the sum of $50.00 per month from January 1, 1929, rental of store room occupied by Eustachio Valle. (i) In the total sum of $3605.75 payments to Ernestine Belindez on her fifth class claim before delinquent income and Federal Estate taxes drawing 12 per cent interest were paid."

"Ten: In suspending, postponing and reserving decision upon and deferring for further hearing the following issues and matters presented for determination, viz: (Consisting of a restatement of subdivisions a, b, c, d, and f, of specification eight just quoted.)"

"Twelve: In failing to make findings and conclusions upon and to determine and adjudicate the following matters on issues squarely presented for determination and adjudication, viz: (a) The misconduct and negligence of the Executor Banks in entering into the contract Exhibit A with Gertrude Marquez Barreiro, agreeing that one-half of the property of the estate should be set aside and distributed to her, and that her share should be placed in trust with the said Banks during her lifetime, and in demanding that she execute a trust agreement in accordance with said contract and offering to allow a distribution of a full one-half of the property to her if she would execute such trust agreement, engaging the estate in a prolonged, void proceedings in partial distribution because of her refusal, claiming and collecting fees for extraordinary services in said void proceedings and afterward having said proceedings set aside as void."

Many other specifications of error are made but have been omitted here as they are a restatement of those already quoted, couched in different language or necessarily involved therein.

We will have occasion to refer to Code sections relating to probate and guardianship proceedings. All such references will be made to the sections of the Code of Civil Procedure in effect at the time the questions discussed here arose and not to the Probate Code now in effect.

Appellants' first contention, that the Bank of Italy National Trust & Savings Association did not lawfully succeed to the office of executor by means of the series of purchases and consolidations, presents a question which has not been definitely decided in this state. As a first answer to this contention, respondent urges that this matter is res adjudicata and cannot properly be considered on this appeal, and relies upon the following facts: Appellants' original objections to the fourth an-

nual account presented the issue as to whether or not the Bank of Italy National Trust & Savings Association had succeeded to the office of executor and requested its removal from office as an interloper. Thereupon the executor filed a petition seeking an order that it had succeeded the Southern Trust & Commerce Bank as executor. By a minute order made on September 13, 1929, the petition to remove the executor was denied, and the petition of the bank was dismissed on the ground that the order sought was unnecessary. The minute order was followed by the formal judgment of November 21, 1929, which we have already quoted. While respondent has presented forceful arguments in support of its contention, we prefer to place our conclusion that the respondent is now the due and lawful executor of the will of deceased upon other grounds. Whether this order, under the circumstances, could be interlocutory, is a question that seems not to have been determined in California, and authorities in other jurisdictions are not in harmony.

The various mutations by which the Southern Trust & Commerce Bank finally was purchased by and consolidated into the Bank of Italy National Trust & Savings Association have been fully set forth in the opinion of the Honorable Charles C. Haines, trial judge as follows: "On December 31, 1926, under the provisions of section 31 of the California Bank Act (as amended by St. 1921, p. 1373, § 15) the Southern Trust and Commerce Bank sold its business, including its Trust Department, to the Bank of America, which had trust powers and was authorized to do business as a trust company in this state. Before the sale was completed the Bank of America and Liberty Bank consolidated under the provisions of section 31a of the California Bank Act and continued its corporate existence under the name of 'Liberty Bank of America,' which likewise had trust powers and was authorized by law to transact business as a trust company in this state. In January, 1927, the State Superintendent of Banks approved the sale of the Southern Trust and Commerce Bank to the Liberty Bank of America and thereupon the trust business of the Southern Trust and Commerce Bank was transferred to the Liberty Bank of America. On the 15th day of February, 1927, the Liberty Bank of America, under the provisions of section 31 of the California Bank Act, sold all of its assets to the Bank of Italy and said sale was approved by the Superintendent of Banks of the State of California, and thereupon the trust business of the Liberty Bank of America was thereafter transferred to the Bank of Italy, which was a state institution and had trust powers and was authorized by law to do business as a trust company in this state. On the 1st of March, 1927, the Bank of Italy under the provisions of section 5154 of the Revised Statutes of the United States (12 USCA § 35) was converted into and became a national banking association under the name of Bank of Italy National Trust and Savings Association with its principal place of business at San Francisco, California. Immediately upon its conversion into a national banking association, Bank of Italy National Trust and Savings Association made the deposits required by law and received from the Federal Reserve Board and from the Superintendent of Banks of the State of California permits and certificates authorizing it to do business as a trust company in this state." These transitions involve purchases under section 31 of the California Bank Act (St. 1909, p. 87, as amended), and consolidations under section 31a of the same act, together with the reorganization of a state bank into a national banking association under sections 35 and 36 of chapter 2 and section 248 of chapter 3 of title 12 of the United States Code Annotated. A decision of the interesting question presented requires careful consideration of portions of these sections.

Section 31 of the California Bank Act, dealing with the sale and purchase of banks, in effect at the time of the above purchases, contains the following provisions: "Upon the approval by the superintendent of banks of an agreement of sale and purchase and the transfer of the business of a trust department or of a bank having a trust department the purchasing bank shall, ipso facto and by operation of law and without further transfer, substitution, act or deed, and in all courts and places, be deemed and held to have succeeded and shall become subrogated and shall succeed to all rights, obligations, properties, assets, investments, deposits, demands, contracts, agreements, court and private trusts and other relations to any person, creditor, depositor, trustor, principal or beneficiary of any court or private trust, obligations and liabilities of every nature, and shall execute and perform all such court and private trusts in the same manner as though it had itself originally assumed the relation or trust or incurred the obligation or liability."

Section 31a of the same act (as added by St. 1913, p. 152, and amended by St. 1921, p. 181), governing the consolidation of banks, provides in part as follows: "When the superintendent of banks issues the certificate of authorization provided for by section one hundred twenty-eight of this act the new or consolidated corporation shall be a body politic and corporate by the name stated in the certificate, and for the term of fifty years, unless it is, in the articles of incorporation and consolidation, otherwise stated and thereupon each constituent corporation named in the articles of incorporation and consolidation must be deemed and held to have become extinct in all courts and places, and said new corporation

must be deemed and held in all courts and places to have succeeded to all their several capital stocks, properties, trusts, claims, demands, contracts, agreements, assets, choses and rights in action of every kind and description, both at law and in equity, and to be entitled to possess, enjoy, and enforce the same and every thereof, as fully and completely as either and every of its constituents might have done had no consolidation taken place. Said consolidated or new corporation must also, in all courts and places, be deemed and held to have become subrogated to its several constituents and each thereof, in respect to all their contracts and agreements with other parties, and all their debts, obligations, and liabilities, of every kind and nature, to any persons, corporations, or bodies politic, whomsoever, or whatsoever, and said new corporation must sue and be sued in its own name in any and every case in which any or either of its constituents might have sued or might have been sued at law or in equity had no such consolidation been made."

Sections 35 and 36 of chapter 2, title 12, United States Code Annotated, provide for the reorganization of state banks into national banking associations. Section 248 of chapter 3 of the same Code provides that a national bank, when not prohibited by state or local laws, may have "the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located."

[1] We cannot see how the Legislature could have been more explicit and clear in the language it used in the subdivision of section 31 of the California Bank Act which we have quoted in specifying the right of the purchasing bank to ipso facto succeed to all of the rights, privileges, and benefits of the purchased bank without any further court or other proceedings. It would do violence to the plain language of this section to hold that a purchasing bank would not automatically succeed to the office of executor held by the purchased bank, unless the language of the Bank Act be modified by some other statutory enactment or be repugnant to some provision of our Constitution. This perhaps explains the scarcity of decisions in California upon this question. However, two recent decisions are of assistance to us in construing this section.

In the matter of the Estate of Barnett, 97 Cal. App. 138, 275 P. 453, 454, the Bank of Italy National Trust & Savings Association, the same corporation that is before us here as executor, filed its annual account as trustee under the will of Melancton Barnett, deceased. It asserted its right of succession from the original corporate trustee appointed in the decree of distribution of the probate court to the office of trustee of this trust estate following various purchases, consolidations, and mergers with its predecessors. The beneficiaries under the trust objected to the account filed by the Bank of Italy National Trust & Savings Association upon the ground that it could not succeed to the office of the original trustee merely by operation of law resulting from these sales, consolidations, and mergers. The court held adversely to this contention, and in so doing said: "Sections 31 (as amended by St. 1921, p. 1373, § 15), 31a (as amended by St. 1921, p. 181), and 31b (as added by St. 1921, p. 1375, § 16), of this act provide for the transfer of the business of banking corporations by sale, by consolidation, and by merger. Each section makes special provision for the transfer of trusteeships by such corporations, the provisions of section 31 relating to a sale reading, in part, as follows: 'Upon the approval of the superintendent of banks * * * the purchasing bank shall, ipso facto and by operation of law and without further transfer, substitution, act or deed, and in all courts and places, be deemed and held to have succeeded * * * to all rights, obligations, * * * court and private trusts and other relations to any * * * principal or beneficiary of any court or private trust.' With this statute before it, it became the duty of the court sitting in probate to recognize the respondent as the new trustee and that court was without jurisdiction to hear or determine any protest on the part of the beneficiaries to the statutory substitution of the trustee, unless the statute is void as offending some constitutional provision."

The case of Bank of America of California v. Granger, 115 Cal. App. 210, 1 P.(2d) 479, also furnishes us with authority for the conclusion that the office of executor passed to the Bank of Italy National Trust & Savings Association by operation of law. This case involved purchases and consolidations of state banks under sections 31 and 31a of the California Bank Act. While the question of the right of a purchasing bank to automatically succeed to the trusts held by the purchased bank or the right of a consolidated bank to succeed to those of its component parts was not particularly discussed in the opinion, it was of necessity before the court, and the conclusions there reached could not have been arrived at had not the court been of the opinion that all of the rights of the predecessor banks merged in the successor banks by operation of law under the provisions of the two sections of the California Bank Act from which we have quoted.

Section 31a of the California Bank Act is also clear and specific in its terms. Its provi-

sions have been thoroughly discussed in the case of Mercantile Trust Co. v. San Joaquin Agricultural Corporation, 89 Cal. App. 558, 265 P. 583, 585. This case involved the right of a bank, after consolidation, to receive and exercise a trust in which the bank with which it had consolidated was named as trustee. In reaching the conclusion that the consolidated bank succeeded to this office by operation of law under the provisions of section 31a of the California Bank Act the court said: "It is not claimed here, nor could it be, upon any sound or reasonable basis or hypothesis, that the legislation involved in the foregoing section of the Bank Act in any manner or degree impinges upon or transcends any of the constitutional restrictions by which the legislative department of the state is hedged. Nor can it be doubted that where, as here, there is, in pursuance of the provisions of section 31a of our Bank Act, a consolidation of two banking corporations the result of which is to bring into existence a single corporation as the successor of the two, the former ipso facto succeeds to and is vested with ownership of the combined capital stocks, properties, trusts, contracts, etc., of the two several constituents of the corporation thus created. * * * The rule as thus stated is declared and expressed in section 4712, vol. 7, Fletcher's Cyc. Corp., as follows: 'When corporations are consolidated, the rights, franchises and privileges of the consolidated corporation depend upon the intention of the Legislature as manifested by the statute authorizing the consolidation. The Legislature may confer upon it, with the consent of the consolidating corporations, which consent is given impliedly by entering into the consolidation, all the rights, franchises, privileges and property of the consolidating corporations, or it may withhold some of them, or it may add to them new rights, franchises or privileges. * * *' See, also, 5 Thompson on Corporations, §§ 6083, 6107, 6111.

"The banking laws of the state of Illinois, as well as those of the state of New York, in all vital respects, are substantially the same as those of California. The provisions in the statutes of those states relating to the merging and consolidation of banking corporations are practically similar to those contained in section 31a of our own Bank Act. Especially illuminating and peculiarly pertinent to the present investigation, therefore, is the discussion in the decisions of the courts of those states in construing and expounding the several provisions of their statutes relative to banking corporations and the scope and the effect thereof with respect to the rights acquired and the obligations assumed by the offspring of the consolidation of two or more banking corporations. The case of Chicago Title & Trust Co. v. Zinser et al., 264 Ill. 31, 35, et seq., Ann. Cas. 1915D, 931, 105 N. E. 718, is, in the facts, strikingly similar to the case at bar, and discusses and disposes of several points advanced here. In that case a corporation named Real Estate Title & Trust Company of Chicago was made by one Etta Nelson the executor of her last will and testament. By her will she authorized said corporation, as her executor, to sell and convey the real estate of which she died seized. At the time the will was made the Real Estate Title & Trust Company and the Chicago Title & Trust Company were two distinct and unrelated corporations, each organized under and according to the laws of the state of Illinois and each vested with the power and right to accept and execute trusts and to be appointed assignee or trustee by deed, and also to be appointed executor, guardian, and trustee by will. Subsequently to the making of the will, and prior to the death of Etta Nelson, the two corporations were consolidated into one, under the name of Chicago Title & Trust Company, in pursuance of the statute of said state authorizing such consolidation. After due legal proceedings, letters testamentary were issued to the plaintiff (the consolidated corporation), and thereafter said plaintiff instituted a suit to compel the specific performance by the Zinsers of an agreement, entered into by and between the latter and the plaintiff after letters testamentary had been issued to the corporation, whereby the Zinsers agreed to purchase certain real estate belonging to the estate of the deceased. The suit was resisted upon grounds involving objections similar to some of those urged against the position of the plaintiff in the case now before us. The cause reached the Supreme Court of Illinois, and the action was by that court sustained in an opinion so clearly and satisfactorily disposing of the objections referred to that we feel that pardonably we may in extenso quote therefrom as follows:

"'By the consolidation of the Real Estate Title & Trust Company and the Chicago Title & Trust Company the original corporations ceased to exist, and the appellee, as the consolidated corporation, acquired and succeeded to all the faculties, property, rights, and franchises of its component parts and became subject to all the duties, obligations, and conditions imposed upon them. Robertson v. City of Rockford, 21 Ill. 451; Chicago, Rock Island & Pacific Railroad Co. v. Moffitt, 75 Ill. 524.

"'The material question here is whether the general rule that a trustee cannot delegate his authority to another is an obstacle to the exercise of a power by the appellee to act as executor or trustee where one of the constituent corporations was named as such. That general rule rests upon the ground that the selection of a trustee implies personal confidence in his discretion and judgment. If a power is given to an executor or trustee which is not ministerial or given for the purpose of

executing a declared trust which the court can enforce but which involves the exercise of discretion and judgment, the power cannot be delegated or transferred to another, either by the trustee or a court. The rule, however, cannot be applied to the case of a corporation, because the element of trust in the judgment and discretion of an individual is entirely wanting. A corporation is without personality, and if it is selected as trustee or executor there can be no reliance upon individual discretion or even upon the continuance of the same administration. Etta Nelson, in naming the Real Estate Title & Trust Company as executor and trustee, knew that its directors, officers, and stockholders might change from time to time, and that the statute authorized a change of name or place of business, enlargement, or change of the object for which the corporation was formed, an increase or decrease of capital stock or change in the number of shares or par value, increase or decrease of the number of directors, and the consolidation of the corporation with any other corporation then existing or that might thereafter be organized. She therefore contemplated that these changes might occur, and that the Real Estate Title & Trust Company might be consolidated with some other corporation such as the Chicago Title & Trust Company, and that it would thereby cease to exist and become a component part of a new corporation. A consolidation took place and a new corporation was created from the original corporations, with an enlarged capital stock and unimpaired franchises. The appellee was entitled to execute the trust, and the chancellor did not err in overruling the demurrer.' To the same effect are the Matter of the Will, etc., of Bergdorf, 206 N. Y. 309, 99 N. E. 714; McElwain Co. v. Primavera, 181 App. Div. 929, 930, 168 N. Y. S. 1134. See latter case also reported in 180 App. Div. 288, 167 N. Y. S. 815."

[2, 3] Under the banking laws of the United States, the changing of a state bank into a national banking association does not destroy the identity of the original bank. All the assets and rights of the state bank pass to the national bank without any formal assignment, and are subject to all the existing liabilities and obligations of the state bank as if the change had not taken place. Michigan Insurance Bank v. Eldred, 143 U. S. 293, 12 S. Ct. 450, 36 L. Ed. 162; Metropolitan National Bank v. Claggett, 141 U. S. 520, 12 S. Ct. 60, 35 L. Ed. 841. Where a state bank reorganizes into a national bank, it passes from one jurisdiction to another, but its identity is not thereby necessarily destroyed. It remains substantially the same institution under another name and subject to new control. Coffey v. National Bank, 46 Mo. 140, 2 Am. Rep. 488; City National Bank v. Phelps, 86 N. Y. 484. With these rules before us, the conclusion is inevitable that the transition of the Bank of Italy, a state institution, into Bank of Italy National Trust & Savings Association, a national bank, carried with it the office of executor of the last will and testament of Benigno Barreiro, deceased, by operation of law and without the necessity of court order.

Appellants seriously contend that jurisdiction over the estates of decedents is vested in the probate courts in California; that these courts have discretion in the appointment of executors given them by law; that an executor is required by law to take the oath of office after its appointment, and that the provisions of the state and national banking acts must be construed with and modified by the provisions of the probate law of this state; that the Bank of Italy National Trust & Savings Association did not receive its appointment as executor through an order of the probate court, and did not qualify by having one of its officers take the required oath of office, and that it cannot now be held to be the duly appointed, qualified, and acting executor of the estate of Benigno Barreiro, deceased, but must be regarded and treated as an interloper in the office which it asserts it occupies; that the right to name the executor of his estate is a right belonging to a testator, and to hold that the office of executor would descend to a corporation not named as such executor would destroy the right of nomination by the testator.

Several of the foregoing objections are answered in the portion of the opinion in Mercantile Trust Company v. San Joaquin Agricultural Corporation, supra, from which we have already quoted. Some are also considered in Estate of Barnett, supra, where the court said: "But, to our minds, there is one principle which controls a situation of this kind and that is the principle of consent of the parties. The Legislature, as we have stated, having the power to enact the legislation, and the trust having been created in contemplation of it, the consent of all parties to the legislative method of substitution of trustees must be deemed to have been given. Mr. Justice Hart, in the Mercantile Trust Case, expressed the same thought in this language: 'The statute authorizing the consolidation or merger of banking corporations, in so far as it prescribes a scheme for the transfer of their properties, * * * enters into and becomes a part of every agreement or obligation * * * and of this the defendant (the trustor), its directors, and bondholders are presumed to have known before and at the time of the execution of the trust deed * * * and * * * to have impliedly assented to the exercise of the legal right of said bank to merge * * * with all the consequences following such merger or consolidation as are prescribed by the law.' The right of the trustor to provide a method of filling vacancies and for appoint-

ment of successors in the trust is not disputed. 26 R. C. L. p. 1278. But when a trustor, in full contemplation of the provisions of the Bank Act relating to the sale, consolidation, or merger of banking corporations, voluntarily designates such a corporation as trustee he must be deemed to have adopted and included within his declaration of trust the full scheme for substitution of trustees prescribed in that act. No more forceful application of this principle could be made than in a case such as we have here of a testamentary trust, because the right to make a testamentary disposition of property is not an inherent right, but one which depends entirely upon the consent of the Legislature. Thus, when the Legislature has prescribed the rules and conditions under which the disposition and administration of estates may be had, the testator is deemed to intend the result which such rules produce and 'they affect the testamentary disposition and provisions as though embodied in the will.'"

The same questions were considered in In re Bergdorf's Will, supra, from which it appears that the will of a decedent named the Morton Trust Company as his executor. Before his death the Morton Trust Company merged into another corporation known as the Guaranty Trust Company under the banking laws of the state of New York which contain provisions similar to those we have quoted from the California Bank Act. After the death of the testator, the Guaranty Trust Company applied for letters testamentary, which application was contested. In denying the contest and granting the letters to the Guaranty Trust Company, the New York court said: "It was within the power of the Legislature to enact that a trust company, into which another trust company lawfully designated as an executor had been merged subsequent to the making and prior to the probate of the will, should be the transferee of the privilege or right of being the executor. * * * By virtue of the statute, effective as a part of the will, the Guaranty Company was designated as an executor, and as such is entitled to receive the letters testamentary." Chicago Title & Trust Company v. Zinser, supra, strongly supports this conclusion.

The case of O'Rourke v. Standard Wood Turning Company, 204 App. Div. 658, 198 N. Y. S. 632, 634, decides a question very similar to the one before us. An award under the Workmen's Compensation Law of the state of New York had been made to Bridget O'Rourke for the death of her husband. She had been declared incompetent and the Trust Company of America, a New York corporation, appointed committee of her property. The Trust Company of America merged with the Equitable Trust Company of New York which petitioned for the payment of the award to it as the successor of the Trust Company of America. In directing the award to be paid to the Equitable Trust Company of New York, the court said: "The merger was an equitable and ratable combination of the assets of each of said companies, becoming one instead of two bodies, and the taking of the one name for both companies. The question is asked: Is the relation of committee and incompetent a trust relation? In Person v. Warren, 14 Barb. 488, it is held that the committee is a trustee of an express trust, although at the same time he is a servant or bailiff of the court. In People ex rel. Smith v. Commissioner of Taxes, 100 N. Y. 215, 3 N. E. 85, the court says: 'The office of committee is as well defined and specifically referred to in law and in the statutes, as that of guardian, executor or administrator.' The question here is the effect of the merger, and the force of the statute is pointed out in Bank of Long Island v. Young, 101 App. Div. 88, 91 N. Y. S. 849. It is disclosed in Matter of Bergdorf's Will, 206 N. Y. 309, 99 N. E. 714, that the testator made his will in 1904, he named, with others, the Morton Trust Company an executor thereof. In January, 1910, the Morton Trust Company merged into the Guaranty Trust Company. The testator died in January, 1911. It was held that the merger did not prevent the issuing of letters testamentary to Guaranty Trust Company. It is found by the Industrial Board that the compensation 'is due and payable to Bridget O'Rourke,' and directs its payment to her committee, the Equitable Trust Company of New York. I am of the opinion that said committee has authority to take it under section 494 of the Banking Law." It must be borne in mind that in this case there was no new appointment of a committee by the court after the merger and no showing of the new committee taking an oath of office.

In Turner's Estate, 277 Pa. 110, 120 A. 701, the orphan's court of Pennsylvania appointed a state trust company as guardian of the estates of minors. The trust company was afterwards consolidated with a national bank which petitioned the orphan's court to order the guardianship funds turned over to it as guardian of the minors. The petition was denied by the orphan's court, but upon appeal was reversed by the Superior Court, which order was affirmed by the Supreme Court of the state. In the opinion of the latter court no question of the necessity of an application for letters of guardianship by the national bank after the consolidation was discussed, but a consideration of this question would seem to be necessarily involved in the decision, and it must therefore be construed as indicating that the conclusion of the Supreme Court of Pennsylvania was that the office of guardian occupied by the state trust company under order of the orphan's court automatically descended upon the national bank at the time of the consolidation, and that no application for appointment or oath of office by the national bank was necessary.

[4, 5] The next question involved in this appeal is whether or not the provisions of the California Bank Act, under which we have held that the office of executor descended by operation of law to a successor corporation, violates the provisions of section 5 of article 6 of the Constitution of California (as amended November 4, 1924), which vested original jurisdiction of all probate matters in the Superior Court. Appellants insist that the power to select and appoint a new administrator with the will annexed is taken from the probate court upon the happening of the purchase or consolidation of an executor bank. A sufficient answer to this is found in the cases which we have already cited, through which runs the principle that purchase or consolidation does not create an entire new entity, but, to paraphrase the expression of a court of a sister state, merely directs the blood of the old corporation into the veins of the new, the old living in the new. Further, the power to appoint a particular person or corporation as an executor or administrator concerns procedure in a probate court rather than its jurisdiction. A testator has the right to nominate the executor of his will, and the probate court will appoint the nominee in the absence of legal disqualification. Section 1365 of the Code of Civil Procedure has long provided the rules governing probate courts in the order of priority which must be followed in appointing administrators. These provisions have been recognized as lawful under the Constitution, and have never been held to interfere with the jurisdiction of the probate court in the administration of estates. By analogy we conclude that the holding that the office of executor descends to a purchasing or consolidated bank is not a violation of these constitutional provisions any more than it is a limitation on the probate court in the appointment of an executor or administrator in the instances above specified. The power remains in the probate court to remove the successor bank from the office if occasion should arise and the necessity for such action present itself.

We have reached the conclusion that the Bank of Italy National Trust & Savings Association succeeded to the office of the executor of the estate of Benigno Barreiro, deceased, without the necessity of court action, and that it is the duly appointed, qualified, and acting executor of that estate. We are aware that this conclusion is contrary to the weight of authority on this question in Massachusetts.

[6] Appellants' second specification of error naturally divides itself into two phases, namely: (1) Is the finding that the Compania had an existence separate and apart from deceased during his lifetime supported by the evidence? And (2) is a like finding concerning the Compania and the executor supported by the evidence? We cannot see how the first of these two questions possesses any such materiality as to deserve extended discussion here. This appeal is taken in a probate proceeding, the purpose of which is to settle and distribute the estate of deceased under the terms of his will, and is from an order of the court made after extended hearings on an account. The executor was required to take charge of the property of the estate of the deceased as it existed at the time of the death. Whether or not deceased during his lifetime operated in Mexico through the Compania as his alter ego is no concern of the probate court, as the alter ego question between deceased and the Compania is not material, and can have no bearing on the conduct of the executor in the administration of the estate. Whether or not the executor used the corporation as its alter ego in taking possession of and operating the properties of the Compania in Mexico is more directly involved in the appeal in case Civ. No. 488 [13 P.(2d) 1033] the opinion in which is this day filed, and is referred to for a more extended discussion of, and decision upon, this question. It is not necessary to repeat here the facts there stated nor the reasons given for upholding the conclusions of the trial court.

Appellants' third assignment of error is necessarily involved in the second phase of their second assignment, and is also considered and decided in the opinion filed this day in case Civ. No. 488 [13 P.(2d) 1033], which we refer to and incorporate herein.

[7, 8] Appellants complain that the finding that the estate has not been damaged, prejudiced, nor confronted with loss because of a failure to have ancillary letters of administration taken out in the republic of Mexico is not supported by the evidence. In considering this question, we must bear in mind that the principal estate of the deceased consisted of shares of stock of the Compania which were in his possession in California at the time of his death. This stock was personal property (sections 657, 658, and 663, Civ. Code), and, "if there is no law to the contrary, in the place where personal property is situated, it is deemed to follow the person of its owner, and is governed by the law of his domicile." Section 946, Civ. Code; Estate of Lathrop, 165 Cal. 243, 131 P. 752. Where there is no ancillary administration, it has been held, on the grounds of comity, that the domiciliary representative may administer on stock of a foreign corporation and may be required to account for funds in a foreign jurisdiction of which it takes possession. Reed v. Hollister, 44 Cal. App. 533, 186 P. 819; Brown v. San Francisco Gaslight Company, 58 Cal. 426. We have been cited to no law of the republic of Mexico under which an administration by a California court on the stock of a Mexican corporation would not be recognized there. It appears from the record that proceedings to probate the estate were started in a Baja Cal-

ifornia court by officials of that state, but were discontinued as unnecessary. The termination of this proceeding, if it can be considered terminated, seems to have met with the approval of the parties interested because of the great expense of such proceedings in Mexico which appear to be considerably larger than in similar proceedings in California. The assets of the estate in Mexico, exclusive of those whose title is of record in the Compania, are of comparatively small and questionable value. It was the conclusion of the trial judge that the value of the property to be recovered to the estate by ancillary proceedings in Mexico would not exceed, and might be much less, than the cost of the proceedings to the estate. This conclusion is amply supported by the evidence, and it does not appear that the lack of administration proceedings in Mexico has yet caused proven loss to the estate. It should be the object of the administration of an estate to conserve its assets and not waste them. Should it prove advisable to take out ancillary letters in Mexico at any time in the future, there is nothing to prevent such proceedings being instituted.

[9, 10] Appellants, in addition to their objections to the fourth annual account and the amendments and supplements thereto, ask the removal of the executor under the provisions of section 1626 of the Code of Civil Procedure because of waste, embezzlement, and mismanagement of the estate. They present many grounds in support of this petition, some of which are considered in this opinion, and others in the opinion in case Civ. No. 488, to which we again refer for a discussion of these questions. Many of the grounds urged for the removal of the executor and a revocation of its letters concern matters directly involved in the first, second, and third annual accounts which were heard and settled by the court in the regular course of the probate proceedings. No appeals were taken from the orders settling these accounts, and, inasmuch as they have now become final, they are not subject to review here. Estate of Clary, 203 Cal. 335, 264 P. 242. Up to and including the settlement of the third account, these include what appellants refer to as lavishing money upon the family of deceased and paying a family allowance out of all proportion to the assets of the estate and its income. These allowances, including those made after the settlement of the third account, were made upon petitions to and under orders of the court. They were large, and, in view of the facts now disclosed as to the actual value of the estate and its present income, appear to have been extravagant, but this was undoubtedly due to a mistaken estimate of the actual value of the property belonging to the estate and the permanency of the very considerable income from this property which existed at the time of the death of Mr. Barreiro and for some little time thereafter. These mistakes were indulged in by Mrs. Barreiro, all the parties interested in the probate proceedings, and their then attorneys. They were honestly made, and the amounts of the allowances can furnish no grounds for the removal of the executor under the facts disclosed by the record. The order settling the fourth account made a substantial reduction in the family allowance.

[11] Appellants urge that their rights were not properly protected in the estate affairs and in the settlement of the first three annual accounts, because Norman R. Morison and Dean M. Plaister, who were the guardians of their estates, were at the same time the trust officers of the executor and acting as its representatives in the active management of the affairs of the estate, and therefore occupied adverse and hostile positions in the two offices. No suit in equity has been brought to vacate any of the orders settling these accounts. We cannot conclude that the sole fact of the same person being the guardian of the estates of minors who are distributees under a will, and at the same time in charge of the affairs of the estate for the corporate executor in itself, demonstrates that he occupies two hostile and adverse positions rendering his acts conclusively illegal in either of them. It is a common custom to appoint the parent of minors, who take under a will, the executor of the will and the guardian of the persons and estates of the minors. That both these offices may be filled by the same person is recognized by the laws of this state. Sections 1365, 1751, Code Civ. Proc. When both offices are held by the same person, that fact of necessity is known to the court hearing the accounts. It may be a reason for a more careful scrutiny of such accounts, but it cannot be said that one and the same person cannot fill both offices. The fact that one person fills both offices cannot be made the sole ground for his removal from either of them.

[12] Appellants complain that the executor wasted large sums of money in needless and useless litigation. They have reference to litigation in the republic of Mexico which we have considered in the opinion in case Civ. No. 488, and to which we refer for a discussion of this question. They also refer to the litigation resulting in the decision in the case of Estate of Barreiro, 86 Cal. App. 764, 261 P. 509. That proceeding was started by Mrs. Barreiro in her petition for partial distribution to her of that portion of the estate which she claimed belonged to her as "community property," in reality being the property which she owned as tenant in common with her husband after the divorce. This litigation arose out of a mutual mistake indulged in by all the attorneys then connected with the estate and the proceed-

ings. They apparently assumed that Mrs. Barreiro would take the property which belonged to her, through the estate, rather than adversely to it. Her attorneys chose the forum in which she sought to assert her rights. She instituted the proceeding which was contested through all of the courts of this state having probate jurisdiction. The order of partial distribution which was made was vacated by the trial court on the ground that it was beyond the jurisdiction of a probate court. No appeal was taken from this decision. In his findings, conclusions, and judgment under attack here, the trial judge held that, as the mistake resulting in the order of partial distribution had been honestly made, it afforded no ground for removal of the executor under the provisions of section 1626 of the Code of Civil Procedure. It is apparent from the record, and from the final order of the trial judge settling the account wherein he refused the allowance of further fees to the executor and its attorneys at that time, that in the future, in fixing fees for unusual services, he will exercise a sound discretion, taking into consideration the extra services performed and to be performed in the probate proceedings. Under this state of the record we conclude that the finding of the trial court, that the expenses of this litigation do not furnish grounds for the removal of the executor, finds support in the record.

[13] Appellants further urge that the executor should be removed and its letters revoked because of a payment to Mrs. Barreiro of some $1,300 under what is termed an "advancement" to her. She was given $1 under the will of deceased, and was not entitled to receive any greater sum under the provisions of that document. This "advancement," of course, should not be credited as a lawful expenditure by the executor out of the funds of the estate, as Mrs. Barreiro, having been divorced from her husband, was neither his widow nor his heir at law at the time of his death. She was, however, the owner of a portion of the property in the possession of the deceased at the time of his death and which the executor took over when appointed and has since held. These advancements should be charged against Mrs. Barreiro's portion of the property when it is carved out of the assets held by the executor and an accounting had between them. We believe that the trial court was justified in holding that these payments did not furnish any sufficient ground for the revocation of letters testamentary as the mistake was honestly made.

[14] Appellants complain of a finding of the trial court to the effect that the inventory and appraisement returned and filed in this proceeding was greatly in excess of the actual value of the property appraised. They direct their arguments chiefly to the appraisement of the shares of stock in the Compania. Three appraisers were appointed by order of court, one of whom was an inheritance tax appraiser. They appraised the one thousand shares of stock in the Compania at $500,000, including within this appraisement the stock belonging to Mrs. Barreiro. It is of course immediately apparent that this was a mistake, as the executor could not administer upon any property not owned by the deceased at the time of his death. The valuation placed upon this stock was seemingly measured by the income derived from rentals. This was an attempt to value property by its use rather than its market value. The difficulty of obtaining a reasonably accurate appraisement of this or like property of the estate may be demonstrated by an exhibit from the record showing appraisements of Mexicali property made over a short interval of time. For the purposes of illustration only here follow the total appraised values of practically the same properties: In Mexican money, the first, $399,256; the second, $399,256.98; the third, $1,040,064.76. The same properties appraised in money of the United States, the first, $131,500; the second, $199,268.34; the third, $111,500. The last appraisement in Mexican money, $1,040,064.76, seems to have been based upon cadastral values, and is so in excess of the other appraisements as to cast a decided doubt upon the reliability of cadastral values as measures of the market value of property. We cannot disturb the finding of the trial court that the appraised value of the shares in the Compania was greatly in excess of its market value.

[15] Appellants complain of what are denominated in the accounts as "liquidating dividends" taken from the Compania by the executor and used by it in paying the expenses of administration, the family allowances, repairs to the property in Mexicali damaged by earthquake, and other such purposes. The record discloses that in excess of $83,000 was so used. They maintain that this amounted to an unlawful distribution of the capital assets of the corporation and was conclusive evidence of waste, mismanagement, and embezzlement of estate funds by the executor requiring its removal from office.

The Compania was incorporated with one thousand shares of capital stock with a par value of $100 per share in Mexican money, which would give a total capital value of approximately $50,000 in money of the United States at the rate of exchange prevailing at the time of the death of Mr. Barreiro. The excess of the actual value of the property owned by the Compania over the par value of its stock was more than $83,000. If the corporation were in California, this

excess could be considered as surplus, undivided profits, or a reserve for dividend purposes. The distribution of a portion of this surplus or undivided profits for the benefit of the stockholders would not in itself be illegal, as the assets of the Compania were not reduced in value below the par value of its capital stock. The fact of the withdrawals of this money, in itself disassociated from the actual expenditures made, does not furnish grounds for the removal of the executor. The conclusions of the trial judge in refusing to revoke the letters testamentary and remove the executor from its office because of waste and mismanagement of the estate or embezzlement of estate funds were based upon a great mass of conflicting evidence. Some of this evidence sustains his conclusions that the executor was not guilty of the acts charged. We therefore conclude that the order refusing to remove the executor and revoke its letters finds support in the evidence and may not be disturbed by us. Estate of Bottoms, 156 Cal. 129, 103 P. 849.

[16] We now pass to the consideration of the Manuel Lujan accounts, the so-called Cardinale notes, the Johnson note, the accounts of Victoriano Sanchez as liquidator of Compania Internacional, and money spent on the mining claims, upon all of which, except a portion of the Lujan accounts, the trial court reserved its ruling. The account of the executor was virtually surcharged in the net amount of $4,782.95 to be paid to the Compania out of its own funds, and $500 out of the estate funds. This was held to have been illegally paid to Manuel Lujan. Appellants claim an additional amount of $3,506.68 should have been surcharged as having been illegally paid to Lujan. This latter amount was one among a number of items upon which the trial court reserved its ruling. Appellants complain of the refusal to surcharge the account with the various amounts upon which ruling was reserved. They maintain that all of these amounts should have been surcharged to the executor and it required to pay the money into the assets of the estate. We have examined the evidence and agree with the trial judge that in many respects the account is most incomplete and unsatisfactory. We can see no reason why he could not reserve his rulings upon the allowance or disallowance of any portion of the account wherein the evidence was unsatisfactory and incomplete. In re Farmers' & Merchants' Bank of Imperial (Cal. Sup.) 1 P.(2d) 422. It would be a manifest injustice to the executor to surcharge the account with items, if the payments were lawfully made, and would be a like injustice to the distributees to fail to surcharge the account with them, if they were not made in accordance with law. The right of a probate judge to reserve his rulings upon any items of an account concerning the legality of which there is reasonable question was recognized in the early case of Reynolds v. Brumagim, 54 Cal. 254, where it was said: "The Court could in terms have settled the account as rendered, expressly reserving all questions as to liability for the omission now complained of."

[17] Appellants make one further criticism concerning the account of Manuel Lujan of which we must take notice. The trial judge found that Lujan had received from the executor and the Compania $10,050. Appellants assert he received an additional amount of $300 which the court failed to consider, and which should have been surcharged against the executor. Without making any further explanation or comment upon this payment, they merely refer to the clerk's transcript "Volume Two, page 431." On this page appears the following entry under date of January 1, 1927: "Southern Trust & Commerce Bank sight draft drawn by L. Lujan, $300.00." We presume that in the long record before us there is some valid explanation of this payment to Lujan and vouchers therefor. Error cannot be presumed, and we do not feel called upon to search the entire record to determine whether or not this expenditure, relatively small in amount, was legally made. We rely upon the well-established rule that error is not presumed and that an appellant must show error before an appellate court can hold that it has been committed by the trial court.

Appellants complain of the ruling of the trial court in refusing to surcharge the executor's account with $35,000, alleged to have been lost on the sale of Tia Juana real property; with $500 per month on the lease with the Compania Commercial; with $50 per month rent of a storeroom occupied by Eustaquio Valle; and with loss of interest from the payment of the claim of Ernestine Belindez. The trial court found against appellants on these items and that no loss resulted to the estate therefrom. This finding is attacked as not supported by the evidence and contrary to it.

[18, 19] The real property in question consisted of portions of lots 9 and 10 in block 40, Tia Juana, Mexico. These were sold to Mariano Escobeda and the Compania Commercial then owned by Miguel Gonzales. Escobeda paid $25,000 in lawful money of the United States for one portion of the property; the Compania Commercial paying $15,000 in like money for the other. The portion of the property purchased by Escobeda had been rented to him by deceased at $300 per month, and that purchased by the Compania Commercial had been rented to it at $100 per month. Appellants maintain that this last lease was very much below what it should have been, and that it could have been rented for from $300 to $350 per month. They ar-

gue that this property should have been producing a net revenue of 7 per cent. upon a valuation of $80,000. They produced two witnesses who attempted to testify as to the reasonable market value of the property. One, Silvio Blanco, a business man and resident of Tia Juana, estimated the fair market value of the property at $65,000. It was evident from his testimony that this value was based largely upon its rental value. He knew of no sales of, nor offers for, similar property in that city. The other witness, Juan J. Cervantes, an engineer in the department of public works of Tia Juana, estimated the value of the property at between $68,000 and $75,000. He knew of no sales of, nor offers for, similar property in Tia Juana, but seemingly placed his valuation on what is known there as cadastral values. Fixing market values in Tia Juana according to standards adopted in the United States was a very difficult problem, as there was no available evidence of sales of property in that city, and the estimates of values given by these witnesses were based upon rentals. The futility of attempting to fix the market value of these properties by the rentals produced at a given time is immediately apparent from the record. The properties of the estate in Mexico were used for the sale of liquor and kindred enterprises which are prohibited by law in California. These uses are not stable and rentals fluctuate with the conditions of business prevailing in the different localities. Property belonging to the Compania in the city of Mexicali which a few years ago rented for several hundred dollars a month is now untenanted. It nowhere appears in that portion of the record cited by appellants whether the valuation placed upon this property by either of the above witnesses was in Mexican money or in money of the United States. If it were in Mexican money, it would make their estimated valuations, measured in money of the United States according to the rate of exchange prevailing at that time, not more than $37,500, or $2,500 less than the executor actually received for the property.

Just before the sale of the Tia Juana real estate, the property belonging to the Compania in the city of Mexicali had been seriously damaged by earthquake, and repairs were necessary to keep it suitable for rental purposes. The greater portion of the income of the estate was derived from rentals there. Sufficient funds were not available for these repairs, and it seemed necessary to sell the Tia Juana property. Accordingly the executor made efforts to secure a purchaser. The best price offered for the property as a whole was $25,000. With the exercise of considerable diligence and effort, no purchaser could be found who would pay more than $40,000. This was the amount actually received.

Courts have experienced considerable difficulty in arriving at a rule which will always govern the fixing of the market value of property where there has been no actual demand for it, or where there have been no sales of similar property in the neighborhood. In the case of San Diego, etc., Co. v. Neale, 78 Cal. 63, 20 P. 372, 3 L. R. A. 83, such a situation was before the Supreme Court. In that case it was held that the value of the use of property, or its rental value, could not be used solely as a basis for fixing its market value; that by market value was meant the price the owner could obtain after a reasonable effort over an ample period of time in finding a purchaser and making a sale of the same or similarly situated property. While the value of the use of property, or in other words, its income, may be considered as an element in fixing its value, the value of the use cannot alone be taken as a standard upon which to estimate and fix its market value. We can find nothing in the evidence cited by appellants which would justify us in setting aside the conclusion of the trial judge that no loss was occasioned by the sale of the property in question for $40,000 in lawful money of the United States.

While appellants have not specified any error committed by the trial court in refusing to surcharge the accounts of the executor with alleged losses from sales of property in Mexicali and in Algodones, they devote many pages of their briefs to a discussion of these two questions. What we have said concerning the alleged loss through the sales of the Tia Juana property applies to the sales of property in Mexicali and Algodones.

[20] Appellants next complain of the loss of $500 per month in a renewal lease for rentals of Mexicali and Tia Juana properties to the Compania Commercial. The record discloses that Barreiro during his lifetime had leased these properties to this corporation which was owned and controlled by his friend Miguel Gonzales. The lease contained an option for a renewal over a period of years. It seems that the original lease contained a provision requiring that notice of an intention to exercise this option be given Barreiro at a Mexicali address. The notice was not sent to the Mexicali address, but was given to, and personally received by, Barreiro in San Diego and also in Tia Juana. Upon this technicality of the notice not having been given at the Mexicali address, Barreiro, shortly before his death, started suit in the Mexican courts to cancel the lease and recover possession of the property. This suit was pending at the time of his death. Subsequently a higher rental was offered by another party, but was rejected by the executor. A renewal lease was executed to Gon-

zales at the rental specified in the original lease. Appellants maintain that loss to the estate was occasioned by not accepting the higher rental offered by the prospective new tenant. They particularly refer to a conference held in San Diego between Mr. Morison, representing the executor, Gonzales, various attorneys, and others, during which Gonzales offered to cancel his lease and surrender the property to the possession of the executor. We have carefully examined this portion of the transcript, and find that Gonzales did make a statement in one portion of his testimony that he would cancel his lease, but all the evidence bearing on this subject would lead to the conclusion that this statement was not an offer of a present cancellation and surrender of the leased premises, but a request that the executor examine the legal rights of the parties under the original lease and option for extension, together with the notices of intention to exercise this option actually given to Mr. Barreiro, and, if after such investigation it was of the opinion that the suits against the Compania Commercial could be prosecuted to a successful termination, he would peacefully and without further litigation cancel his lease and surrender the property to the executor. We are of the opinion that the investigation made by the executor and its attorneys correctly disclosed that the action instituted by Barreiro could not have been brought to a successful conclusion. The new lease was for the same term and at a similar rental as specified in the option for an extension executed by Mr. Barreiro. Under this state of facts no loss was shown.

[21] Appellants complain of an alleged loss of rental of $50 per month on a storeroom occupied by Eustaquio Valle. It is not questioned that this storeroom had a rental value of the amount stated. Valle had been employed by the executor to take care of certain business connected with the Mexican properties and was paid a monthly salary, and as part of his compensation was furnished this room for use as an office. While the total compensation, including the use of the office, was somewhat in excess of that paid for like service in California, we have been referred to no evidence that would indicate that the total amount paid Valle was an unreasonable amount for such services in Baja California. There being no evidence to the contrary, we cannot disturb the finding of the trial court that the amount paid to Valle by the executor, including the free rental of the room in question, was a reasonable amount to be paid for his services, and that the estate suffered no loss thereby.

[22] Appellants make objection to the payment of the Belindez claim which had been allowed and which consisted of $750 and $2,855.75, paid on October 17, 1927, and December 21, 1927, respectively. They contend that the state succession taxes and the federal estate and income taxes ought to have been paid first because they bear a higher rate of interest than ordinary allowed claims, and thereby a loss of interest resulted to the estate. Section 1643 of the Code of Civil Procedure classifies obligations with reference to priority. Debts given priority under the laws of the United States are assigned to the third class while liens generally are assigned to the fourth class and general obligations of the estate to the fifth class. The Belindez claim was a recognized debt of the estate, and no objection can be made to its payment except, perhaps, as to time. From the opinion of the Hon. Charles C. Haines, trial judge, we quote and adopt the following: "In my judgment there can be no question about the propriety of paying it (the Belindez claim) prior to the payment of either the state succession tax or the federal estate tax. The state succession tax is a tax on the individual shares passing from the decedent by will or otherwise to other persons, and, though the executor is liable for it, it is paid out of their shares, not out of the gross estate, and obviously cannot be intended to have any priority over the claims of any creditors of the decedent. The federal estate tax is reckoned on the value of the estate rather than any shares in the estate, but it is reckoned on the net estate, and obviously was not intended to prejudice creditors. The situation as to the federal income tax is, indeed, different, as that was a debt or obligation of the decedent incurred in his lifetime and which undoubtedly has a priority under the laws of the United States. There was, however, prolonged uncertainty about what it amounted to, and it is not clear from the evidence just when its amount was finally arrived at and fixed and placed in shape to be paid. In the meanwhile, the Belindez claim bore 7 per cent. interest. Were it clear from the evidence that the income tax demands were liquidated and fixed before the payments complained of on the Belindez claim were made, so that the executor deliberately preferred in time of payment a claim of the fifth class, bearing 7 per cent. interest, over one of the third class, having priority by law and bearing 12 per cent. interest, doubtless it would be accountable for the 5 per cent. difference in interest so lost. But in the circumstances it is not sufficiently plain that the executor did not use reasonable business judgment in that matter to make me feel justified in surcharging it on that account. As far as the principal of both obligations is concerned, it would have to be paid in any event before the net share of the minors in the estate could be freed of the claim."

[23] Appellants' twelfth assignment of error refers to an alleged misconduct of the executor in entering into a contract with Mrs.

Barreiro and in attempting to get her to execute a trust agreement placing her portion of the estate properties in trust with the executor for her use during her lifetime and for the benefit of appellants after her death. This contract was prepared before the appointment of the executor. The declaration of trust was not executed by Mrs. Barreiro. If executed, it might have resulted in benefit to the appellants, as it would have given them a fixed and present interest in the property of their mother which they do not now have. Neither the estate nor appellants were prejudiced by this contract or by the unexecuted declaration of trust.

[24] In the opinion this day filed in case Civ. No. 488 [13 P.(2d) 1033], we have affirmed the order of the trial court directing the executor to pay the sum of $4,782.95 out of its own funds into the treasury of the Compania on the ground that it was negligent in not collecting this sum from Manuel Lujan, the Mexican attorney who disappeared before making payment of this money to the executor of the Compania. In that case we held that the probate court could examine the conduct of the executor in its control of the Mexican property of the deceased and the Compania because it had disregarded its corporate entity and managed the property in Mexico without due regard to the existence of the corporation. In the instant case we have examined in great detail some of the actions of the executor in its management of the Mexican property and sustain the ruling of the probate court in refusing its removal, even though, through its negligence, it lost the money taken by Lujan. A return of this money by the executor will prevent its loss to the estate. The trial court was of the opinion that the executor and its then attorney, now deceased, were honestly mistaken in the position taken in the earlier years of the administration, and that a refund of the money lost was all that the equities of the situation required; the removal of the executor not being necessary under the circumstances disclosed by the record. We have not disturbed these findings. Rulings were reserved on a number of questions involving possible loss to the estate. Because such rulings were reserved for future hearing and determination, these questions are not before us on either appeal except as to the right of the trial court to reserve its ruling.

[25] As we have repeatedly stated, the property owned by Mrs. Barreiro should be removed from the possession of the executor. The income from this property, if any, does not belong to the estate. The expense of caring for and maintaining her portion should not be charged to the estate. It is evident that an accounting must be had and some adjustment made. Whether this will result in the executor being charged with a greater amount than its account now shows, or being credited with expenditures in excess of those now claimed by it, cannot now be determined. The order of the trial court should be amended by reserving to it the right to credit to, or charge against, the executor any sums that an accounting between it and Mrs. Barreiro may show necessary and proper under the circumstances of such an accounting.

It is ordered that there be, and there is hereby, added to the order of the trial court filed on June 27, 1930, a paragraph numbered eighteenth, in words and figures as follows:

"Eighteenth: It is further ordered that the court reserve unto itself the right to further correct and modify the accounts of the executor by reducing from the total value of the property in the accounts charged to it, the value of that portion of such property as may be determined to belong to Gertrudis Marquez Barreiro, if any, and to modify the accounts of the executor by adding thereto, or deducting therefrom, as the case may be, any income received by said executor on the property held by it during the course of administration which actually belonged to Gertrudis Marquez Barreiro, and any expense incurred by it which should have been properly charged against or credited to the said Gertrudis Marquez Barreiro, if it should finally appear that such credits or charges should be made."

The orders appealed from, as so modified, are affirmed.

We concur: BARNARD, P. J.; SCOVEL, Justice pro tem.

In re BARREIRO'S ESTATE.*

BARREIRO et al. v. BANK OF ITALY NAT. TRUST & SAVINGS ASS'N.

Civ. 488.

District Court of Appeal, Fourth District, California.

July 29, 1932.

Rehearing Granted Aug. 24, 1932.

1. Divorce ⇐322.

Where divorce decree made no disposition of community property, husband and wife became owners thereof as tenants in common.

2. Corporations ⇐1.

Before court will look through form of corporation in order to reach sole owner of stock, there must be facts that would otherwise perpetrate fraud on innocent party.

3. Corporations ⇐1.

Facts did not bring alter ego doctrine into play to such extent that court could hold Mexican corporation alter ego of executor of stockholder in management of its Mexican affairs.

Facts were that, after decedent's death, there were found among effects of deceased all shares of capital stock of Mexican corporation made payable to bearer, but some of such stock was owned by deceased and his divorced wife as tenants in common, that executor caused meeting of stockholders of Mexican corporation to be held, and at such meeting a new board of directors was elected with trust officer of executor elected as president and the then attorney for executor named among the directors, and that executor and its successors had ever since continued in control of affairs of such corporation.

4. Executors and administrators ⇐55.

Where executor found among deceased's assets shares of stock payable to bearer, some of which were owned by deceased's divorced wife, right of possession of only portion belonging to deceased vested in executor at time of appointment.

5. Corporations ⇐194.

Meeting of stockholders which was illegal as to one considerable stockholder was illegal as to all.

6. Corporations ⇐1.

Executor of deceased stockholder having disregarded corporate existence and failed to observe law regarding functioning of corporation, and having taken direct charge of corporate property, could not hide behind corporate entity and protect itself from losses occasioned by executor's direct management of corporation's property.

7. Courts ⇐200¼.

Superior courts have both probate and equity jurisdiction, and, where necessary to do justice, probate court may exercise equity jurisdiction.

8. Equity ⇐437.

Where equity court has jurisdiction of person, it may enforce decree in personam, although it could not enforce it in rem.

9. Executors and administrators ⇐465.

Where California executor has gathered in assets of estate in foreign jurisdiction, it may be held accountable for them.

10. Executors and administrators ⇐469(1).

Probate court had jurisdiction to require executor to account for Mexican property of which it took control.

11. Executors and administrators ⇐506(3).

Under evidence, court properly refused to allow executor credit for $1,200 paid attorney for services to deceased, consisting of consultations and drawing of papers, and properly allowed only $200 therefor.

12. Executors and administrators ⇐508(1).

Where executor taking charge of Mexican corporation wrongfully paid out sum to attorney from corporation's treasury without any lawful procedure, court properly directed that said sum be returned to treasury, rather than into estate funds.

13. Executors and administrators ⇐506(3).

Under evidence in hearing on account, court properly concluded that loss of rentals of properties wrongfully obtained by attorney in proceeding was directly traceable to executor.

14. Executors and administrators ⇐508(1).

Court properly directed executor to replace overpayments made to attorney for services in certain appeals where attorney had, before deceased's death, given receipt found among papers of which executor took possession.

15. Executors and administrators ⇐506(3).

Amount of evidence which probate judge may require of executor in support of correctness of account is largely matter of his own discretion.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

The Bank of Italy National Trust & Savings Association, executor of the estate of Benigno Barreiro, deceased, filed its fourth annual account, opposed by Maria Teresa Barreiro and others, minors, by Charles A. Brinkley and Robert L. Cardenas, guardians of their estate. From a portion of an order settling the account, the executor appeals.

Affirmed.

Wright & McKee and C. M. Monroe, all of San Diego, for appellant.

Jesse George and C. A. Brinkley, both of San Diego, for respondents.

MARKS, J.

This is an appeal taken by the executor of the last will and testament of Benigno Barreiro, deceased, from a portion of an order of the superior court of San Diego county, settling its fourth annual account, in which order the executor was directed to pay out of its own funds into the treasury of the Compania de Inversiones de la Baja California the sum of $4,782.95, and also the sum of $500 out of the funds of the estate.

This is a companion case with one bearing the same title and our Civ. No. 885 [13 P. (2d) 1017], wherein the minors appealed from the same order, the opinion in which case has been this day filed and is referred to for a more complete statement of the facts than is here incorporated and a discussion of some of the questions of law which we find it unnecessary to repeat. The Compania de Inversiones de la Baja California will hereafter be referred to as the "Compania."

After the death of Benigno Barreiro and the appointment of appellant's predecessor as the executor of his last will and testament, there were found among the effects of the deceased 1,000 shares of the capital stock of the Compania made payable to the bearer. It is true that some of this stock was owned by the deceased and Gertrudis Marquez Barreiro, his divorced wife as tenants in common. The then executor caused a meeting of the stockholders of the Compania to be held in Mexico on July 9, 1925, at which time a new board of directors was elected, with Norman R. Morison, who was trust officer of the executor and in active charge of the estate, elected as president, and Lewis J. Utt, then the attorney for the executor, named among the directors. The executor and its successors have ever since continued in control of the affairs of the Compania.

The order of the trial court requiring the executor to pay moneys into the treasury of the Compania is based upon its finding that charges made by Attorney Manuel Lujan of Mexico for professional services rendered and expenses incurred were unjust, excessive, and no proper charge against the deceased, the Compania, or the estate. The task of the trial court in determining the correctness of these charges was made more difficult by the fact that Lujan, prior to the hearing that resulted in the order under consideration, left his home, has not been heard from since, and is presumably now dead. Mr. Utt, who acted as attorney for the executor and American advisor for the Compania during all of the time covered by the Lujan account, is also dead. Therefore the testimony of these two witnesses, which would have been most desirable, was not available.

While appellant makes several separate specifications of error upon which it relies for a reversal of that portion of the judgment of which it complains, practically all of them may be stated and considered under one head, namely: Has the probate court of California, having jurisdiction over the estate of the deceased, the right to examine the conduct of the executor in managing the affairs of a Mexican corporation and charge it with expenditures made by it for or through the corporation? This question does not seem to have been directly answered by any of the cases decided in California. The respondents seek to justify the action of the court below upon the theory that the executor possessed the control of all of the stock of the Compania and the complete management of its affairs, using it only as its alter ego, and that therefore the court could look through the corporation and examine the actions of the executor and its officers as though the corporation did not exist. Were this the only ground upon which the decision of the trial court could be sustained, we might not agree with it.

[1] The argument of respondents in support of the order in question is based upon the mistaken assumption that the deceased was the sole and only owner of all of the stock of the Compania and all of the property standing of record in its name. They urge that the corporation after the reorganization meeting of July 9, 1925, ceased to have any actual existence in so far as the management of its properties and affairs was concerned, and served only as a fictitious name under which the executor managed and operated the properties in Mexico. The deceased at the time of his death had possession of all the certificates of stock in the corporation, which were all made in favor of the bearer. While this might have created a presumptive ownership of the stock in him, in the absence of evidence to the contrary, it is evident that Gertrudis Marquez Barreiro, his divorced wife, was, as tenant in common with him, the owner of a portion of this stock. Barreiro and his former wife were divorced on December 29, 1923, the final decree making no disposition of their community property. Under this state of facts they became owners as tenants in common of all the community property possessed by them at that time. Biggi v. Biggi, 98 Cal. 35, 32 P. 803, 35 Am. St. Rep. 141; Kirschner v. Dietrich, 110 Cal. 502, 42 P. 1064; Brown v. Brown, 170 Cal. 1, 147 P. 1168.

[2, 3] It is true that in some instances a court may look through the form of a corporation in order to reach the sole owner of all of the stock when that owner attempts to transact his business in the name of the

corporation as his alter ego. There must be a unity of interest and ownership between the two individualities, and such a state of facts that would perpetrate a fraud and work an injustice upon an innocent party by the recognition of the existence of the corporation separate and apart from the identity of the individual owning all its stock and operating through it, to justify such an action by the court. Minifie v. Rowley, 187 Cal. 481, 202 P. 673; Wenban Estate, Inc., v. Hewlett, 193 Cal. 675, 227 P. 723. We do not believe that the facts of the case before us bring the alter ego doctrine into play to such an extent that we can hold the Compania the alter ego of the executor in the management of its Mexican affairs. Wood Estate Co. v. Chanslor, 209 Cal. 241, 286 P. 1001; LeComte Davis (Liberty Mortgage Co.) v. Perry (Cal. App.) 8 P.(2d) 514.

[4] The first question to be considered is the legality of the reorganization meeting held on July 9, 1925, at which a new board of directors was elected for the Compania. As we have observed, the stock in the corporation was issued to bearer and was in the possession of the executor. At the time of the death of Mr. Barreiro, its ownership was vested in himself and his former wife, an undetermined amount in each. The right of possession of only that portion of the stock belonging to Mr. Barreiro vested in the executor at the time of its appointment.

Section 313 of the Civil Code, as it existed prior to the amendments of 1931, provided that "shares of stock of an estate of a minor, or insane person, may be represented by his guardian, and, of a deceased person by his executor or administrator." This section has been construed to give the right to executors to vote stock belonging to their testators upon exhibiting a certified copy of letters testamentary without formal transfer of the shares on the books of the corporation. Smith v. San Francisco, etc., Co., 115 Cal. 584, at page 591, 47 P. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119; Market Street Ry. Co. v. Hellman, 109 Cal. 571, 42 P. 225. Of course, this right given to the executor to represent the stock of the deceased at any meeting of stockholders of the Compania could only extend to such stock as was owned by Mr. Barreiro at the time of his death. The executor could not represent the stock owned by Mrs. Barreiro without authority from her.

There seems to be no great difference between the rules of descent established by the Mexican law and those prevailing in California. The estate of a deceased person in both jurisdictions descends to the heirs subject to administration. Article 3232 of the old Mexican Civil Code, stated to be article 1286 of the new Code; article 3235 of the old Civil Code, stated to be article 1290 of the new Code; article 3173 of the old Civil Code, stated to be article 1990 of the new Code; articles 3703 to 3706 of the old Civil Code and articles 3726, 3727 of the old Civil Code consolidated in article 1704 of the new Code. Articles 3728, 3729, and 3730 of the old Mexican Civil Code, re-enacted into articles 1704, 1705, and 1706 of the new Code, give the executor such powers as are authorized by law and by the testator in a will or those which the heirs expressly give him, and no others. In the will admitted to probate, the Southern Trust & Commerce Bank was given charge of the heritages of the children of Mr. Barreiro, and the desire was expressed that Eustaquio Valle continue carrying on the business of the Compania as he was doing prior to the death of deceased. Under this power in the will, which seems to be permitted under the provisions of the Mexican Civil Code, it is argued with some force that the executor possessed the same rights to represent the deceased and his children in voting the stock of the Mexican corporation that it would have possessed under the authority given by section 313 of the Civil Code of California had the Compania been a California corporation. For the purpose of this opinion we will assume, without holding, that such powers were given to it.

Article 204 of the Commercial Code of Mexico provides that the call for meetings of a corporation shall be made by the board of directors, or by the examiners, and that more than one-half of the capital stock must be represented. Article 203 of the same Code provides that the calls to general stockholders' meetings shall be made by a notice published in the official journal of the state, district or territory wherein the corporation has its domicile, and that the notice must contain a statement "of the proceedings for the day, or of all questions to be submitted for the deliberation of the meeting. Every resolution adopted in contravention of this article shall be void." These rules were not all followed in calling the meeting.

The by-laws of the Compania provided that calls for general stockholders' meetings must be signed by the president or by the commissary and be published for at least ten days in advance of such meeting. The by-laws further provided that, when all of the capital stock is represented, a meeting may be held without the necessity of a call. Mr. Uribe, a Mexican attorney called as an expert on Mexican law, testified that the provisions of the Commercial Code would prevail over those of a by-law.

The trial court was of the opinion that, as all of the stock of the corporation was actually represented at the meeting of July 9, 1925, including the stock of Mrs. Barreiro, those participating in the meeting would be estopped from contesting its legality, and that the directors elected at such meeting would at least be the de facto directors of such corporation and entitled to act as such until removed

from office by a proceeding instituted by an authority other than that of one of those participating in the meeting. Guaranty Loan Co. v. Fontanel, 183 Cal. 1, 190 P. 177; Dolbear v. Wilkinson, 172 Cal. 366, 156 P. 488, Ann. Cas. 1917E, 1001; San Buenaventura Mfg. Co. v. Vassault, 50 Cal. 534; Guaranty Loan Co. v. Treadwell, 53 Cal. App. 538, 200 P. 653. We have been referred to no opinion of any one learned in the law of Mexico and to no decision of a Mexican court upon this question.

At the time of the meeting of July 9, 1925, Mrs. Barreiro was represented there by Messrs. Herman Freese and Stephen Connell, who were her attorneys. The minors were represented by their guardian, and the executor bank was represented by its trust officer and by Mr. Lewis J. Utt, its attorney in the probate proceedings. The minutes of this meeting recite that all of the stock of the Compania was represented as follows: Eustaquio Valle, 1 share; Norman R. Morison, 1 share; Stephen Connell, 1 share; Anton J. Schreiber, 1 share; M. G. Richardson, 1 share; D. M. Plaister, 1 share; Lewis J. Utt, 994 shares. The minutes recite that Morison was named president of the meeting and Valle its secretary, and that Messrs. Connell and Utt were named inspectors to count the number of shares and votes. Messrs. Morison, Richardson, Schreiber, Connell, and Utt were elected directors, and Morison and Utt were elected president and secretary, respectively. The by-laws were amended by making Tia Juana as well as Mexicali an authorized place for holding the corporate meetings. These minutes were protocalized before a Mexican judge of the first instance and were recorded in the registry at Tia Juana, Mexico. The Mexican law provides that the certificates of stock of a corporation must be actually and physically present and exhibited at a stockholders' meeting. It is doubtful if this provision was complied with at this meeting.

[5] From what we have said it is apparent that the meeting of July 9, 1925, was not legally called and held, and that, if the proceedings there had are to be considered binding upon the stockholders, it must be because of the doctrine of their estoppel to question the legality of the meeting because of their participation therein. If they be estopped to question the legality of this meeting, at least Mrs. Barreiro is not estopped from questioning the legality of any subsequent meeting, either of the stockholders or of the board of directors. No call or notice of any subsequent meeting was given, and she did not participate therein. Her attorney, Mr. Connell, was removed as a member of the board of directors. The subsequent meetings, being illegal as to one considerable stockholder, must be considered illegal as to all.

[6] The Mexican law vests the management of the affairs of a corporation in its board of directors much as does the law of California. No meetings of the board of directors seem to have been held. All the business of the corporation which was referred by the executor to any meetings seems to have been referred to stockholders' and not to directors' meetings. The questions of sales of properties, execution of leases, and other matters of policy, when considered at all, were considered at stockholders' meetings which were held without Mrs. Barreiro being notified or represented, and which were not called in accordance with Mexican law. The stockholders of a Mexican corporation seem to be given no power over the details of its management under the law of Mexico. Therefore it follows that whatever was done in the name of the corporation after the meeting of July 9, 1925, was done, not only without the authority of law, but in direct violation of the provisions of the Mexican Code.

The Mexican Commercial Code requires that corporations keep an elaborate set of books in forms particularly specified. No effort was made after the death of Mr. Barreiro to keep any such set of books, and no attention was paid to any of these requirements.

It cannot be doubted that the executor dominated and controlled all of the affairs of the corporation following the death of Mr. Barreiro. It chose one board of directors, and then proceeded to brush aside their authority and administer the properties of the corporation without regard to the corporate entity. The only function performed by the Compania after the meeting of July 9, 1925, seems to have been that of holding the naked title to the Mexican property. The executor brushed aside the legal entity of the corporation and assumed direct control of its property and its affairs. In its first annual account filed in the court below on July 2, 1926, it set forth: "Your petitioner, immediately upon its appointment, proceeded to reorganize the said Mexican corporation, and to assume full control and active management thereof. * * * The collection of rents from said real property, and the execution of leases to tenants has involved and does involve a high degree of attention, as well as responsibility. Your petitioner has had to handle considerable sums of money from this source, as well as to carry on all the business of the decedent, a business which engrossed his entire time, and which consisted of looking after his Mexican investments."

The question, therefore, which presents itself may be stated as follows: Can the executor, after having disregarded the corporate existence and corporate entity, and having failed to observe the provisions of law of the republic of Mexico regarding the functioning

of a corporation, and having taken direct charge of the corporate property, hide behind the corporate entity which it did not recognize over a period of years, and thus protect itself from losses occasioned by its direct management of the properties of the Compania? The question would seem to contain its own answer.

In this opinion all references to the Code of Civil Procedure are made to that Code in effect before the adoption of the Probate Code.

We are next confronted with the question of the jurisdiction of a probate court of California over property owned in Mexico by the Compania which was taken possession of and administered by an executor appointed by the California probate court without any ancillary letters having been issued in Mexico. Section 1913 of the Code of Civil Procedure provides that the authority of an executor or administrator does not extend beyond the jurisdiction of the government under which it was given its authority. The rigorous jurisdictional limitation of the powers of an executor imposed by this section has been somewhat modified by many decisions sustaining the right of an executor to collect debts due the estate in other jurisdictions when such collections can be made without suit. 12 Cal. Jur. 238, 239, and cases there cited.

[7] It is well settled in California that superior courts have both probate and equity jurisdiction, and that, where necessary to do justice to all parties concerned, the probate courts may exercise equity jurisdiction. Estate of Maxwell, 74 Cal. 384, 16 P. 206; Estate of Burton, 93 Cal. 459, 29 P. 36; Verdier v. Roach, 96 Cal. 467, 31 P. 554, 557; Toland v. Earl, 129 Cal. 148, 61 P. 914, 79 Am. St. Rep. 100; Estate of Bell, 168 Cal. 253, 141 P. 1179; Estate of Glenn, 153 Cal. 77, 94 P. 230; Bauer v. Bauer, 201 Cal. 267, 256 P. 820; Estate of Heeney, 3 Cal. App. 548, 86 P. 842; Estate of Hill, 94 Cal. App. 113, 270 P. 708. In Verdier v. Roach, supra, it was said: "Our superior courts have both probate and equity jurisdiction, so that whenever, in the course of the administration and settlement of estates, our probate statutes are found to be inadequate to authorize and accomplish all that a court of equity is authorized to do in such cases, our superior courts may exercise their equity powers in connection with, and as incidental to, their powers in probate matters, to the extent necessary to a complete administration and distribution of estates: provided, of course, that nothing be done in contravention of any statutory provision."

[8] It has long been the rule in equity that, where a court has jurisdiction of the person, it may enforce a decree in personam, although it could not enforce it in rem. Penn v. Lord Baltimore, 1 Vesey Sr. 443 [27 English Reports, Reprint, p. 1132]; Massie v. Watts, 6 Cranch, 148, 3 L. Ed. 181; Arglasse v. Muschamp, 1 Vern. 75; Tollor v. Carteret, 2 Vern. 494; Phelps v. McDonald, 99 U. S. 298, 25 L. Ed. 473; Mitchell v. Bunch, 2 Paige (N. Y.) 606, 22 Am. Dec. 669; Miller & Lux v. Rickey (C. C.) 127 F. 573; State v. Cronan, 23 Nev. 437, 49 P. 41; 5 Cal. Juris. 471, § 44; Smith v. Davis, 90 Cal. 25, 27 P. 26, 25 Am. St. Rep. 92; Peninsular, etc., Co. v. Pacific S. W. Co., 123 Cal. 689, 56 P. 604; Taylor v. Taylor, 192 Cal. 71, 218 P. 756, 51 A. L. R. 1074; Redwood Inv. Co., etc., v. Exley, 64 Cal. App. 455, 221 P. 973; Cole v. Manning, 79 Cal. App. 55, 248 P. 1065. In the case of State v. Cronan, supra, it was held that the courts of Nevada, having obtained personal jurisdiction over the parties therein, had the right to inquire into and determine the powers of a California corporation, its officers and stockholders, under the laws of California, and question the validity of the corporate acts, although the courts of Nevada had no jurisdiction over the corporation itself.

[9] For many years it has been held in California that, where a California executor has taken charge and gathered in assets of the estate in foreign jurisdictions, it may be held accountable for them. Estate of Ortiz, 86 Cal. 306, 24 P. 1034, 1035, 21 Am. St. Rep. 44; Fox v. Tay, 89 Cal. 339, 24 P. 855, 26 P. 897, 23 Am. St. Rep. 474; Estate of Grivel, 199 Cal. 351, 249 P. 184, 185; Reed v. Hollister, 44 Cal. App. 533, 186 P. 819. The rule is stated in Estate of Ortiz, supra, as follows: "I think the law applicable to the facts is correctly stated by Prof. Schouler, in his late treatise on Executors and Administrators (2d Ed. 1889, § 175), as follows: 'The earlier rule frequently asserted in England, in one loose form or another, is that assets in any part of the world shall be assets for which the domestic executor or administrator is chargeable; the practical effect being to enjoin upon the principal personal representative the duty of procuring, so far as foreign law and the peculiar circumstances will permit, personal assets wherever situated, realizing the bulk of the estate of his decedent as best he may, gathering in the property as one who represents the whole fortune, and, having gathered it, account to those interested accordingly. Some of the judicial expressions on this point, to be sure, import too onerous a responsibility on the representative's part; and Mr. Justice Story has pointed out the fallacy of holding a domestic executor or administrator answerable for foreign property which it is admitted that he can neither collect nor sue upon, nor compel its payment or delivery to himself by virtue of his domestic appointment—foreign property, we may add, of whose existence, or of the grant of foreign administration for realizing it as assets, he may be quite unaware. And yet, to let external assets knowingly escape his control, and be lost to the estate, when with reasonable diligence they might have been procured, seems a plain dereliction of duty in the principal or domiciliary

representative, whose function, as rightly understood, is to grasp the whole fortune, as the decedent did during his life, save so far as the obstructive law of foreign situs, or the limitations of his own appointment, may restrain him.'"

Estate of Grivel, supra, is quite similar in fact to the one at bar. The deceased had property in the republic of Mexico and in the United States. He had a former wife and children. There was this difference, that probably there were ancillary probate proceedings in Mexico. The appeal was taken by the domiciliary executor from an order surcharging his accounts. In the course of the opinion the court said: "Appellant admits that he did sell about 1,600 head of cattle, collected debts owing decedent from persons residing or doing business in Mexico, and transacted other business in said foreign territory, but claims that in so doing he acted solely as attorney in fact for said [ancillary] administratrix, and not in his official capacity as administrator of said estate. He further admits that moneys derived from the sales of property made in Mexico, and which passed into his hands, were deposited by his direction in a bank situate in Calexico, county of Imperial, where the business of the estate was transacted by him. It is the insistent claim of appellant that he was acting in two separate and distinct capacities in handling the funds and property of an estate of which he was the domiciliary administrator, to wit, as agent or attorney in fact of the ancillary administratrix of all property which had its situs in Mexico at the time of decedent's death, and as administrator only of such property as had its situs in the state of California at the time of decedent's death, and to no further extent. We question the soundness of this contention. Appellant was the administrator of the entire estate and of all the funds and property which came into his hands which were admittedly property and moneys belonging to the estate, and it was clearly his duty as such officer to report and account to the court which had appointed him for all moneys and property belonging to the estate which he received into his possession, and it does not matter what the source may have been. We think as a general proposition that the court has inherent power to compel a report of the property which has passed into the hands of the domiciliary administrator, even though he claims to have remitted it to the ancillary administrator."

Reed v. Hollister, supra, also involved the necessity of a local executor accounting for funds coming into his possession from a foreign jurisdiction and the power of the probate court to require him to account for such funds. After a careful consideration of the case, the court reached the conclusion that the probate court had such jurisdiction, and that the executor must account to it for such funds.

[10] We have reached the conclusion that the probate court had the jurisdiction to require the executor of the estate of Barreiro to account to it for the Mexican property of which it took control and which it virtually removed from the possession of the Mexican corporation which owned it, and correctly required the executor to render an account of all of the transactions which it conducted in connection with the Mexican property standing in the name of the Compania.

The order of which the executor complains on this appeal is a virtual surcharge of its account in the sum of $4,782.95, on account of moneys paid to and collected by Manuel Lujan. Mr. Lujan, an attorney at law of the republic of Mexico, was apparently the personal attorney of Benigno Barreiro and for the Compania before Mr. Barreiro's death. He acted also as the Mexican advisor to the executor of the estate. The items of the account, showing charges and receipts as summarized by the trial judge, are as follows:

For services rendered prior to Mr. Barreiro's death, as per statement of June 20th, 1925 (Executor's Exhibit N-2), as follows:	
1. Trip to Mexico City re certain appeals pending against the Compania and the city of Mexicali as well as the Galeana case	$ 1,300.00
2. Cardinale attachment	1,775.00
3. Attachment on real property of Paul Kittiquitz	650.00
4. Two suits against the Compania Commercial	500.00
5. Appeal in a criminal case involving Mr. Barreiro	500.00
6. Consultations with Mr. Barreiro, stated to have been not less than 100 in number	1,000.00
7. Drawing up documents and papers	200.00
Total	$ 5,925.00
For services to Compania for the 12 months ending June 6, 1926, as per statement (Executor's Exhibit O-2) of that date, at $350.00 per month	$ 4,200.00
Personal expenses during that year	250.00
Compensation for the two months ending August 6, 1926, as per statement dated November 30, 1926 (Executor's Exhibit P-2)	700.00
Compensation and expenses on trip to Mexico City in summer and fall of 1926, amounting apparently to	2,100.00
(Balances the two remittances to him for that purpose of July 27, 1926, and September 11, 1926, respectively hereinafter referred to.)	
Making an aggregate of	$13,375.00

As against these charges he has admittedly been paid:

By Mr. Barreiro in his lifetime (see Executor's Exhibit N-2)	$ 100.00	
Other items as shown by said supplement to the Executor's Fourth Account:		
November 5, 1925	600.00	
December 4, 1925	500.00	
July 27, 1926 (re Lujan's trip to Mexico City)	600.00	
August 19, 1926	400.00	
September 11, 1926 (re Lujan's trip to Mexico City) (I do not count a transmission charge on last item of $32.95 in this connection.)	1,500.00	
December 8, 1926	500.00	
Also collections in which Executor's Exhibit O-2 Lujan admits having made and retained as follows:		
13 months' rent from the Compania Commercial on the Mexicali and Tia Juana properties affected by the lease litigation, at $450.00 per month	5,850.00	
Interest on the so-called Johnson note	325.00	
Aggregating	$10,375.00	
This accounting, if correct and complete, would still leave due to Lujan		$3,000.00

The account as revised and allowed by the trial court is as follows:

Lujan admits, according to his statements (Executor's Exhibits N-2, O-2, and P-2), as hereinbefore reviewed, an aggregate of		$10,375.00
This, however, includes what he collected by way of interest on the Johnson note, an account which was apparently not property of the Compania de Inversiones, and should therefore, have nothing to do with his accounting with it		325.00
This leaves of money of the Compania de Inversiones for which he admits being accountable		$10,050.00

As we have also seen, he is chargeable also with the $591.68 collected by him through the Cardinale escrow; but since there has been reserved for the future the question of whether he has earned anything in connection with the Cardinale litigation, the question whether this debit of $591.68 is to be offset against any such charge may properly be reserved, and the disposition of said $591.68 item reserved also. Neglecting this item for the present, then, we consider the credit side of his account generally.

He is to be credited with:

Expenses in trip, January and February, 1925, to Mexico City, amounting altogether to sixty days	$1,200.00	
Fees in suits against the Compania Commercial	500.00	
Consultations with Benigno Barreiro regarding Compania affairs and drawing up documents relative to same	200.00	
Fourteen months' services as consulting Mexican attorney for the Compania de Inversiones subsequent to Mr. Barreiro's death	2,100.00	
Personal and traveling expenses for ten days in trips to Mexicali	200.00	
Personal and traveling expenses for thirty days in summer and fall of 1926 in trip to Mexico City	600.00	
Making an aggregate of	$4,800.00	
This left him indebted to the Compania de Inversiones to the extent of		$ 5,250.00

To the balance of the account just quoted and charged against the executor the court added the sum of $32.95, costs paid on sending money to Lujan in Mexico City.

The items of which appellant complains are those credits either disallowed or reduced. Ruling was reserved on the charge of $1,775 for the Cardinale attachment, and $591.68 collected through escrow. We have considered the right of the probate court to reserve ruling on items of an account, in our opinion filed in case Civ. No. 885, which was an appeal by the minors from this same judgment. This portion of that opinion is referred to for a discussion of this question, and it will not be necessary to repeat it here.

The court below disallowed the charge of $650 for an attachment on the real property of Paul Kittiquitz. It appears that this grew out of a claim against one Johnson alleged to be due to the Compania Merchantil Internacional, a corporation formerly controlled by Mr. Barreiro which he placed in the hands of a liquidator for the purpose of liquidation. It is evident that this particular claim for services could not be made against the executor or the Compania, but against the Compania Merchantil Internacional or the liquidator. The trial court reserved a ruling upon the question of a settlement between the executor and the liquidator, and this item can undoubtedly be adjusted when that matter is determined.

[11] The charge of $1,000 for not less than one hundred consultations by Barreiro with

Lujan, and the $200 for the drawing up of documents and papers by Lujan, will be considered together. On November 19, 1924, Lujan executed a receipt to the Compania, whereby he receipted for $500 in full for his services, both to the Compania and to Mr. Barreiro up to that date, and agreed to make no further charge for services to be rendered by him in the two appeals pending in the supreme court in the city of Mexico, one on a petition of Miguel Galeana, in which the Compania was a third party, and the other an appeal presented against the municipal council of Mexicali. This receipt was dated about seven months prior to the death of Mr. Barreiro. The trial judge was of the opinion that the charges were excessive and were not supported by proper evidence. In this we agree with him. He allowed $200 for these services, which we cannot hold was an unreasonable compensation under the circumstances disclosed by the record.

Lujan presented a bill for services rendered the Compania for fourteen months at the rate of $350 per month. On account of the death of Mr. Utt, and the apparent death of Mr. Lujan, the evidence as to just what these services consisted of is very meager. The trial court found that some services were performed consisting of consultations with Mr. Utt as attorney for the executor and the Compania, and that the reasonable value of the services rendered was $150 per month. We think the allowance quite liberal under the circumstances, and cannot hold the trial court in error in fixing the compensation at this sum.

The account of Lujan contains three items of traveling expenses, one on a trip to Mexico City concerning the two appeals pending there which we have mentioned, which trip occupied sixty days, another, compensation and expense on a trip to Mexico City in the fall of 1926 in connection with the same two appeals which occupied thirty days, and, the third, expenses of trips to Mexicali which occupied ten days. The total amount claimed by Lujan for these items was $3,850, which the court held to be excessive and not justified by the evidence. In so far as they included any compensation for services rendered in connection with the two appeals, the correctness of the ruling of the trial court in excluding such charges from the account cannot be questioned in view of the receipt given by Lujan on November 19, 1924. The trial court allowed him traveling expenses of $20 per day for each day consumed on the trips to Mexico City and to Mexicali. The receipt of Lujan did not contain any agreement not to make a charge for traveling expenses, and a reasonable allowance to cover such expenditures was undoubtedly correct. We think the sum of $20 per day fixed by the trial court for this purpose was ample, and that it cannot be questioned by us. These allowances made by the trial court are supported by competent evidence in the record, and, as the question is merely one of the sufficiency of the evidence to support the ruling of the trial court, its conclusion becomes final.

[12] Appellant urges that the probate court had no authority to direct that the sum of $4,782.95 be paid out of the private funds of the executor into the treasury of the Compania, but only had authority to surcharge the executor's account with this amount and direct it to be paid into the estate funds. This money was withdrawn from the treasury of the Compania by the executor without any authority from the board of directors or any lawful procedure. The trial court was undoubtedly correct in directing it to be returned to the source from which it was taken. The order was in accordance with the forcible suggestion made by the trial court of the desirability of reorganization of the Compania as a going concern lawfully conducted under the laws of the republic of Mexico. It is very evident that this result is desirable, and that suggestion should be followed, if, under the Mexican law, it is now possible for the corporation to be revived. It would save many legal complications similar to those that have arisen which of necessity embarrass the executor and the other persons interested in the affairs of the Compania. It would ease the removal of the property of Mrs. Barreiro from the possession of the executor without unduly disturbing the other affairs of the administration.

Appellant maintains that the finding of the trial court to the effect that the executor failed to use due diligence, prudence, and care in its transactions with Lujan, and that Lujan was overpaid and was permitted to retain more money than he was reasonably entitled to, due to the negligence of the executor, is not supported by the evidence, and is contrary to it. It relies upon the rule that, where the executor exercises its best judgment and due care and prudence in the selection of an agent or attorney who is well recommended, it is not liable for money lost by the insolvency of the agent, unless the executor was negligent and careless in its dealings with him. 24 Cor. Jur. 126; Estate of Taylor, 52 Cal. 477. Appellant particularly urges that it should not be chargeable with the sum of $5,850, thirteen months' rental from the Mexicali and Tia Juana properties, nor with overpayments to Lujan on account of his trips to Mexico City.

[13] The real properties from which the rentals were collected were the ones involved in an action instituted by Mr. Barreiro to cancel leases held by the Compania Commercial.

See opinion in case 13 P.(2d) 1017, Civ. No. 885 for further particulars. When the suits were instituted, the rents were paid into court. Lujan, as the attorney of record in these cases, in some manner obtained possession of the money after the commencement of probate proceedings, retaining it when he disappeared, which was some considerable time later. During the time that this money was in his possession, the executor did not seek to have him pay it into the treasury of the Compania, where it rightfully belonged, nor in any manner did it seek its recovery. The trial court concluded, and we think correctly so, that the loss of this money was directly traceable to the executor, who, over a considerable period of time, failed to collect from Lujan, and seemingly acquiesced in his retention of this money.

[14] Appellant urges that it was not negligent in overpaying Lujan on account of his expenses and services rendered on the two trips to Mexico City, because, at the time the payments were made, it did not have actual knowledge of the receipt which Lujan had executed on November 19, 1924. The evidence discloses that this receipt was found among the papers of Mr. Barreiro, of which the original executor took possession at the time of his death. No good reason appears why the executor by the exercise of reasonable diligence could not have acquainted itself with the contents of this receipt long before it made any of these payments to Lujan. We think its negligence is apparent in both instances, and that the court properly directed it to replace the money lost as a result thereof.

[15] Appellant next complains that the trial court wrongfully placed upon it the burden of proving the correctness of its accounts rather than placing upon the contestants the burden of proving that the accounts were not correct. In this contention we cannot agree with appellant. The amount of evidence which a probate judge may require of any executor in support of the correctness of any account is largely a matter of his own discretion. Where there is no contest, it is the duty of the trial court to satisfy itself of the correctness of the account, and, within the limits of reason, it may require the executor to produce such evidence as will satisfy it in this respect.

The portion of the order approving the final account, appealed from by the executor, is affirmed.

We concur: BARNARD, P. J.; SCOVEL, Justice pro tem.

125 Cal.App. 447

ANDERSON v. MATSON NAV. CO.

Civ. 8205.

District Court of Appeal, First District, Division 2, California.

Aug. 23, 1932.

Rehearing Denied Sept. 22, 1932.

1. Damages ⇐132(3).

$9,000 to seaman for permanent partial paralysis of side of face, with permanent loss of control of eyelid, disfigurement, and pain and suffering, *held* not excessive.

2. Trial ⇐260(1).

Refusal of requested instruction which adds nothing to general instructions given is not error.

3. Negligence ⇐66(1).

Failure to heed warning does not constitute negligence, if warning comes so late as to offer no opportunity to avoid danger.

4. Seamen ⇐29(5).

Refusal of requested instruction that injured seaman's failure to heed warning to look out for falling crowbar constituted contributory negligence *held* proper under evidence (Merchant Marine Act, § 33 [46 USCA § 688]).

The evidence disclosed that the crowbar was being lowered down hatchway, and that it slipped through rope in which two loose half-hitches had been tied, and the only warning referred to in evidence was that given by second officer, who shouted "Look out below" after crowbar slipped, or as he saw it slipping.

5. Seamen ⇐29(4).

Doctrine of assumption of risk *held* inapplicable to seaman struck by falling crowbar which slipped through rope due to negligence of fellow seaman (Merchant Marine Act § 33 [46 USCA § 688]; Federal Employers' Liability Act § 1 [45 USCA § 51]).

6. Damages ⇐210(1).

Instruction to deduct from seaman's damages for inability to work amount which steamship company paid for keep and maintenance *held* properly refused as misleading (Merchant Marine Act § 33 [46 USCA § 688]).

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Rasmus P. Anderson against the Matson Navigation Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Brobeck, Phleger & Harrison, of San Francisco, for appellant.

Ford & Johnson and Fletcher A. Cutler, all of San Francisco, for respondent.

SPENCE, J.

Plaintiff, a seaman employed by the defendant, brought this action under section 33 of the Merchant Marine Act (U. S. Code, tit. 46, § 688 [46 USCA § 688]), to recover damages for personal injuries suffered in the course of his employment. The jury returned a verdict in favor of plaintiff in the sum of $9,000, and from the judgment entered upon the verdict defendant appeals.

The injuries were sustained on December 28, 1929, while plaintiff was working on the 'tween deck located two decks below the main deck in hold number four on the S. S. Ventura. He had been assigned to cleaning up, and, after filling a bucket with rubbish which he had taken from the scuppers, he walked to the edge of the hatch on the 'tween deck, and looked up for the purpose of calling for a line to hoist the bucket. Plaintiff testified that just as he looked up, and before he had a chance to call for the line, something struck him. The object which struck him was an iron crowbar which was approximately five feet in length and weighed approximately thirty to thirty-five pounds. This crowbar was being lowered down the hatch by a seaman named Cauling under directions of the second officer. The testimony showed that Cauling had tied two loose half-hitches around the bar, and that, when he started to lower it, the bar slipped through the rope. It is conceded that there was sufficient evidence to sustain the implied finding of defendant's negligence.

[1] Appellant's first contention is that the damages are excessive. The settled rule in this connection as expressed in the recent case of Davis v. Renton, 113 Cal. App. 561, at page 563, 298 P. 834, is that a "reviewing court may interfere only in cases where the excess appears as a matter of law, or where the recovery is so grossly disproportionate to any compensation reasonably warranted by the facts as to shock the sense of justice or at first blush raise a presumption that it is the result of passion, prejudice, or corruption rather than honest and sober judgment." We have carefully reviewed the evidence relating to the nature and extent of the injuries received by respondent, and in our opinion appellant's contention cannot be sustained.

The crowbar struck the left side of respondent's head. The blow laid open the entire left side of respondent's face, fracturing the bones. He was immediately taken to the hospital on December 28, 1929, and remained there as a result of his injuries until July 19, 1930, a period of approximately seven months. Thereafter he continued treatment for his injuries, and there was testimony indicating that he would require further treatment for the rest of his life. Four operations were required, one of which involved plastic surgery performed in an effort to at least partially cover the ugly wound inflicted. Four sets of nerves were either lacerated or destroyed, resulting in an anæsthesia and partial paralysis of the left side of the face. Respondent lost control of his left eyelid and was unable to close the left eye. This resulted in constant tearing, and, because of the inability to close the eye, there was inflammation and danger of infection caused by dust or other foreign substances blowing into the eye. It appeared that this condition of the eye and the paralysis of the face were permanent, and could not be corrected by further operation. We deem it unnecessary to go into greater detail concerning the evidence of respondent's injuries and the prolonged treatment which he was compelled to undergo. The record discloses that despite said treatment, and any treatment which he may receive in the future, he will permanently have a partially paralyzed face, prominently scarred and the inability to close his left eye, the results of which tend, not only to be disfiguring, but also disabling. There was further testimony tending to show that respondent was unable to work because of dizziness experienced when he attempted to bend over or when he attempted to go to any height. Some of respondent's claims in this connection were at least partially discredited by pictures taken by a private detective while respondent was assisting others in building a small shack shortly before the trial. Much is said in the briefs regarding this portion of the testimony, but in our opinion this testimony may be disregarded. Taking into consideration the severity of the injuries, the unquestioned pain and suffering endured by respondent during his long confinement in the hospital, and the permanent effects of said injuries upon respondent's face and eye, as shown by the evidence and briefly outlined above, we do not believe that this court under the settled rule above stated should interfere with the determination of the jury and trial court on this issue of damage.

Appellant next contends that the trial court erred in refusing to give certain requested instructions on contributory negligence. It is conceded by appellant that there was no error in the instructions given on this subject, but it is contended that appellant was entitled to have the jury more specifically instructed thereon, citing Southern Railway Co. v. Hermans (C. C. A.) 44 F.(2d) 366; Illinois Central Railroad v. Nelson (C. C. A.) 203 F. 956; Flack v. Delaware, L. & W. Railroad Co. (C. C. A.) 45 F.(2d) 683, and other cases. Requested instructions Nos. 8

and 9, on the subject of contributory negligence, which the trial court refused, were as follows:

"Instruction No. 8.

"Where an employee has actual knowledge, or, under the circumstances reasonably ought to have knowledge of the possible danger, and such knowledge is of such a character that a reasonably prudent man, under similar circumstances, would exercise due care to avoid the danger, and he is injured by reason of his failure to use such care, he is guilty of contributory negligence."

"Instruction No. 9.

"If a warning has been given to an employee of a possible danger and he has heard it or under the circumstances reasonably should have heard it, and yet fails to heed the warning, and such failure proximately contributes to his injuries, such conduct on the part of the employee constitutes contributory negligence."

[2-4] Requested instruction No. 8 went no further than to tell the jury that, if a prudent man would exercise due care under the circumstances to avoid a possible danger, respondent was under such duty and his failure to do so would be contributory negligence. In our opinion, this instruction added nothing to the general instructions given by the court on this subject. Requested instruction No. 9 purported to tell the jury as a matter of law that failure to heed a warning constituted contributory negligence. It is subject to criticism, in that it ignores the element of opportunity to heed such warning. If a warning comes so late in point of time as to offer no opportunity to act to avoid the danger, we know of no rule under which an injured man would be chargeable with negligence as a matter of law merely because of his failure to heed such warning. The proposed instruction relates to any warning preceding injury, and in the light of the evidence we believe that the said instruction was properly refused. Respondent testified that he heard no warning. The only warning referred to in the evidence was that given by the second officer. He testified that he sang out, "Look out below," after the crowbar had slipped or as he saw it slipping. The chief mate was the only witness called by appellant who was near the scene of the accident at the time. Although he testified that the shout of warning came first, he stated, "In the order that I heard it, I heard a shout, a bang and then saw something hit Anderson." A reading of the entire testimony on the subject leads to the conclusion that the time element between the so-called warning and the striking was practically negligible. Under these circumstances, the instruction in the form proposed would have been misleading, to say the least, and it was not error to refuse to give it. If it may be said that there was any evidence warranting an implied finding that respondent had an opportunity to avoid the danger by heeding a warning, and failed to do so, appellant should have proposed a properly qualified instruction on this subject.

[5] Appellant further contends that the trial court erred in the giving and refusing of certain instructions on assumption of risk. Section 33 of the Merchant Marine Act, under which this action is brought, provides that: "All statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply." Turning to the Federal Employers' Liability Act, we find the following: "Every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. * * *" U. S. Code, tit. 45, § 51 (45 USCA § 51.) In construing these statutes it has been held that, while the fellow servant rule does not apply in actions brought thereunder, the doctrine of assumption of risk, at least to a restricted degree, is applicable. Chesapeake & O. Ry. Co. v. Kuhn, 284 U. S. 44, 52 S. Ct. 45, 76 L. Ed. 157; Reed v. Director General of Railroads, 258 U. S. 92, 42 S. Ct. 191, 66 L. Ed. 480; Chesapeake & O. Ry. Co. v. De Atley, 241 U. S. 310, 36 S. Ct. 564, 60 L. Ed. 1016; Southern Railway Co. v. Hermans (C. C. A.) 44 F.(2d) 366; States Steamship Co. v. Berglann (C. C. A.) 41 F.(2d) 456; Grimberg v. Admiral Oriental Steamship Line (D. C.) 300 F. 619; McGeorge v. Charles Nelson Co., 107 Cal. App. 148, 290 P. 75.

The instructions given at the request of respondent informed the jury that respondent "did not assume the risk of any negligence on the part of any of the officers or employees engaged in said work," and that, even if respondent "knew and assumed the risks of an inherently dangerous method of doing the work assigned to him he did not assume the increased risk attributable not to the method but to the negligence of this defendant in pursuing it if any." On the other hand, the refused instructions requested by appellant were to the effect that respondent assumed the ordinary risks of his employment, "and when obvious or fully known and appreciated he assumed the extraordinary risks and those due to negligence of his employer and fellow employees. * * *"

A review of the decisions under the above-mentioned statutes shows that the authorities are not entirely harmonious in defining

the proper application of the doctrine of assumption of risk. The instructions proposed by respondent and given by the court find support in the rule as stated in 56 Corpus Juris, 1100, § 684, where it is said: "The doctrine of assumption of risk is inapplicable where the damage was proximately caused by the negligence of a fellow servant. The seaman does not assume the risk of injury from the negligence of an officer, or from other member of the crew." In Reed v. Director General of Railroads, 258 U. S. 92, it is said at page 95, 42 S. Ct. 191, 192, 66 L. Ed. 480: "In actions under the federal act the doctrine of assumption of risk certainly has no application when the negligence of a fellow servant which the injured party could not have foreseen or expected, is the sole, direct, and immediate cause of the injury. To hold otherwise would conflict with the declaration of Congress that every common carrier by railroad while engaging in interstate commerce shall be liable to the personal representative of any employee killed while employed therein when death results from the negligence of any of the officers, agents or employees of such carriers." In Chesapeake & Ohio Railway Co. v. Proffitt, 241 U. S. 462, 36 S. Ct. 620, 622, 60 L. Ed. 1102, the court, after saying that the employee assumes the ordinary risks "so far as these are not attributable to the negligence of the employer or of those for whose conduct the employer is responsible" goes on to say: "Even if plaintiff knew and assumed the risks of an inherently dangerous method of doing the work, he did not assume the increased risk attributable not to the method, but to negligence in pursuing it."

Conceding that the doctrine of assumption of risk may apply in cases where an inherently dangerous method is ordinarily employed in doing certain work, still it would do violence to the terms of the statute to hold that an employee assumes the risk of particular acts of negligence of his fellow employees in pursuing the method employed. In the present case, even assuming that respondent may be said to have assumed the ordinary risks attendant on lowering heavy objects into the hold on a line, it cannot be said that he assumed the increased risks resulting from the negligence of his fellow employees in pursuing that method. Turning to the evidence, we find that the seaman Cauling, who was in the act of lowering the crowbar when it slipped, was not called as a witness, although present in court. The only evidence relating to the cause of the slipping was given by the second officer. He testified that Cauling put two loose half-hitches around the bar, and that it slipped just as Cauling started to lower it. The only rational conclusion to be drawn from the evidence is that the bar slipped by reason of the negligent manner in which Cauling tied the half-hitches, and that the accident happened as the result of this particular act of negligence on the part of Cauling in pursuing the method rather than as the result of one of the ordinary risks inherent in the method employed. Under these circumstances, the doctrine of assumption of risk was not applicable, and there was no error in the giving and refusing of the instructions to which reference has been made.

[6] Appellant also complains of error in the refusal of a proposed instruction relating to damages. Respondent prayed for general and also special damages, alleging, among other things, that prior to the accident he received the sum of $65 per month, "together with his keep and maintenance." Appellant alleged in its answer and showed by the evidence, that since the accident it had paid to respondent several hundred dollars for his keep and maintenance. It proposed the following instruction, which was refused: "Defendant alleges in its answer that it has paid to and for the plaintiff for his keep and maintenance since the time of the accident certain sums of money. I instruct you that if you find the defendant has paid to or for plaintiff for his keep and maintenance since the accident any sums of money you should deduct such sums from any damages suffered by plaintiff for inability to engage in employment in case you find plaintiff entitled to any such damage at all." The only authority cited by appellant is Graeber v. Derwin, 43 Cal. 495. The authority cited is not in point. In the case of a seaman, the compensation for his services is made up of two elements, the actual wage and his keep or maintenance. Employees other than seamen are ordinarily compensated for their services solely by wages. In the case cited, the court merely held that it was error to allow an injured person (not a seaman) damages for loss of wages and also compensation for his living expenses during the same period. Under the maritime law, however, the shipowner is under obligation to furnish maintenance to a sick or disabled seaman, regardless of whether he is liable for damages for negligence. The Osceola, 189 U. S. 159, 23 S. Ct. 483, 47 L. Ed. 760; The Bouker (C. C. A.) 241 F. 831. This right to maintenance arises out of the contract of employment while the right to damages for injuries arises in tort. Pacific Steamship Co. v. Peterson, 278 U. S. 130, 49 S. Ct. 75, 73 L. Ed. 220. The latter right existed prior to the Merchant Marine Act only in the case of unseaworthiness. Appellant concedes that, since the enactment of the Merchant Marine Act, the right to maintenance continues even though the injured seaman may also recover damages for injuries resulting from negligence, but appellant argues that respond-

ent "is not entitled to recover the same damages twice." This may be granted but we find nothing to indicate that, by reason of the instructions given, or by reason of the refusal of this proposed instruction, such double recovery resulted. The only reasonable construction to place upon the words "loss of wages if any," as used in the instructions given, is that it had reference to the loss of the actual wages which had been received by respondent while working and not to his maintenance received in addition thereto as part of his compensation. If appellant believed that there was any doubt regarding the meaning thereby conveyed to the jury, a proper instruction could have been proposed to dispel such doubt. The proposed instruction, however, indicated that respondent was not entitled to maintenance in addition to the items of damage mentioned in the instructions given, but that all sums paid for maintenance should be deducted from the sum to be awarded. There was not error in refusing this proposed instruction.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

PACIFIC FINANCE CORPORATION v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY. *

Civ. 8358.

District Court of Appeal, Second District, Division 2, California.

Aug. 23, 1932.

Rehearing Denied Sept. 22, 1932. Hearing Granted by Supreme Court Oct. 20, 1932.

Dismissal and nonsuit ⇐60(1).

Cross-complaint not brought to trial within five years after filing of answer must be dismissed (Code Civ. Proc. § 583).

Petition for writ of mandate by the Pacific Finance Corporation against the Superior Court of the State of California in and for the County of Los Angeles.

Writ granted.

Overton, Lyman & Plumb, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondent.

CRAIG, Acting P. J.

In an action commenced by the petitioner for rescission of contract, the defendant served and filed an answer and cross-complaint in March, 1927. Said action was not set for trial until March 31, 1932, on which date the same was called to be heard in the Superior Court. Two days prior thereto the plaintiff had served and filed its notice of motion to dismiss the action upon the ground that it had not been brought to trial within five years after the defendant had filed his answer. The court, after argument, dismissed on its own motion the original complaint and answer, and ordered the case to trial upon the cross-complaint and the answer thereto. This proceeding was instituted here to show cause why the said motion should not be granted below as prayed. It is contended by the respondent that section 583 of the Code of Civil Procedure, upon which said motion was founded, does not require the dismissal of an action as to a cross-complaint where issue was joined thereon less than five years prior to the date of such motion. Said section provides that: "Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended."

No case in point is cited by either party. In fact, it is virtually conceded that there is none. We do not feel that an exception should be read into the section by us, which was not deemed by the legislature essential to insure expedition in the trial of civil cases. "The plain and obvious purpose of the foregoing section is to regulate the matter of compulsory dismissals only under one set of circumstances, to wit, where an answer has been filed and the action has not been brought to trial within five years thereafter." Allyne v. Superior Court, 200 Cal. 661, 254 P. 564, 565. Our Supreme Court in the cited case has lately held that the words of said section must be interpreted according to their common acceptance, and quoted with approval from Romero v. Snyder, 167 Cal. 216, 138 P. 1002, wherein that court declined to assume authority to depart from the express language of the statute. We therefore conclude that the motion to dismiss said action should have been granted as to all issues presented, and that the Superior Court was without jurisdiction to hear the same.

The writ of mandamus is granted, as prayed.

We concur: IRA F. THOMPSON, J.; STEPHENS, Justice pro tem.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 25 P.2d 983.

125 Cal.App. 487

SUMNER v. EDMUNDS et al.

Civ. 785.

District Court of Appeal, Fourth District, California.

Aug. 24, 1932.

Appeal and error ⇐788.

Appeal from judgment for cross-complainant *held* dismissible where appellants' brief disclosed questions raised pertained only to issues involving judgment on original complaint, not affecting judgment on cross-complaint.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Edgar W. Sumner against William J. Edmunds, M. A. Bucher, and others, in which M. A. Bucher filed a cross-complaint against William J. Edmunds and another. From an adverse judgment, William J. Edmunds and the Fresno Republican Publishing Company appeal. On motion of M. A. Bucher to dismiss the appeal from the judgment on the cross-complaint.

Motion granted.

Harris, Willey, Griffith & Harris, of Fresno, for appellant Fresno Republican Pub. Co.

F. W. Docker, of Fresno, for appellant Edmunds.

Martin C. Thuesen, of Fresno, for respondent Sumner.

Christian Hoeppner, of Fresno, and Feemster, Cleary, Perkins & McCormick and Earl W. Westcott, all of Visalia, for respondent Bucher.

MORTON, Justice pro tem.

In this action plaintiff recovered judgment for $2,600 against defendants William J. Edmunds and Fresno Republican Publishing Company, a corporation, for injuries received by him in an automobile collision, upon the finding of the trial court that he was a guest of said defendants at the time of the accident. Defendant M. A. Bucher, owner of the truck with which the Edmunds automobile collided, filed a cross-complaint against defendants Edmunds and Fresno Republican Publishing Company, a corporation, upon which the trial court awarded him judgment in the sum of $1,231. These defendants appealed from both judgments. Plaintiff Sumner has not filed a reply brief nor asked an extension of time within which so to do. Respondent Bucher moves the court for an order dismissing the appeal as to the judgment rendered in his favor against the cross-defendants and appellants upon his cross-complaint.

After an examination of appellants' brief, we are unable to find a substantial ground of appeal from the judgment awarded respondent Bucher. Appellants accept the finding of the trial court that Edmunds was an employee of the Fresno Republican Publishing Company and attack the Sumner judgment upon this premise. The questions raised therein all pertain to the issues involved in the Sumner judgment and if sustained would not affect the Bucher judgment.

The motion is therefore granted dismissing the appeal of the cross-defendants and appellants from the judgment rendered against them upon the cross-complaint of the said M. A. Bucher.

We concur: MARKS, Acting P. J.; JENNINGS, J.

125 Cal.App. 587

FRENCH v. ORANGE COUNTY INV. CORPORATION et al.

Civ. 7225.

District Court of Appeal, Second District, Division 1, California.

Aug. 29, 1932.

1. Appeal and error ⇐1048(6).

Error, if any, in forbidding plaintiff to examine witness under statute, *held* harmless; plaintiff being allowed wide latitude in cross-examining witness (Code Civ. Proc. § 2055).

2. Appeal and error ⇐1052(5).

In action against bank as depositary of deed converted by president, error, if any, in allowing bank's question asking whether president discussed such conversion with directors *held* harmless to plaintiff recovering against bank.

3. Damages ⇐92.

Mere assignee of landowners' cause of action for conversion of deed *held* not entitled to exemplary damages.

4. Pleading ⇐236(1).

Allowing or refusing amendments to pleadings is within court's discretion.

5. Pleading ⇐237(7).

Refusing permission to amend complaint to conform to proof *held* not error; testimony supporting opinion that lots were worth more than value alleged being unsatisfactory.

It appeared that real estate agent, in support of his opinion that lots involved were worth $4,500 as compared with a value of $3,750 as alleged in complaint, testified that he knew of a sale of two lots in vicinity for $3,200 one or two years

prior to sale in question, and that he had offered $3,000 for lots involved.

6. Escrows ⇐8(1).

Where landowners, seeking purchaser, deposited deed with bank, bank owed utmost good faith.

Having received deed as a proposal, the escrow holder would not be allowed to have it acknowledged by an attesting witness and recorded as a subsisting contract between its president and its principal and others who never assented to its terms or accepted it.

7. Escrows ⇐8(1).

Where landowners, seeking purchaser, deposited deed with bank, president's causing insertion of his own name as grantee, acquiring property for one-half its value, *held* breach of good faith, and bank was liable.

8. Banks and banking ⇐116(1).

Interest of president of bank with which landowners, seeking purchaser, deposited deed, *held* not adverse to bank's interest, respecting rule imputing agent's knowledge to principal.

9. Escrows ⇐8(1).

President of bank with which landowners deposited deed owed utmost good faith to landowners, and could not be allowed to profit personally.

Appeals from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Paul M. French against the Orange County Investment Corporation and others. From a judgment granting partial relief to plaintiff against the People's National Bank (the National Bank of Commerce of Los Angeles), plaintiff appeals, and defendant bank appeals from the judgment and from an order denying its motion for judgment notwithstanding the verdict. The two appeals were consolidated on stipulation of counsel.

Judgment and order affirmed.

Harry K. Sargent, of Los Angeles, for Paul M. French.

Faries, Williamson & Musick, of Los Angeles, for People's Nat. Bank.

YORK, J.

On March 28, 1928, plaintiff commenced an action against defendants for fraudulent conversion of a deed, executed by plaintiff's assignors. The complaint in said action prayed that defendants account to plaintiff for the value of plaintiff's interest in the real property conveyed by the deed, to wit, the sum of $2,673.64, and that plaintiff have judgment therefor and for $10,000 exemplary damages. Thereafter, upon motion of plaintiff, the action was dismissed as to all defendants except the defendant bank. On January 19, 1929, the action was tried before a jury which resulted in a judgment for plaintiff. Defendant's motion for a new trial was granted, and a second trial was had on November 1, 1929, which again resulted in a judgment in favor of the plaintiff; said second judgment being for the sum of $2,142.27.

Plaintiff appeals from this judgment, specifying as grounds for reversal seven errors of the court (1) in refusing to allow plaintiff to examine C. J. Shepherd, president of defendant bank, under section 2055 of the Code of Civil Procedure; (2) in overruling plaintiff's objection to a question asked of one of the witnesses; (3) in refusing to permit plaintiff to amend his complaint to conform to the evidence; (4) in modifying plaintiff's requested instructions as to measure of actual damages; (5), (6), and (7) in refusing to give certain instructions requested by plaintiff.

Defendant bank appeals from the judgment and also from an order of the court denying its motion for judgment notwithstanding the verdict, and contends that the evidence is insufficient to sustain the verdict and judgment. Upon stipulation of counsel the two appeals were consolidated.

The transaction out of which the action and these appeals arise appears to be as follows: On or about December 13, 1927, the then owners of the property here involved, through their agent in Portland, Or., by letter mailed December 9th, deposited a "deed in blank" with the defendant bank with instructions to deliver the same to the Orange County Investment Corporation when the bank held $300 net to the owners. The Investment Corporation had undertaken to act as agent in finding a purchaser for the property. The owners were residents of Oregon, and ignorant of the true value of the property. They acted in reliance upon representations made to them by the Investment Company that the lots were worth not over $500 each, whereas in fact their market value was $1,250 each. On December 29, 1927, at 9:30 a. m., the bank received written instructions from the said agent to the effect that unless the money was received during banking hours of that day to return the deed. Between the time of the receipt of these instructions and 11:30 a. m. of the same day, the escrow officer of the bank, who was also assistant cashier, was directed by the president of the bank to insert the name of said president as grantee in the deed and charge the president's account with the sum of $300. At 11:30 a. m. of the same day the escrow department of the bank received a telegram from the owners' agent reading: "Do not deliver Hodder deed mailed ninth return immediately." Later in the day the escrow officer, at the direction of the president, sent the following wire to the

agent: "Telegram and letter received too late to hold deed stop remitting today." The remittance of $300 was sent to the agent, and the deed was recorded on January 4, 1928. Shortly thereafter the property was sold at a profit.

The value of the property was alleged in the complaint to be $3,750, less incumbrances of $776.36. At the trial proof was adduced showing that the incumbrances were $1,307.73 and a stipulation entered into between the parties to that effect. The jury found in favor of plaintiff in the sum of $2,142.27—$3,750 less incumbrances of $1,307.73 and $300, the amount remitted to the agent.

[1] Taking up the appeal by plaintiff. If there was error committed by the court in its refusal to permit the plaintiff to examine Mr. Shepherd under section 2055, Code of Civil Procedure, such error was harmless, for the reason that the plaintiff was allowed extremely wide latitude in his cross-examination of this party, who was president of the defendant bank at the time he took title to the property, but who subsequently resigned such position and at the time of trial was not connected with the bank. Plaintiff was allowed to bring out the transaction in great detail in his cross-examination of this witness.

[2] The second specification of error is based on the overruling of plaintiff's objection to defendant's question to the vice president of the bank, as to whether or not the former president had discussed with the directors of the bank the fact that he had bought the property here in question. We fail to see how the court's action prejudiced the plaintiff in any way, in view of the fact that the judgment rendered in favor of plaintiff runs against the defendant bank.

[3] The plaintiff's objection that he was not awarded exemplary damages in addition to compensatory damages is not well taken, because plaintiff prosecutes this action solely and only as assignee of the cause of action of the injured persons who owned the property at the time of the alleged unlawful conversion of their deed. In 8 Ruling Case Law, p. 595, it is said: "Exemplary damages are allowed only to the immediate person receiving the injury, either in a suit prosecuted by himself or by some one for his use." This appears to be harmonious in principle with the rule that "a bare right to file a bill in equity for fraud committed upon the assignor will be denied, because the transfer of such right is against public policy." Swallow v. Tungsten Products Co., 205 Cal. 207, 217, 270 P. 366, 370.

[4, 5] The allowance or refusal of amendments to pleadings is a matter within the discretion of the trial court. The basis of plaintiff's proposed amendment was the testimony of the real estate agent, who stated that it was his opinion that the lots were worth $4,500. When asked how he arrived at this figure, he claimed he knew of a sale of two lots for $3,200 located nearer the ocean, made a year or two prior to the sale in question. He also testified that he had offered $3,000 for the three lots involved in this action. In view of the testimony offered and the fact that the complaint alleged the value to be $3,750, we are convinced that there was no error in the refusal of permission to amend the complaint to conform to proof.

We have examined the modified instruction referred to, and also the three instructions requested by plaintiff and refused to be given by the court (Pltfs. Opening Brief, pp. 27 et seq.), and we fail to find wherein the plaintiff was injured or prejudiced by either the modification or the refusal of the court to give the instructions requested.

Defendant bank appeals from the judgment on the ground of the insufficiency of the evidence. An examination of the record discloses ample evidence to support the verdict and the judgment.

[6-9] We are convinced that the bank, as depositary of the deed here involved, owes to the grantors the utmost good faith, and cannot exercise the power conferred by its position as holder to use the paper for its own benefit or to the advantage of its president for an entirely different object to that for which it obtained it. Having received it as a proposal, the escrow holder will not be allowed to have it acknowledged by an attesting witness and recorded as a subsisting contract between its president and its principal and others who never assented to its terms or accepted it. Wiard v. Brown, 59 Cal. 194. The evidence shows that the president of the bank conferred with Mr. Wickoff, who was the manager of the real estate department of the Orange County Investment Company, on the morning that the deed was completed, and it is reasonable to assume that Mr. Wickoff informed him of the profit that could be made upon the transaction as finally consummated. We are of the opinion that there was sufficient evidence upon which the jury could base its verdict, and, further, that the jury was convinced by such evidence that the act of the president in having his own name inserted as grantee, and the acquisition by him for $1,600 of property which was proved to be worth at least $3,000, was a breach of the good faith that was owing to the grantors on the part of the bank as depositary, and that the said depositary thereupon became liable in damages to the said grantors. Defendant-appellant makes the point that the rule that knowledge of agent is imputable to principal is not applicable where agent's interests are adverse to that of the principal. As president of a banking institution, we are

unable to see how the interest of Mr. Shepherd could be adverse to that of his principal (the bank) in a transaction such as that here involved. At any rate, his interest should have been identical instead of adverse, because as president he, too, owed the utmost good faith to the grantors, and could not take advantage of the situation to make a personal profit.

No error was committed by the court in denying defendant-appellant's motion for judgment notwithstanding the verdict, and neither was error committed in the giving of the instructions complained of, or in refusing to give the instructions which defendant-appellant contends it was entitled to have given to the jury. (Defts. Opening Brief, pp. 62 et seq.)

The judgment is affirmed. Also the order is affirmed.

I concur: CONREY, P. J.

I concur in the judgment: HOUSER, J.

125 Cal.App. 602

BOWMAN v. BOWMAN et al. *

Civ. 1009.

District Court of Appeal, Fourth District, California.

Aug. 29, 1932.

Rehearing Denied Sept. 23, 1932. Hearing Denied by Supreme Court Oct. 27, 1932.

1. Marriage ⇐60(7).

In wife's action to annul marriage of husband to another, who attacked vacation of divorce decree and charged conspiracy between spouses, evidence concerning relations between husband and other woman before divorce and subsequent reconciliation of spouses, was admissible.

2. Appeal and error ⇐1097(1).

Law of case determined on first appeal is not controlling on second, where facts are essentially different.

3. Appeal and error ⇐1097(1).

Judgment on first appeal, where second wife appeared as victim of husband and former wife, *held* not controlling on second appeal, where second wife appeared as disrupter of first marriage and participant in fraud on court.

4. Notice ⇐7.

Absent positive law or rule of court requiring notice, where party has means of obtaining knowledge from known source, or has actual knowledge, formal notice is generally unnecessary.

5. Equity ⇐65(1).

Equity does not allow one to take advantage of his own wrong nor will it assist in perpetration of fraud on another or the public.

6. Divorce ⇐165(4).

Evidence *held* to show that wife was not guilty of laches in moving to set aside divorce decree fraudulently procured.

7. Divorce ⇐165(4).

Motion to set aside divorce decree on ground of fraud is not subject to six-month limitation, nor is court's power to act derived from such statute (Code Civ. Proc. § 473).

8. Marriage ⇐60(7).

Evidence *held* to show that second wife intrigued to disrupt husband's first marriage, and, with knowledge of fraudulent divorce decree, married him.

9. Marriage ⇐60(7).

Evidence *held* to show that second wife knew that husband's divorce from first wife was fraudulent, and had such knowledge of proceedings to set aside decree, as to make formal notice unnecessary.

10. Marriage ⇐58(5).

On setting aside of fraudulent divorce and reconciliation with husband, who, after divorce, had married woman who was cause of it, first wife *held* entitled to annulment of husband's second marriage.

Appeal from Superior Court, San Diego County; A. C. Finney, Judge.

Action by Frances C. Bowman to annul marriage of Horace D. Bowman and Bryan Houston Bowman, in which Bryan Houston Bowman filed cross-complaint. From judgment for plaintiff, Bryan Houston Bowman appeals.

Affirmed.

Hill, Morgan & Bledsoe and Kenneth K. Wright, all of Los Angeles, for appellant.

Stearns, Luce & Forward, of San Diego, for respondent Frances C. Bowman.

Wright & McKee and C. M. Monroe, all of San Diego, for respondent Horace D. Bowman.

MORTON, Justice pro tem.

This is the second appeal in this action of Frances C. Bowman to annul the marriage of Horace D. Bowman and Bryan Houston Bowman. In the first trial judgment was entered for Frances C. Bowman, Bryan Houston Bowman appealed, and the judgment was reversed. Bowman v. Bowman, 97 Cal. App. 613, 275 P. 1023, 1024. Frances C. Bowman asked for a rehearing, which was denied, and hearing in the Supreme Court was also de-

nied. Then Frances C. Bowman moved for a new trial in the court below on the ground of the insufficiency of the evidence to sustain the findings. This motion was granted, and the case was tried again. Judgment was again entered in favor of Frances C. Bowman, and Bryan Houston Bowman again appeals.

From a study of the record before us we find the facts to be as follows: Frances C. Bowman and Horace D. Bowman intermarried October 16, 1915; on September 28, 1923, Frances C. Bowman filed suit for divorce against Horace D. Bowman; Bryan Houston, a girlhood friend of twenty years who had often visited in the home of the Bowmans, staying over week-ends, and who had encouraged Frances many times not to put up with the conduct and ill treatment of Horace, appeared and testified as her corroborating witness; on October 13, 1923, Frances obtained an interlocutory decree of divorce.

About July 27, 1924, Horace and Frances became reconciled, effected a condonation, and resumed marital relations. On October 22, 1924, they moved to Pasadena, and after a day or two Horace moved some of his belongings to a Los Angeles hotel for the purpose of taking medical treatment and to be away from the noise of the children. While at the hotel, and after receiving a letter from Bryan Houston, he decided to "walk out on" Frances. On October 28th he called on his attorney, David P. Hatch, and arranged that he should call F. F. Grant at San Diego, attorney for Frances, and request him to have the final decree of divorce entered. Bowman did not inform his attorney that there had been a reconciliation and condonation, and Grant, without knowledge of the reconciliation and condonation, and without communicating with Frances, had the final decree entered October 28, 1924. Three days later Horace left on a trip east, called on Bryan Houston in New York, and they became engaged. November 20, 1924, Horace met Frances by prearrangement at Salt Lake City, and they celebrated the birthday of their older son, stopping at the same hotel, but occupying separate rooms. Horace returned to Los Angeles November 21, 1924, and on December 22 met Frances and his children at the train upon their return from Salt Lake City and assisted them in moving to a house in Pasadena. He, however, continued to live at a Los Angeles hotel. Early in January, 1925, Horace assisted Frances and his children to move to Santa Monica, and on January 15, 1925, he told her of the entry of the final decree. This was her first information concerning it. About a week later Frances wrote to Bryan Houston, then in New York, that the reconciliation had failed, that the final decree had been granted and of Horace's deception in getting it, and that they were telling people about it, and that it was a good end to a bad mess.

On April 21, 1925, Horace D. Bowman and Bryan Houston were married, and a week later Frances learned of the marriage. Horace and Bryan returned to Los Angeles in May, 1925. On May 23, 1925, Frances wrote to an attorney friend in Portland for legal advice. On June 6, 1925, she consulted an attorney in Los Angeles. Another conference with this Los Angeles attorney occurred in July. During the latter part of July, 1925, Horace and Bryan had trouble, and Horace consulted an attorney regarding the possibility of an annulment of their marriage. In August, 1925, Frances several times consulted her former attorney, F. F. Grant, in San Diego, and in September, 1925, he advised her that in his opinion she could, by motion, secure the setting aside of the final decree of divorce. This was the first time she had been so advised. On October 19, 1925, Frances filed her application to set aside the final decree of divorce, and two days later notice was served upon Horace, but no service was made upon Bryan.

Horace and Bryan separated on October 25, 1925. The final decree of divorce of Horace D. Bowman and Frances C. Bowman was set aside November 2, 1925, and two days later Frances brought this action to annul the marriage of Horace D. Bowman and Bryan Houston Bowman. On December 1, 1925, Frances and Horace became completely reconciled, a third child has been born to them, and they still continue to live together.

In this action to annul the marriage of Horace D. Bowman and Bryan Houston Bowman, defendant Horace D. Bowman answered, admitting the allegations of the complaint. Defendant Bryan Houston Bowman answered, denying the allegations of the complaint, pleaded certain affirmative defenses, and filed a cross-complaint naming Frances C. Bowman and Horace D. Bowman as cross-defendants, and praying that the order vacating their final decree of divorce be set aside and annulled, to which each filed an answer. In the first trial judgment was entered denying the prayer of the cross-complaint, and vacating, annulling, and setting aside the marriage of Horace D. Bowman and Bryan Houston Bowman. Defendant and cross-complainant Bryan Houston Bowman appealed on the judgment roll. Bowman v. Bowman, supra. The District Court of Appeal reversed the judgment, with directions to the trial court to enter judgment against Frances C. Bowman denying her prayer for annulment of the marriage of Bryan Houston Bowman and Horace D. Bowman, and ordered that judgment be entered in favor of Bryan Houston Bowman as prayed for in her cross-complaint against both cross-defendants, and that the

order made in the action entitled "Frances C. Bowman v. Horace D. Bowman," numbered 40292, in the Superior Court of San Diego county, purporting to set aside and vacate a final decree of divorce, be set aside, vacated, and annulled, and that the final decree of divorce stand as a subsisting and valid decree. A petition for rehearing was denied by the District Court of Appeal and petition to have the case heard in the Supreme Court was also denied, Justices Richards and Langdon dissenting. After judgment had been entered in accordance therewith, respondent Frances C. Bowman moved for a new trial upon the ground of insufficiency of the evidence to sustain the findings. This motion was granted, and the action was retried. Judgment was again entered in favor of Frances C. Bowman, and Bryan Houston Bowman again appeals.

At the second trial of this action evidence was introduced which changed the picture as to Bryan being an innocent third party. The cross-complaint filed by Bryan alleged that, after being told by Horace of the entry of the final decree of divorce, and later having received a letter from Frances conveying the same information, she relied upon this knowledge and married Horace. She further alleged that Horace and Frances entered into a conspiracy and secret agreement to set aside the final decree and annul her marriage with Horace, thereby defeating and defrauding her of her marital rights. She further alleged that Frances allowed one year to pass before acting to set aside the final decree.

[1] To the introduction of evidence concerning alleged relations between the husband and Bryan Houston prior to the entry of the interlocutory decree of divorce and prior to the reconciliation of Horace and Frances, counsel for Bryan objected on the ground that these matters were incompetent, irrelevant, and immaterial, and wholly collateral to any issue in the case. If the hands of Bryan Houston Bowman were tainted with fraud concerning the case at bar, the trial court was entitled to this information, and the objection was properly overruled. In the case of Manhattan Medicine Co. v. Wood, 108 U. S. 218, 2 S. Ct. 436, 442, 27 L. Ed. 706, Mr. Justice Field said (quoting from the opinion of Chief Justice Duer in Fetridge v. Wells, 4 Abb. Prac. [N. Y.] 144): "Those who come into a court of equity, seeking equity, must come with pure hands and a pure conscience. If they claim relief against the fraud of others, they must themselves be free from the imputation." See, also, Castroville Co-op. Creamery Co. v. Col, 6 Cal. App. 533, 92 P. 648.

We must now consider the law of the case as established in Bowman v. Bowman, supra. First, it should be noted that the appeal was taken on the judgment roll only, and the District Court of Appeal determined as follows: "The appeal presents the question as to whether or not the conclusions of law were supported by the findings, and whether or not, in view of the findings of fact, the cross-complainant should have been granted the relief prayed for in her cross-complaint." Second, the judgment of the trial court was reversed on two points: "[1] We determine that, irrespective of whether appellant was a necessary or proper party to the proceeding to vacate the final decree, she was entitled to notice of the application, as one whose rights as a wife have been injuriously affected by the order vacating the final decree of divorce, and that she is entitled to complain of the fraud practiced upon the court and upon herself, and, by her cross-complaint in equity, have the said order set aside and annulled. * * * [2] The second reason we find which would indicate that the judgment in this case should be reversed is that, in our view, the order made in the proceedings in the divorce suit after the entry of the final decree was void, as being in excess of the jurisdiction of the court, because (1) Frances C. Bowman was guilty of laches, as affirmatively appears in findings VII and IX, in delaying her application for suit herein from the early part of January, 1925, when it is found she first knew of the entry of said final decree, until November 2, 1925, a delay of approximately ten months; (2) she was estopped from the right to make application for an annulment of the final decree, as it affirmatively appears from said findings that when she first learned of the final decree in the early part of January, about three months after her own counsel had applied for and obtained the said decree on October 28, 1924, she acquiesced therein, expressed satisfaction therewith, and was willing and desirous that said decree should stand as a valid and subsisting decree. After she learned of the marriage of Horace D. Bowman to Bryan Houston Bowman, which took place in April, 1925, Frances C. Bowman accepted all of the benefits granted her by the said decree in the way of support, maintenance, and the custody of minor children, etc. She thereby confirmed and ratified the action of her attorney, Mr. Grant, in causing the issuance of said final decree. She made no effort thereafter to have said decree set aside until November 2, 1925, more than a year after its issuance, by which time the trial court had lost jurisdiction to vacate it or set it aside, under the well-established law of this state."

[2] On the first appeal the appellate court did not determine that Bryan Houston Bowman was a necessary or proper party to the proceedings to vacate the final decree of divorce. However, upon the findings of the trial court, it was held that she was entitled to notice of the application as one whose rights as a wife were involved and entitled to com-

plain of the fraud practiced upon the court and herself. In numerous decisions, the Supreme Court of this state has laid down the rule that the law of a case only applies so long as the evidence develops the same state of facts. If the facts produced at the second trial are essentially different, the rule ceases to be of binding force. In Klauber v. San Diego Street Car Co., 98 Cal. 105, 107, 32 P. 876, the court held: "It is only when the same matters that were determined on the first appeal are brought before it on the second appeal that the rule can be invoked; and, being a rule which tends to prevent a judicial consideration of the case, it is not to be extended beyond the exigencies which demand its application, and it is therefore held that whenever, upon the second hearing, the record presents a different state of facts, the former determination ceases to be an estoppel." Mitchell v. Davis, 23 Cal. 381; Bennett v. Wilson, 133 Cal. 379, 65 P. 880, 85 Am. St. Rep. 207; Otten v. Spreckels, 183 Cal. 252, 254, 191 P. 11; Estate of Baird, 193 Cal. 225, 233, 223 P. 974; 2 Cal. Jur. 950.

[3] After a careful examination of the evidence and the findings of the trial court, we believe that at the second trial a different state of facts presents itself for determination. In the second trial the findings held that there was no conspiracy and agreement between respondent Frances C. Bowman and respondent Horace D. Bowman to defraud either the court or Bryan Houston Bowman as to the entry of the final decree, and that Frances on her own initiative, and without assistance from Horace, was the moving party to set aside the final decree. Further, it was held that the proceedings to vacate the final decree were not kept secret from Bryan, and there was no agreement between Frances and Horace to institute this present annulment action if the motion was granted. The court further found that the affidavits upon which the final decree of divorce was set aside were true; that Horace did not oppose said motion because he had no defense and had been so advised by his counsel; that Frances and Horace were living together as husband and wife in pursuance of their reconciliation when the final decree of divorce was granted; that they continued to live together until November 1, 1924; that Bryan Houston knew of the reconciliation and condonation between Horace and Frances which had commenced in July, 1924, and continued until after the final decree had been entered; that Bryan Houston for many years had been an intimate friend of Frances, frequently visiting in the home of Frances and Horace, and, while accepting their hospitality, engaged in a secret love affair with Horace; that for this reason Bryan desired to bring about a separation, and advised and encouraged Frances to secure a divorce; that the conduct and influence of Bryan was a cause of the separation and divorce; that Bryan was a corroborating witness in the divorce action, and testified in support of Frances' allegations; that Bryan had possession of all the facts of this case which were then before the court, and nothing connected with the case was unknown to her, and there were no facts in her possession that would have caused or required or justified the court in refusing to set aside the final decree of divorce; that she had no defense to the motion to set aside the final decree and no facts existed which would have caused its denial; that, had she been served and had she been present at the hearing and produced all said facts, no different or other action would have resulted. It now appears from all the evidence and the findings in the second trial that Frances was the innocent party deceived by fraud practiced over a number of years by her supposed friend Bryan Houston.

In the first trial of the case and on the appeal, Bryan Houston Bowman appeared an innocent third party, a second wife about to be defrauded of her rights by a conspiracy and agreement between the husband and the first wife. On the present appeal, from the evidence and the findings, she now appears as the third person in the original divorce action. With her knowledge of the facts surrounding the securing of the interlocutory decree, the condonation and reconciliation, and the manner by which the final decree was obtained, it should be said, as in Medina v. Medina, 22 Colo. 146, 43 P. 1001, that a person acting under such a decree is not entitled to the protection of the court, as she acquired no rights in good faith upon which she could rely under a decree of court.

[4, 5] The evidence shows that in July, 1925, Horace and Bryan discussed a separation and a possible annulment of their marriage. Bryan knew that Horace had written to a Kansas City attorney regarding it, and at approximately the same time she consulted legal counsel in Los Angeles. It appears that Horace desired a separation and that Bryan was opposed to it. Prior to the motion to set aside the final decree (during September and October, 1925), Horace told Bryan several times that Frances was starting a lawsuit in the old divorce matter to open up the matter of the divorce and property and everything concerning her situation. After the papers were served on him, he told Bryan that Frances had started the suit. Bryan knew in what court the divorce action had been tried, she had appeared as a witness for Frances, and she knew how the final decree had been secured. She had ample information to put her on inquiry immediately. "In the absence of positive law or order of court requiring notice, it may be stated as a general rule that, where a fact as to which notice might otherwise be required, is one which the party has means of ascertaining from a defi-

nite known source, or which is equally known to both parties, no notice thereof need be given." 46 Cor. Jur. 552; Tynan v. Kerns, 119 Cal. 447, 51 P. 693; Prouty v. Devin, 118 Cal. 258, 50 P. 380. A court of equity does not allow one to take advantage of his own fraud, and will refuse to lend its aid to assist in enforcing a fraudulent imposition upon government, public, or private individuals. When parties are in pari delicto, a court will leave them where it finds them, after purging its records of the fraud practiced upon the court. 12 Cal. Jur. 779.

[6] The first trial court by its findings held that Frances learned of the granting of the final decree in January, 1925, and made no effort to set it aside; on the contrary, she acquiesced therein, expressed satisfaction that it had been granted and her willingness that it should stand as valid and binding, and that she had accepted benefits under said decree after the marriage of Horace and Bryan. Presented with this finding, the District Court of Appeal, with no evidence or knowledge of the fraud of Bryan Houston, naturally concluded that Frances was guilty of laches, having, according to their conclusion, waited ten months before moving to set it aside. The only party injured by the delay was Bryan, and in the eyes of the appellate court she appeared the innocent second wife.

With both the evidence and the findings at our command, we are able to get the entire picture of the situation. According to the record before us, there had been a complete reconciliation and condonation between Frances and Horace. In January, 1925, he told her that he had secured a final decree in October, and, stunned by his deception, she endeavored to cover her disappointment by saying she was satisfied. Between January and April, Horace came to the home frequently to see the children, and Frances tried upon several occasions to discuss the matter of the divorce with him, but he would reply, "Oh, forget it." He would tell her that what he had done was for her best interest. She testified that he had her convinced there was nothing she could do about it. In April, 1925, she learned of the marriage of her husband to her former friend and confidante and of their secret love affair. The discovery of this fraud first crushed her, then caused her to act. In view of this evidence, it is here that the time should start, if at all, upon which to base a charge of laches. It was at this time that Frances discovered the fraud practiced by Bryan upon her. She testified that investigation brought additional light, and then in June she sought legal advice. Up to that time the law was somewhat uncertain, but the case of McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A. L. R. 1110 (decided May 29, 1925), clearly determined the principles involved for a motion to vacate the final decree. In that case it was held that, in an action for divorce, where there had been a reconciliation, condonation, and a resumption of marital relations after entry of the interlocutory decree, and if, during that period, the husband without the knowledge of the wife secured a final decree of divorce, these facts constituted extrinsic fraud upon the court, and the court retains jurisdiction to set aside the final decree upon motion of the wife. Upon the advice of her Los Angeles attorney, she consulted attorneys in San Diego during August and September, and in October her motion was filed to set aside the final decree. The motion was heard on November 2, 1925, and the final decree was set aside by order of the Superior Court of San Diego county. Within approximately six months of the discovery of the fraud her motion had been made and granted.

[7] After distinguishing the law of the case as found by the District Court of Appeal in Bowman v. Bowman, supra, and in view of the entirely different state of facts as shown by the evidence and findings on the second trial now before us, we must turn to the proper function of courts in dealing with fraud practiced upon them. In the case of McGuinness v. Superior Court, supra, we find that an almost identical state of facts as is here involved is defined as extrinsic fraud, and that the court retained jurisdiction to set aside its decree, and its right so to do is not derived from section 473 of the Code of Civil Procedure, nor limited to the time therein specified. In the case of Ex-Mission L. & W. Co. v. Flash, 97 Cal. 610, 32 P. 600, it was held that a motion to set aside a judgment upon the ground of fraud in its procurement is not subject to the six-month limitation provided in section 473 of the Code of Civil Procedure, and in the opinion in that case it is pointed out by the court that said section of the Code, while providing for relief in cases of "mistake, inadvertence, surprise, or excusable neglect," does not include "fraud" among the grounds upon which relief from a void or voidable judgment may be sought under its terms.

The introduction of the additional evidence involved the question of fraud on the part of appellant, Bryan Houston Bowman, and the determination of her rights involved a consideration of her acts and representations under the light of the law as to fraud. In the case of Dealey v. East San Mateo Land Co., 21 Cal. App. 39, at page 43, 130 P. 1066, 1068, the court says: "Here the fraud is not against the defendant, but against the public. Pleading such a fraud is not a condition precedent to the court's taking cognizance of it. As soon as it is disclosed to the court, whether alleged in the pleadings or not, that the contract between the parties contemplates a fraud upon the public, it must sua sponte refuse to grant any relief to either party based on such contract. [Citing cases.] It is the

duty of courts to protect the public at all times against fraud, and one way of doing so is by closing the doors to would-be or actual perpetrators of such fraud who would fain make use of the court to divide the spoils between them."

In Mitchell v. Cline, 84 Cal. 409, 24 P. 164, 166, we find the court quoting Pomeroy's Equity Jurisdiction, § 401, as follows: "Where two or more have entered into a fraudulent scheme for the purpose of obtaining property in which all are to share, and the scheme has been carried out so that all the results of the fraud are in the hands of one of the parties, a court of equity will not interfere on behalf of the others to aid them in obtaining their shares, but will leave the parties in the position where they have placed themselves."

[8] Ignoring for the moment the children of Frances and Horace, let us find who were the parties interested in the original divorce action. The record discloses Frances C. Bowman as plaintiff and Horace D. Bowman as defendant. The case of Lane v. Superior Court, 104 Cal. App. 340, at page 345, 285 P. 860, 863, clearly portrays the true parties to every marriage contract when an action comes before the court for an interlocutory decree. "There are two major reasons why the law requires a year to intervene between the interlocutory and the final decree of divorce. One is to permit the determination of the paternity of the children, and the other, not less of interest to society, is to permit, if possible, the husband and wife to compose their difficulties and become so reconciled to one another that the marital relations may be resumed and no final decree of divorce become necessary. If the marriage relation found its inception in a civil contract of the two parties in the performance, existence, and termination of which they alone be concerned, our task would be a simple one. But in every such contract there is a third party vitally interested, the society in which we live, and representing it, the government which gives that society the permanence upon which its existence depends. For this reason the rules of marriage are prescribed by law, and the right of dissolution should be jealously guarded." The interest of the third party, "the society in which we live," our government and the public in general, requires a careful analysis of all the facts before a marriage contract is dissolved.

It must be admitted that the true guardian of the American home is the wife and mother. If a child is led astray, she never relaxes her effort to bring him back. If the husband, through sickness, weakness of character, or inability to resist the appetites of human nature, errs, and the wife still loves him because of what he used to be, or because he is a fond and loving father to her children, has she not the right to endeavor to bring him back under the proper circumstances and re-establish her home and family? From the evidence we must conclude that this husband with his wife and children constituted a happy family until Bryan Houston became involved in a secret love affair with the father. Then friction arose, and we find Bryan Houston writing to the wife, "Every one gets into trouble but only smart people get out of it," and frequently saying to her in the supposedly close confidence of a twenty-year friendship, "I would not live with him," and, "I would get a divorce from a man who treated me that way." She appeared as a corroborating witness to assist the wife in getting free from the husband whom "I would not live with." Throughout the years of friction and litigation the love of the husband and father for his children continually drew him back to his first home. Approximately eight months after the interlocutory decree there was a reconciliation and condonation concerning which Frances wrote in detail in two letters during August of 1925 to her supposedly close friend, Bryan Houston, telling her how happy they all were. These letters were not answered by Bryan. The husband, after secretly securing the final decree of divorce on October 28, 1924, very promptly told Bryan about it, and from that moment, by reason of the letters previously written her by Frances, which she admits receiving, and her own personal knowledge of the reconciliation, she was charged with notice that said final decree was fraudulently obtained. Without hesitating, and before Frances knew of the final decree, she became engaged to Horace during the early part of November, 1924, less than a month after the granting of the final decree, and before she had received the letter of January 16, 1925, from Frances expressing satisfaction over the granting of the final decree. From the evidence we conclude that Bryan Houston knew she was involved in and a principal cause of the family's troubles, and had designingly advised the wife to leave her husband and get a divorce; that she had personal knowledge of the reconciliation and condonation; that she had knowledge the final decree was granted through concealment and fraud upon the court; that Frances, without knowledge of the fraud, designing advice, and betrayal of friendship by Bryan, had expressed satisfaction with the granting of the final decree possibly to cover her pride and anguish. In spite of all this knowledge, Bryan Houston married Horace D. Bowman. It is apparent she was fully aware of the fact that the legal eligibility of Horace for a marriage to her was upon very uncertain ground, and that whenever the fraud upon which his freedom had been secured was exposed the court might properly revoke and annul the entire judgment.

[9] The question squarely before this court is, Shall Bryan Houston Bowman be allowed to take advantage of her own fraud and

stand on the technical ground of lack of legal notice and a finding of laches against an innocent party, made by a court before which these facts did not then appear, or shall the court purge its records of the fraud?

[10] Society is entitled to a condemnation of the tactics of Bryan Houston Bowman. We should permit this mother and defrauded wife to re-establish her home and family. In the case of Rehfuss v. Rehfuss, 169 Cal. 86, 145 P. 1020, 1022, our Supreme Court directed attention to the fact that actions for divorce differ from ordinary suits between private parties in the degree of solicitude which the law as well as public policy imposes upon the court in the interest of preserving the integrity of marriage relations. The court says: "That relation is the basis of the family, the foundation of society. It cannot be destroyed by the mere consent, whim, or caprice of the parties to the marriage, nor can it be stipulated away in judicial proceedings. The relation can be dissolved only by consent of the state, and upon statutory grounds, presented in good faith to a court of competent jurisdiction. * * * It is the duty of the court, representing the state, in accordance with the letter and policy of the law, to guard strictly against fraud, collusion, or imposition."

In the case at bar we find fraud practiced upon the court, upon society, and upon three children, two born prior to the divorce proceedings and the third after the final reconciliation and condonation. The fraud which permeates this case cannot be condoned by the court, and cannot be allowed to brand this third son with the stigma of illegitimacy. Preservation of the sanctity of the marriage state is essential to the continuance and betterment of organized society. "The state has an interest in the maintenance of the marriage tie, which neither the collusion nor the negligence of the parties can impair." Rehfuss v. Rehfuss, supra. A full consideration of the law and the evidence leads to but one conclusion, that the judgment of the trial court should be affirmed. It is so ordered.

We concur: MARKS, Acting P. J.; JENNINGS, J.

125 Cal.App. 476

FOERST v. HOBRO et al.

Civ. 8350.

District Court of Appeal, First District, Division 1, California.

Aug. 24, 1932.

Rehearing Denied, Sept. 23, 1932.

1. False imprisonment ⇐20(1).

Complaint alleging false imprisonment must show that judicial proceedings pursuant to which imprisonment occurred were defective and that court had no jurisdiction.

2. False imprisonment ⇐20(1).

Complaint alleging plaintiff was charged with criminal offense and imprisoned stated no cause of action for false imprisonment where not alleging how proceeding was defective.

Complaint alleged in substance that inspector of department of health swore to criminal complaint against plaintiff pursuant to which she was arrested by police officer and imprisoned in city prison for several hours; that as result of such arrest and imprisonment she suffered damages on account of humiliation, mental shock, and physical injuries, and her claim that imprisonment was illegal was based solely upon assertion that complaint in criminal proceeding did not state a public offense, but she did not set forth copy of criminal complaint nor substance of its allegations nor allege its defects.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Wilhemina Foerst against William D. Hobro and another. From a judgment for defendants, plaintiff appeals.

Affirmed.

M. James McGranahan, of San Francisco, for appellant.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for respondents.

TUTTLE, Justice pro tem.

This was an action to recover damages for an alleged false imprisonment, brought against two inspectors of the department of health of the city and county of San Francisco, one of whom was chief inspector. Demurrers to the original and the first amended complaint were sustained with leave to amend; and the second amended complaint being defective also, the demurrer thereto was sustained without leave to amend. Judgment in favor of defendants was entered accordingly, and plaintiff appeals therefrom.

The complaint alleged that the inspector, acting under instructions from and at the direction of his chief, swore to a criminal complaint against plaintiff, pursuant to which she was arrested by a police officer and imprisoned in the city prison for several hours; and that as a result of such arrest and imprisonment she suffered damages on account of humiliation, mental shock and physical injuries.

As will appear from the second amended complaint, and from plaintiff's briefs on ap-

peal, her claim that the imprisonment was illegal is based solely upon the assertion that the complaint in the criminal proceeding did not state a public offense. She did not set forth a copy of the criminal complaint, however, nor any portion thereof, nor the substance of any of its allegations; nor did she allege generally or at all wherein the said criminal complaint was defective or failed to state a public offense; in fact, she did not even indicate the nature of the criminal charge placed against her. With respect thereto, both on this appeal and before the trial court, she has chosen to stand on the single allegation contained in paragraph VI of the second amended complaint: "That the said arrest was illegal and unlawful by reason of the fact that the aforesaid [criminal] complaint did not state a public offense."

[1, 2] Respondents contend that the foregoing allegation is but a conclusion of law, and that therefore, since no facts are pleaded which show the imprisonment to have been unlawful, no cause of action is stated. The authorities fully sustain such contention. As held in the case of Burlingame v. Traeger, 101 Cal. App. 365, 281 P. 1051, a demurrer to a complaint for false imprisonment is properly sustained where the complaint fails to allege any facts indicating that the order of arrest or the affidavit upon which it is based are insufficient, and where there is no showing of any irregularity on the face of the order of arrest or any lack of jurisdiction of the court to issue it; allegations that the order is illegal, unauthorized, and void, and that the affidavit is insufficient, being mere conclusions of law. In so holding the court said (page 369 of 101 Cal. App., 281 P. 1051, 1052): "The rules are elementary that an allegation that an instrument is 'illegal,' 'unauthorized,' or 'void' is but a conclusion of law, and that such words, when used in connection with issuable facts, are to be regarded as mere surplusage and never obviate the necessity of alleging the facts showing wherein the illegality, lack of authorization or invalidity lies." Likewise in the case of Going v. Dinwiddie, 86 Cal. 633, 25 P. 129, it was held that allegations charging merely that the acts constituting such imprisonment were done "wrongfully" or "unlawfully" are nothing more than conclusions of law, and tender no issue, where no facts are averred to show the acts complained of are wrongful or unlawful; the court saying: "There may be some relations where 'wrongfully' and 'unlawfully' and similar adverbs have some significance, but the ordinary rule is that for purposes of pleading they are utterly valueless." And again, in Lapique v. Agoure, 51 Cal. App. 56, 195 P. 1075, 1076, in holding that an action for false imprisonment does not lie for an imprisonment in due course of regular proceedings of a court having jurisdiction of the offense (19 Cyc. 339), the court goes on to say that "a complaint for false imprisonment must aver facts from which want of jurisdiction appears. Allegations, as here, that the imprisonment was unlawful and void, tender no issue," citing Going v. Dinwiddie, supra. From the foregoing it will be seen that where, as here, it affirmatively appears from the complaint that the alleged wrongful detention is pursuant to judicial proceedings, facts must be stated showing that such proceedings were defective and that therefore the court in which they were had was without jurisdiction; and that it is not enough to allege merely that the complaint was insufficient or that the court had no jurisdiction. 25 Cor. Jur. p. 533, § 129.

Stripped, then, of its conclusions of law, the second amended complaint shows merely that an inspector of the department of health instituted a criminal proceeding in a court of competent jurisdiction, by swearing to a complaint charging plaintiff with a criminal offense, and that thereafter plaintiff was arrested and imprisoned under process duly issued in said proceeding. In that state of the pleading, all presumptions of regularity being indulged in, and no facts being alleged showing how or in what respect the proceeding was defective, no cause of action for false imprisonment has been stated.

The case of Ah Fong v. Sternes, 79 Cal. 30, 21 P. 381, stressed by plaintiff in support of her position, is essentially different from the present one for there, in addition to alleging that plaintiff was unlawfully imprisoned, the complaint set forth specific facts, which, in themselves, if true, were sufficient to establish an illegal imprisonment. In this regard it was alleged that a writ of habeas corpus had been duly issued by the superior court commanding defendant to produce the body of plaintiff at a specified time and place; that said writ had been served on defendant while he had plaintiff in his custody and under his control; and that defendant refused to obey such writ. Plaintiff calls attention to certain language used in the decision therein which she claims upholds the form of complaint here filed; but an analysis of the language relied upon, in the light of the cases cited by the court in support thereof, shows clearly that the language was intended to apply to cases such as the court then had under consideration, where specific facts are alleged which are legally sufficient in themselves to show an illegal imprisonment, or to cases where the arrest is made without the sanction of a warrant or any judicial proceeding, and facts are alleged which, if true, would establish an illegal arrest and detention.

We conclude, therefore, that the demurrer to the second amended complaint was properly sustained, and no other points being made with respect thereto, the judgment appealed from is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

LEJEUNE v. GENERAL PETROLEUM CORPORATION OF CALIFORNIA.*

Civ. 8325.

District Court of Appeal, First District, Division 1, California.

Aug. 20, 1932.

Rehearing Granted Sept. 19, 1932.

1. Appeal and error ⇐221.

Point that damages were excessive cannot be raised for first time on appeal.

2. Seamen ⇐29(5).

Allegations regarding employer's negligence where anchor chain, while being hauled in, suddenly reversed and injured seaman, did not show specific manner in which accident occurred so as to prevent application of res ipsa loquitur doctrine (Jones Act 1920, § 33 [46 USCA § 688]; Federal Employers' Liability Act § 1 [45 USCA § 51]).

Complaint alleged that while plaintiff seaman was engaged in stowing away anchor chain in performance of his duties, officers and employees of shipowner so carelessly and negligently operated winch and its appliances used to haul in anchor and stow anchor chain, and such winch and its appliances and said anchor chain were, by reason of negligence of defendants, so defective and insufficient that anchor chain suddenly reversed in opposite direction, and seaman was thereby violently thrown against some portion of chain locker.

3. Seamen ⇐29(1).

It was duty of officers of ship, toward seaman sustaining injuries when anchor was being hauled in, to take precautions against results which might accompany heaving in of anchor on heavy swell of sea (Jones Act 1920, § 33 [46 USCA § 688]; Federal Employers' Liability Act § 1 [45 USCA § 51]).

4. Negligence ⇐24.

In determining question of negligence, there must be considered facts known to person, or which, by use of proper diligence, would have been known to prudent man in his place.

5. Seamen ⇐29(4).

Seaman does not assume risk of negligent acts of those in charge of ship, or their failure to take reasonable precautions (Jones Act 1920, § 33 [46 USCA § 688]; Federal Employers' Liability Act § 1 [45 USCA § 51]).

6. Seamen ⇐29(4).

Seaman does not assume risk, even though danger was obvious to him (Jones Act 1920, § 33 [46 USCA § 688]; Federal Employers' Liability Act § 1 [45 USCA § 51]).

7. Appeal and error ⇐1002.

Jury's conclusion on conflicting evidence could not be disturbed on appeal.

8. Negligence ⇐138(2).

Where explanation leaves it doubtful whether ultimate cause of injury was negligence of party charged, res ipsa loquitur instruction is proper.

9. Seamen ⇐29(5).

Res ipsa loquitur doctrine *held* applicable where seaman stowing anchor chain in chain locker was injured when anchor suddenly reversed direction and injured seaman (Jones Act 1920, § 33 [46 USCA § 688]; Federal Employers' Liability Act § 1 [45 USCA § 51]).

Evidence disclosed that plaintiff seaman and his companion were in chain locker and could observe nothing but chain coming through steel pipe from winch above, and could not observe manner in which windlass was operated, or in which other members of crew were performing their respective duties; that machinery was under immediate direction and control of officers of ship; that plaintiff could not know whether pawl or forelock was in proper position, or whether the compressor brake was being watched as it should be, but was compelled to rely upon proper operation of machinery by his superiors and agents of employer.

10. Appeal and error ⇐1170(7).

Erroneous admission of conversation *held* harmless where not necessary to establish plaintiff's case (Const. art. 6, § 4½).

Admission of evidence in effect that prior to happening of accident seaman who was with plaintiff at time of accident had had conversation with first mate in which he had said that winch was not in perfect order, although error because conversation was vague and indefinite and no specification was made as to any particular defect in machinery, and plaintiff had made no effort to show any defect in windlass, was harmless because such testimony was not necessary for establishment of plaintiff's case.

11. Appeal and error ⇐1170(9).

Giving instruction regarding aggravation of pre-existing condition where no pre-existing injuries were involved *held* harmless, where jury was properly instructed regarding measure of damages (Const. art. 6, § 4½).

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Frank M. Lejeune against the General Petroleum Corporation of California. From a judgment for plaintiff, defendant appeals.

Affirmed.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 18 P.2d 429.

A. L. Weil, of San Francisco, W. L. Appleford, of Los Angeles, and Martin J. Weil, of San Francisco, for appellant.

Ford & Johnson, of San Francisco, for respondent.

LAMBERSON, Justice pro tem.

The plaintiff was employed as an able seaman on the tank steamer Lebec, owned and operated by the defendant and appellant. Because of injuries received while the ship was weighing anchor off of the town of Davenport, Santa Cruz county, this action for the recovery of damages has been brought against appellant under the provisions of the Jones Act (46 USCA § 688), which reads as follows: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply. * * * " The Federal Employers' Liability Act, to which reference is made in the preceding act (45 USCA § 51), reads in part as follows: "* * * For such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

For about two weeks prior to the date of the incident, which is the subject of the action, the respondent had been employed on the Lebec. The ship, about February 15, 1931, and after a general overhauling, at San Pedro loaded with fuel oil and proceeded to Davenport, where it was the custom and was necessary to anchor in the open sea about one mile from shore, where the ship picked up a pipe line leading to the tanks on shore, which were used for storage, and to discharge its cargo through such pipe line. The ship was moored to three buoys, and had out the port and starboard anchors. For the performance of the task of hoisting anchor, two men, one of whom was the respondent, were assigned to the chain locker for the purpose of stowing the anchor chain as it came in. The chain locker was a compartment located in the forecastle head immediately below the windlass or winch, hereafter described, and was about 12 feet by 5 feet in dimensions, and 15 feet in depth. The anchor chain consists of links each about 14 inches long, 7 inches wide, and weighing about 25 pounds. It was hoisted by means of a windlass, to which was affixed a device known as a "wild cat," which operated on the principle of a friction clutch, and which, when meshed with the revolving part of the winch, drew the chain in by means of "dogs," which engaged the open space in the links of the anchor chain. The motive power which operated the winch was steam. From the winch the chain fell through a pipe into the chain locker. As a safety device, there was first a pawl or forelock built in to the deck between the winch and the opening in the ship's side through which the anchor chain was drawn. The forelock was so designed that in the event of a reversal of the chain, the "dog" on the forelock would fall into the open part of the link and prevent the chain from running further.

Because of the manner in which the chain was constructed it was agreed that about 20 inches of the chain might run out before the pawl would engage. As an additional safety factor, there was upon the winch or windlass a band or compressor brake which was operated by means of a handle, and which was designed for use in the event of the failure of the hoisting machinery or of the forelock to engage the chain while running out.

On the day of the accident, the boatswain was assigned to the duty of turning the steam into the winch and off, that is, attending the throttle. An able seaman was stationed at the starboard compressor brake for the purpose of applying the brake in the event of an emergency, while the first mate stood in the forecastle head in front of the winch and superintended the operation, watching at the same time the slackening away of the port anchor chain which was being slowly payed out, as the starboard anchor was being drawn in. The master of the ship was on the bridge about 175 feet away from the winch.

A heavy sea had been running during all of the morning and part of the preceding day, causing the lightened ship to rise as much as 8 to 12 feet with the swell. During the process of hoisting the anchor, and after the larger part of the chain had been drawn in, the ship rose with the swell, and the chain suddenly stopped running in, and reversed its direction. At that time the chain had been stowed to a height of about 4 feet below the top of the locker room, and there was a space left between the pile of chain and the walls. The respondent and his companion, who testified that he was about 3 feet from the respondent, were standing on the pile of chain, it being necessary to stoop over in order to work, and the respondent was shoving the chain over with his shoulder. As the chain suddenly ceased coming in, respondent's companion jumped to safety, but the respondent remained where he was, and by the reversal of the chain was thrown some distance from the pile, his head striking against some obstacle in the locker room. No serious injury was immediately apparent, although there was some bleeding from the nose, and the respondent, with the assistance of the boatswain, stowed the remainder of the chain. He continued with his various duties, although complaining of pains in his head, until after his arrival in San Pedro the following day. After some

persuasion he went to a hospital, and later a paralysis of certain members on the left side of his body developed, resulting from damage to the brain. Respondent also claimed that his left eye and ear were injured.

After the boatswain had taken the place of the seaman who had been assisting the respondent, the work of hoisting the anchor was resumed, and it developed that the flukes of the anchor had been broken off, presumably because the anchor had become engaged with or had fouled boulders on the ocean floor. The anchor weighed approximately 9,600 pounds. The chain had been payed out to about 540 feet, and the ship, when unloaded, weighed approximately 10,200 dead weight tons. The starboard anchor was lying at a depth of between 45 and 50 feet. The pilot, who had been taking the ships in, and mooring and unmooring them during the period of two years, said that he could put the ship within 40 feet of the same place each time, and that this was the first occasion on which an anchor had fouled.

The jury returned a verdict in favor of respondent for $20,000. No motion for a new trial was made, and the appeal is from the judgment of the court entered upon the verdict.

[1] Appellant bases its appeal upon the following grounds: That there was no evidence of negligence on the part of defendant, but that the injury sustained by respondent was due entirely to the fouling of the anchor, and the heavy swell of the sea; that the court erred in admitting statements alleged to have been made to the seaman Morris, who had assisted respondent in the chain locker, at unspecified times prior to the accident, as to some unspecified defect in the windlass; that the court erred in instructing the jury as to the doctrine of res ipsa loquitur, the appellant contending that the doctrine is not applicable to the case; and also that the court erred in instructing the jury as to the measure of damages and matters not in issue; and, lastly, upon the ground that the damages were excessive. This last point cannot be considered by this court for the well-established reason that such point cannot be raised for the first time on appeal, but must be presented to the lower court on motion for a new trial. Bate v. Jolin, 206 Cal. 504, 274 P. 971.

The question as to the sufficiency of the evidence to support the verdict goes hand in hand with the question of the applicability of the doctrine of res ipsa loquitur. The testimony of the seaman Forrester, who was attending the starboard compressor brake, was that while the crew were heaving in the anchor "it slipped down, stopped, and *surged out*"; that he immediately put on the brake "which is the thing naturally to do." There is considerable conflict of testimony as to the distance which the chain traveled out of the locker room and over the winch toward the sea. The seaman Morris, who was with respondent in the locker room, said that the chain stopped falling down to them; that he immediately jumped away, and as he jumped, the chain ran out 6 to 12 feet. Witnesses on behalf of appellant testified that it ran back only 18 to 20 inches. The court gave the following instruction: "There is a rule of law known as res ipsa loquitur which, translated literally, means 'the thing speaks for itself.' This rule defined declares that when the thing which causes injury is shown to be under the management and control of the defendant and the accident is such as in the ordinary course of things does not happen if those who have the management and control use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of ordinary care."

And at the request of the appellant, the court gave a further instruction as follows: "I instruct you that the doctrine of res ipsa loquitur, meaning 'the thing speaks for itself,' to which I have referred in a previous instruction, applies only to the case where the injury was proximately caused by a thing under the control of the defendant, and defendant offers no evidence showing a lack of negligence. This doctrine, however, does not shift the ultimate burden of proof of negligence from plaintiff to the defendant. The defendant need not satisfy you by a preponderance of evidence that it was not negligent, but defendant is merely required to make such a showing of want of negligence on its part as to leave the jury unsatisfied whether or not there was negligence on the part of the defendant. When such evidence is offered by the defendant, then if the plaintiff fails to prove to you by a preponderance of evidence that the accident was proximately caused by the negligence of the defendant, your verdict should be against the plaintiff and in favor of the defendant, even though the defendant has merely made such a showing as to want of negligence on its part as to leave the jury unsatisfied whether the defendant's negligence was the cause of the injury or not."

[2] During the course of the trial, respondent was permitted to amend his complaint, and by his amendment alleged "that while plaintiff was engaged in stowing away the anchor chain, in the performance of his duties as aforesaid, the officers, servants and employees of said defendant herein, and each of them, so carelessly and negligently operated a certain winch and its appliances, used to haul in said anchor and stow said anchor chain, and said winch and its appliances and said anchor chain were, by reason of the negligence of defendants, and each of them, so defective and insufficient that said anchor chain, while the same was being hauled in by defendant, its officers, agents and employees as aforesaid, and stowed by plaintiff and an-

other employee in the 'star board' chain locker on said steamship 'Lebec', suddenly reversed and violently proceeded in the opposite direction, and plaintiff was thereby violently thrown from his feet against some portion of said chain locker, and as a proximate result thereof plaintiff sustained great bodily injury," etc.

These allegations do not attempt to explain or set out the cause of the accident, or the specific manner in which it occurred, but are nothing more than general allegations of negligence. Vertson v. City of Los Angeles, 116 Cal. App. 114, 2 P.(2d) 411; Soto v. Spring Valley Water Co., 39 Cal. App. 187, 178 P. 305; Lippert v. Pacific Sugar Corporation, 33 Cal. App. 198, 164 P. 810; Burke v. Dillingham, 84 Cal. App. 736, 258 P. 627; Seney v. Pickwick Stages, 82 Cal. App. 226, 255 P. 279; Atkinson v. United Railroads of S. F., 71 Cal. App. 82, 234 P. 863.

In the case of Cochran v. Pittsburgh & L. E. R. Co. (D. C.) 31 F.(2d) 769, the court, in holding that the doctrine of res ipsa loquitur applies in a case governed by the Federal Employers' Liability Act (45 USCA §§ 51–59) and Safety Appliance Act (45 USCA § 1 et seq.), said [page 771 of 31 F.(2d)]: "* * * The res doctrine is a rule of evidence. It is a rule which permits or requires an inference of negligence to be drawn from the fact of an accident plus the circumstances which characterize the accident. It is an evidential inference, which will carry a case to the jury, but is not binding upon the jury; indeed, the weight of the inference is oftentimes for the jury, and a court might not be justified in setting aside a contrary verdict, if the jury did not deem the inference sufficient to warrant a verdict in plaintiff's favor. * * *"

In the case of Michener v. Hutton, 203 Cal. 604, 265 P. 238, 59 A. L. R. 480, the Supreme Court said (page 607 of 203 Cal., 265 P. 238, 239, 59 A. L. R. 480): "It is elementary that the maxim, 'Res ipsa loquitur,' translated means simply, 'The thing, or affair, speaks for itself.' The courts of this state have long since adopted the rule as expressed in 1 Shearman and Redfield on Negligence (6th Ed.) p. 132, viz.: 'Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of proper care.' O'Connor v. Mennie, 169 Cal. 217, 223, 146 P. 674; Valente v. Sierra Ry. Co., 151 Cal. 534, 538, 91 P. 481; McCurrie v. Southern P. Co., 122 Cal. 558, 561, 55 P. 324; Judson v. Giant Powder Co., 107 Cal. 549, 556, 48 Am. St. Rep. 146, 29 L. R. A. 718, 40 P. 1020; Dixon v. Pluns, 98 Cal. 384, 388, 35 Am. St. Rep. 180, 20 L. R. A. 698, 33 P. 268. Of course, to justify the application of this doctrine in any case the circumstances of the accident must be such as, unexplained, afford reasonable evidence of want of care in a respect for which the defendant is liable in the particular action. * * * One who seeks to recover damages for injuries alleged to have been incurred by reason of another's negligence must establish by a preponderance of the evidence that the latter's negligence has occasioned him loss. However, where the facts are such as to give rise to an inference of negligence from the inherent nature and character of the act causing the injury, or, in other words, to give application to the principle of res ipsa loquitur, the burden of proceeding is shifted to the defendant and if he would escape an adverse finding he must adduce evidence to meet the plaintiff's prima facie case."

In the case before the court, the evidence does not disclose any fault on the part of respondent. He and his companion were in an almost completely inclosed compartment, and could observe nothing but the chain coming through the steel pipe from the winch above, the steam escaping from the cylinder of the engine operating the windlass, and the noise of the revolving windlass. They were unable to see or observe the manner in which the windlass was operated, or the manner in which the other members of the crew were performing their respective duties. The hoisting of the anchor was being done under the immediate direction and supervision of the captain, first mate, and boatswain. The machinery was under the immediate direction and control of the officers of the ship. The mooring place was determined by the pilot, and was under the control of appellant. The respondent could not know whether the pawl or forelock was in proper position, or whether the compressor brake was being watched as it should be. He was compelled to rely upon the proper operation of the machinery by his superiors and the agents of his employer. The hoisting of an anchor was one of the simplest and most common incidents involved in the operation of a ship operating in the trade in which the Lebec was being used. The port captain of the appellant, who piloted the Lebec to its mooring, testified that he had been present when the moorings were first laid; that he had been piloting the ship to that anchorage, mooring it and unmooring it for a period of two years.

[3] Objection has been made by defendant that the accident was due to the intervention of agencies over which it had no control; in other words, that the direct cause of the reversal of the anchor chain was the fouling of the anchor in a rocky reef, coupled with the heavy swell of the sea. The contention is not sound. The anchorage, as heretofore pointed out, was well known to the agents of the appellant, and in the absence of docking facilities, it was the duty of the appellant to be thoroughly informed as to the anchorage.

The heavy swell, which was on at the time of weighing anchor, had been on for many hours before the accident, and was nothing of extraordinary character. No extraordinary results followed it in any way. It was an ordinary, natural event, such as might have been contemplated and anticipated in an open roadstead like the anchorage at Davenport. It was the duty of the officers of the ship to take precautions against the results which might accompany the heaving in of the anchor under such conditions. There appears no intimation on their part that the swell which had been running created hazardous conditions, or that it imperiled the vessel in any way. The action of the sea and the effect of the heavy swell were not beyond the foresight of the ship's officers, although such conditions might have called for the exercise of more diligent care on their part.

[4] Negligence is opposed to diligence or carefulness, and is never absolute or intrinsic, but is always relative to some circumstance of time, place or person. Smith v. Whittier, 95 Cal. 279, 30 P. 529. There must be taken into consideration in determining the question of negligence those facts which were known to the person against whom complaint is made, or which, by use of proper diligence, would have been known to a prudent man in his place.

[5, 6] A seaman in the performance of tasks connected with his employment, does not assume the risk of negligent acts of those in charge of his ship, or their failure to take reasonable precautions. States S. S. Co. v. Berglann (C. C. A.) 41 F.(2d) 456. The relationship of master and seaman is intimate and peculiar. Masiulis v. United States, etc., Corp'n (C. C. A.) 31 F.(2d) 284, 285. He is bound to obey, and there is no assumption of risk, even though the danger may have been obvious to him. United States v. Boykin (C. C. A.) 49 F. (2d) 762; Panama R. Co. v. Johnson (C. C. A.) 289 F. 964; Wychgel v. States S. S. Co., 135 Or. 475, 296 P. 863.

"One who seeks to recover damages for injuries alleged to have been incurred by reason of another's negligence must establish by a preponderance of the evidence that the latter's negligence has occasioned him loss." Michener v. Hutton, supra. In the last-cited case the court said: "It is apparent from these latter authorities that it is for the jury, or the court when sitting without a jury, to determine from all the evidence in the case whether the defendant has successfully met and rebutted the prima facie case made out by the plaintiff in an action wherein the mere proof of the happening of the accident and the circumstances surrounding it give rise to an inference of negligence. That the inference of negligence created by the application of the doctrine of res ipsa loquitur constitutes evidence which may not be disregarded by the jury, but is to be weighed and considered as against the evidence adduced by the defendant in rebuttal thereof, has been announced in numerous cases."

[7] Appellant has not offered any explanation of the reversal of the chain, or the failure of the windlass to hold the chain, or the failure of its employee to apply the brake in time to prevent the running out of the chain. The application of the brake, when made, so far as the evidence discloses, appears to have stopped the chain immediately. The jury had the duty of determining whether or not the explanation offered by the defendant was satisfactory, an in view of the conflict in the evidence, its conclusion cannot be disturbed. In the language of the court in Soto v. Spring Valley Water Co., supra (page 190 of 39 Cal. App., 178 P. 305, 306): "No reasonable inference seems possible, except that this apparatus, had it been properly operated, would have been safe, and that its improper operation was due to the negligence of somebody or to some defect in the machinery, undisclosed to and undiscoverable by the deceased, and known, if known to anybody, to the defendant's employees."

[8] Where the explanation given by the person charged with negligence leaves it doubtful as to whether or not the ultimate cause of injury is the negligence of the party charged, it is proper to instruct the jury as to res ipsa loquitur. Atkinson v. United Railroads of S. F., supra; Meyer v. Tobin (Cal. Sup.) 4 P. (2d) 542.

[9] The effect of the evidence offered by appellant as to the condition of the windlass, and the manner of the operation of its various parts in the hoisting of the anchor, was simply to create a conflict of evidence of which the jury was the final arbiter, and its conclusions cannot be disturbed.

Our conclusion is that the maxim res ipsa loquitur is applicable to the facts of this case, and that the trial court properly gave to the jury the two instructions of which complaint is made.

[10] There was received in evidence the deposition of the seaman Morris, who was with respondent in the chain locker at the time of the accident. Objection was made to testimony contained in such deposition as to conversations between a former first mate of the vessel and Morris, and between Morris and the man who was serving as chief mate at the time of the accident. Such testimony was as follows:

"* * * We were talking about one thing and another. I do not recall the other conversation. * * *

"Q. Prior to the happening of this accident to Lejeune, had you had any conversation with anyone on the ship about this winch? A. Yes, sir.

"Q. With whom? A. With the first mate, sir, a gentleman by the name of Tosh.

"Q. What was that conversation? * * * A. I mentioned something to Mr. Tosh about the way the winch worked and he said words to the effect, 'Yes, it was not in perfect order.'

"Q. Was that the only conversation you had with him? A. With that man, yes sir. And then with the mate relieving him, Mr. Friar, on there, a short while prior to the accident, I mentioned the same thing to him. * * *

"Q. What did the other mate say if anything when you made that remark to him? * * * A. He said, yes, or words to that effect, that he knew it was not working right."

While the statements of Morris might, under different conditions, have been admissible for the purpose of showing notice to the agents or officers of appellant, for which purpose it was ostensibly offered (Bundy v. Sierra Lumber Co., 149 Cal. 772, 87 P. 622; Diller v. Northern Cal. Power Co., 162 Cal. 531, 123 P. 359, Ann. Cas. 1913D, 908), the objection should have been sustained for the reason that the conversation as related by the witness was vague and indefinite, and no specification was made as to any particular defect in the machinery; furthermore, the respondent made no effort to show any defect in the windlass. We have read the entire record, however, and are of the opinion that the error is one of those contemplated by section 4½ of article 6 of the Constitution, and that it did not result in a miscarriage of justice. The testimony was not necessary for the establishment of his case on the part of respondent, as he had a right to stand on the proof of the happening of the accident and the circumstances surrounding it, from which the presumption of negligence arose.

[11] Appellant objected to the following instruction given at the request of the respondent: "If you believe from the evidence that at the time of the accident in question, plaintiff was suffering from any then existing physical impairment, then in assessing damages, in case your verdict is for the plaintiff, you are entitled to consider the effect of the injuries sustained in the accident, if any, in aggravation, if any, of the pre-existing condition, and award plaintiff damages in an amount compensating him for any additional physical or mental disability, if any, occasioned plaintiff by the accident in question."

The instruction would have been proper under other circumstances (Campbell v. Los Angeles Traction Co., 137 Cal. 565, 70 P. 624; White v. Red Mountain Fruit Co., 186 Cal. 335, 199 P. 318), but pre-existing injuries were not involved in the instant case. It is quite obvious from a reading of the record that the sole purpose of the appellant in asking the respondent about claims for alleged injuries, while working on other vessels, was to show that respondent was a person who was in the habit of making such claims, and also a malingerer. The giving of such an instruction may be ascribed to misapprehension of appellant's object in introducing the question, or to an excess of zeal on the part of respondent's counsel. The jury was properly instructed as to the measure of damages, and we are of the opinion that the error falls within the provisions of the Constitution hereinbefore cited.

We have examined all of the other instructions complained of by appellant and find no error which justifies a reversal of the judgment. The instructions fairly and fully submitted the issues involved to the jury, particularly upon the matter of burden of proof.

For the foregoing reasons stated, it is ordered that the judgment be affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

125 Cal.App. 573

MALLOWAY v. HUGHES et al.

Civ. 8323.

District Court of Appeal, First District, Division 1, California.

Aug. 29, 1932.

Rehearing Denied Sept. 28, 1932. Hearing Denied by Supreme Court Oct. 27, 1932.

1. New trial ⇐6.

Granting or refusing to grant motion for new trial is largely within discretion of trial court.

2. New trial ⇐72, 157.

In passing upon motion for new trial trial court must weigh evidence for both parties and, if satisfied that finding of jury is contrary to weight of evidence, may grant new trial.

3. New trial ⇐72.

Even where evidence is not conflicting and proof seems favorable to one litigant, question of probative force of testimony is within determination of trial court in proceeding on motion for new trial.

4. Appeal and error ⇐977(3).

Reviewing court cannot interfere with determination of trial court granting new trial unless manifest abuse of discretion appears, or evidence is insufficient as matter of law to support verdict for moving party.

5. New trial ⇐70.

Evidence respecting negligence of driver of automobile which struck boy attempting to cross street warranted order granting new trial after verdict for defendants (St. 1923, p. 553, § 113, as amended by St. 1927, p. 1436, § 30).

6. Negligence ⇐95(1).

Where action is brought by infant in his own right for injuries sustained by him, negligence of parents cannot be imputed to child.

Appeal from Superior Court, Monterey County; Maurice T. Dooling, Judge.

Action by Allan Malloway, a minor, by and through his guardian ad litem, J. S. Malloway, against James Hughes and others. Verdict for defendants. From an order granting a new trial, defendants appeal.

Affirmed.

James Sykes, of San Francisco (Thomas F. McCue, of San Francisco, of counsel), for appellants.

Ford & Johnson, of San Francisco, for respondent.

KNIGHT, J.

Plaintiff, Allan Malloway, aged four years and ten months, while attempting to cross a street in Monterey, about 10 o'clock on the morning of the 4th of July, 1930, was struck and injured by an automobile owned by the defendants James Hughes and Mabel R. Hughes, and driven by their daughter, the defendant Betty Hughes, aged sixteen years, and through his guardian ad litem brought this action to recover damages for the injuries sustained. The action was tried before a jury, which rendered a verdict in favor of the defendants, and judgment was entered accordingly. Subsequently, on motion of plaintiff, the trial court granted a new trial on the grounds of insufficiency of the evidence to justify the verdict, and from such order the defendants appeal.

The accident occurred at the intersection of High and Harriet streets, which are forty or forty-five feet wide. The former runs in a northerly and southerly direction, and the middle, traveled portion thereof is paved with rock and asphalt. Between the sidewalk and the curb there is a strip planted to grass. Harriet street is unpaved, and is without curbs or sidewalks in the vicinity of the intersection with High. The grade of neither street is level for any considerable distance from the intersection. The injured boy lived on the southeast corner of the intersection, and the house directly opposite, on the southwest corner, was occupied by a Mrs. Wishart. The automobile which Betty Hughes was driving, a Packard, was proceeding northerly along High street, and was approaching the intersection when the boy attempted to cross the street. He started from the easterly curb of High street in front of his home to cross to the westerly side of High street to the curb in front of the Wishart house, where some other children were playing; and the impact occurred on High street at or near the produced southerly intersection curb line of Harriet street.

Besides Betty Hughes, there were two other witnesses to the accident, Mrs. Perrin and a boy named Turner, twelve years old. Mrs. Perrin was riding in an automobile driven by her husband, traveling southerly on High street just northerly of its intersection with Harriet; and the Turner boy was standing on the sidewalk on Harriet street just easterly of the intersection. Betty Hughes testified that she first saw the Malloway boy about a half block ahead (approximately sixty feet), at which time he was walking slowly from his house toward the easterly curb line of High street, and was about twenty feet in from the curb; that about the same time she observed some children on the opposite side of the street. At that time, so she testified, she was traveling between eighteen and twenty miles an hour; that she sounded the automobile horn, and took her foot off the gas accelerator; that when she sounded the horn the Malloway boy stood still, and she continued on; that when she reached a point about opposite the boy, at which time she was traveling about twelve miles an hour, the boy darted from the curb toward the automobile; that she applied the brakes immediately and swerved the car sharply to the left, but the boy continued to run slightly ahead of and parallel with the right front end of her automobile; that she felt "a very slight thud" and at the same time looked up High street and saw an automobile (which proved to be the Perrin car) approaching the intersection in the opposite direction on High street. Continuing, she testified: "I knew I was either endangering myself or the car coming, and I think I applied the gas possibly, I am not certain, to get out of their way and kept turning into Harriet street." Stating further in this respect, "My natural instinct was to get out of the way of the oncoming car, because there would be another smash up." At any rate, the evidence shows that her automobile continued on diagonally over the intersection and across the pathway of the Perrin car, and stopped against the curb on the northwest corner of the intersection. In making the turn westerly down Harriet street, the rear end of the automobile swerved or skidded to the right against the curb, splintering some of the spokes in the rear right wheel. The evidence further shows that the boy was struck by the right end of the front bumper and was thrown several feet toward the middle of Harriet street, where it intersects the produced easterly curb line of High street, and that the main injuries sustained were a fractured clavicle, a fractured femur, both on the left side, and a linear skull fracture.

The testimony of Mrs. Perrin was sub-

stantially the same as that given by Betty Hughes, except that she states that the boy started to run across the street from the curb at the very corner of the intersection, and not several feet south of the corner; and she stated also that she saw some of the children run across the street just before the Malloway boy attempted to cross. In this regard she stated that she first saw the Hughes car when it was about a half block southerly of the intersection, at which time it was traveling between fifteen and twenty miles an hour, and at the same time she observed the children playing in front of the Malloway house on the High street side and that being conscious of the approaching automobile she watched the children because her own children were approximately the same age. Continuing, she stated that after some of the children had "darted" across the street the Malloway boy, who had a toy gun in his hand, turned very quickly and went back away from the curb toward his house. "The next thing that happened," she said, as her testimony is given in narrative form in the bill of exceptions, "was that he apparently changed his mind and dashed out to the curb, and at that time Betty's car was there right in front of the house when Allan Malloway darted out. The Hughes car I would say at that time was about half a car length toward the corner from the center of the house. Then just as quick as a flash the child turned around from the front of the house and went out and stepped off the curb, and Miss Hughes was driving close to the curb and he stepped right in front of the car, and Miss Hughes was very quick with the wheel, and she pulled the car around to the left and the child apparently followed the front of the car around. She was driving along this way and the child continued to follow the front of the car this way, and then he was hit—he was hit on this part of the street, and Miss Hughes turned to the left constantly and the child constantly being to the right of the car—to the right of the front bumper. I saw the child hit. I could not say that I saw the child actually run into the car but that was what happened. The child ran into the Hughes car. He ran into the right of the front bumper at that time. I would say that Betty Hughes' car was going about four or five miles an hour." And again on cross-examination she stated: "The first impression I got was he was going across with the children. Instead of that he ran back over toward the house, as quick as a flash he ran from the house to the street. He was darting all the time. He was in movement. Children run fast. He was traveling as fast as the automobile. I would say he was. The automobile was going slowly. Yes, he ran out in the street ahead of the automobile, right in front of it. In the direction the automobile was going. She turned her car. I stated he was running as fast as the automobile. He was naturally ahead of the automobile. He was, he was right—I would say that he stepped in front of the automobile and she pulled the car away. He was running when he came off the curb and he was ahead of the automobile. He hesitated for just an instant after he got off the curbing. * * * He was even with the front bumper, and I think the children were over here and I think he thought he could go around the front of the car. He was trying to beat it and get around it and get to the other side of the street. He ran out past the middle of Harriet Street, anyway, to get in front of this automobile. The automobile was turning to the left constantly. It was not going faster than the boy. It was creeping * * * and kept going slower and slower."

The following is the substance of the testimony given by the Turner boy: "I saw Allan Malloway before he was hit by the automobile. He was then right behind the chalkrock wall. Then he went across the street to Wishart's. He started from the corner of the curb near the corner where the two streets join. At that time I was standing in the street just going by Harriet Street. Allan was walking slow in a straight line across the street. He didn't get quite to the middle of the street. * * * I was watching him all the time, that he was going over across the street. I did not hear an automobile horn at the time. I heard the brakes before he was hit. I then saw the automobile. I have ridden in an automobile and watched the speedometer. I was in an automobile this morning when it was driven fifteen miles, twenty miles, thirty and forty miles an hour. I think the Packard automobile at the time it struck Allan Malloway was going about thirty-five miles. The car struck him on the side. That is on his side. The side of the bumper hit him. He was rolled over on the pavement." Afterwards, as a witness for defendants, he admitted having said immediately after the collision that "Betty was not going fast * * * not going very fast," meaning, so he said, that about fifty miles an hour would be fast.

A traffic officer arrived at the scene of the accident about forty minutes after it happened, and he observed the position of the Hughes car, with the right rear wheel against the curb and one or two or three pieces of split or broken spokes. He also saw skid marks leading up to the Hughes car. His testimony in this regard as it is set forth in narrative form in the record was as follows: "The first skid marks—this is the line of the curb extending across High Street, and there were two distinct skid marks starting about twenty-two feet from the line of this Harriet Street curb, back up and about twelve feet up from the High Street curb—two distinct skid marks. These skid marks extended down north on High Street, and at a point here,

about even with the Harriet Street curb line, the left hand skid mark left just a few jump marks and just at the point where the car was sitting, was a small heavy skid mark for a short distance. The right hand skid mark was heavy all the way, over seventy-two feet. This skid mark was heavy clear over to this point. That was a distance of about seventy-two feet. It was measured by me. This skid mark here was twenty-two feet at this point and then the others were sort of jump marks—they didn't keep solid all the way through, until it got to the curb. Then there was twelve or fifteen feet of heavy skid marks, from the left hand wheel." He further testified that a Packard automobile (similar to the Hughes car) having two-wheel brakes, in good condition, running at fifteen miles an hour, could be stopped "in about thirty to thirty-five feet"; and that running at twenty miles an hour it would require forty to forty-five feet to bring it to a stop.

Mrs. Malloway and Mrs. Wishart were in their respective homes at the time the accident happened and did not see it, but they saw the boy immediately before it happened. They were looking through the windows of their houses and saw the boy as he stepped from the curb and was about to cross the street. They stated that at that time they heard no automobile approaching. They turned and walked away from the windows, and just a few seconds afterwards they heard the screech of brakes and Mrs. Wishart heard the automobile strike the curb. She went back to the window and the boy was then lying in the street. Mrs. Malloway was notified of the accident immediately after it happened. Testimony was introduced on the part of defendants to show that on an unpaved road, or where there is dust or gravel on a paved road, such as here, it requires more distance to stop an automobile after the brakes are applied than on a clean paved road. The above is substantially all of the evidence bearing upon the question of negligence.

[1-4] It is apparent from the foregoing that if the appeal herein were one taken from the judgment entered on the verdict in favor of defendants, it would be held that the evidence narrated would be legally sufficient to sustain such judgment. But that is not the situation. We are here dealing with an appeal from the order of the trial judge granting a new trial, and therefore on such an appeal in reviewing the evidence we are governed by an entirely different rule. As said in Moss v. Stubbs, 111 Cal. App. 359, 295 P. 572, 296 P. 86, the well-settled rule is that the matter of granting or refusal to grant a motion for a new trial is largely within the discretion of the trial court (Work v. Whittington, 61 Cal. App. 302, 214 P. 474); that in passing upon such motion the trial court is not bound by the rule of conflicting evidence as is the appellate tribunal (Huckaby v. Northam, 68 Cal. App. 83, 228 P. 717; Smith v. Royer, 181 Cal. 165, 183 P. 660); but must weigh and consider the evidence for both parties and determine for itself the just conclusion to be drawn from it (Green v. Soule, 145 Cal. 96, 78 P. 337; Rudin v. Luman, 53 Cal. App. 212, 199 P. 874); and if it is satisfied that the finding of the jury is contrary to the weight of the evidence it may grant a new trial. Gordon v. Roberts, 162 Cal. 506, 123 P. 288. Even where the evidence is not conflicting and all the proof seems to be favorable to one or the other of the parties litigant, the question of the probative force or the evidentiary value of the testimony is nevertheless within the determination of the trial court in a proceeding on motion for a new trial. Otten v. Spreckels, 24 Cal. App. 251, 141 P. 224; Roberts v. Southern Pac. Co., 54 Cal. App. 315, 201 P. 958. Therefore under the law as thus declared it is beyond the power of the reviewing court to interfere with the determination of the trial court unless a manifest abuse of discretion appears (Campanella v. Campanella, 204 Cal. 515, 269 P. 433; Buck v. Borchers, 203 Cal. 210, 263 P. 226), or there is no substantial conflict in the testimony on material issues and the evidence as a whole is insufficient as a matter of law to support a verdict in favor of the moving party. Springer v. Pacific Fruit Exchange, 92 Cal. App. 732, 268 P. 951; Wendling, etc., Co. v. Glenwood, etc., Co., 153 Cal. 411, 95 P. 1029; Empire Investment Co. v. Mort, 169 Cal. 732, 147 P. 960; Harvey v. Machtig, 73 Cal. App. 667, 239 P. 78.

The California Vehicle Act (section 113, as amended by St. 1927, p. 1436, § 30), as it stood at the time this accident happened, besides fixing a speed limitation of twenty miles an hour for driving automobiles in a residential district, provided that such vehicles should be driven at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, and at such speed as would not endanger the life, limb or property of any person; and in holding that the evidence in this case did not justify the implied finding of the jury that the Hughes automobile was not negligently operated, the trial court must necessarily have refused to accept the testimony given by Betty Hughes and Mrs. Perrin as to the manner in which the accident happened, and based its conclusion that the automobile was negligently operated upon the admission of Betty Hughes that she saw the children some sixty feet away playing near the street, and upon the physical conditions found to exist after the accident, the screeching of the brakes and the testimony given by the Turner boy to the effect that the Malloway boy "was walking slow in a straight line across the street" when he was struck and that at that time the Hughes car was traveling about thirty-five miles an hour.

And in view of the broad powers vested in the trial judge on motion for new trial in determining the weight that shall be given to the evidence, we are not prepared to hold as a matter of law that the inference drawn by the trial court is wholly unsupported by the facts above mentioned.

[5] Appellants point out that according to the testimony given by Betty Hughes, as soon as she saw the children she sounded her horn and reduced her speed to less than eighteen miles an hour by taking her foot off the gas accelerator; and that she explained the marks in the street by saying that after the boy darted from the sidewalk into the automobile and she felt the slight thud she speeded up to avoid colliding with the oncoming Perrin car. Furthermore, as appellants point out, there are certain circumstances tending to show weakness in the testimony given by the Turner boy as to the speed of the Hughes car. In this regard it would appear from the map which was used at the trial that he was unable to see the movement of the Hughes car until almost immediately before the impact at the corner because according to his testimony he had just emerged from "behind the Malloway house from the rear" and was going toward Harriet street at the time the accident occurred, and it would seem, therefore, that not only did the Malloway house obstruct part of his view of High street, south of Harriet, but, as he testified, there was also a chalkrock wall "a little higher than" he was in front of the Malloway house on Harriet street, extending toward but not up to High street. Moreover, according to the record, his estimate of the speed the Hughes car was traveling was based upon the fact that on the morning of the trial, which took place some seven months after the accident, he was driven in an automobile at a speed of twenty, thirty, and forty miles an hour and he watched the speedometer. Whether or not he was driven along High street over the same course taken by Betty Hughes on the day of the accident, does not appear. However, as already shown, under the decisions above cited, on motion for new trial the matter of the credibility of the witnesses, the weight and the probative force that shall be given to their testimony, and the question of the evidentiary value of physical facts, are all within the determination of the trial court; and therefore in the present case we are not at liberty to interfere therewith on appeal.

[6] Appellants make the further point that contributory negligence was established as a matter of law. The point is based mainly upon the admitted fact that Mrs. Malloway saw the child playing in High street shortly before the accident and made no effort to get him off the street; and appellants argue therefrom that it was the height of contributory negligence on the part of the mother to permit her infant to play in a public street unattended on the morning of the 4th of July, when a parade was about to take place in the city and when she must have known of the increased dangers from excitement and traffic. It appears to be definitely settled in this state now, however, that where, as here, the action is brought by the infant in his own right for injuries sustained by him, and is not one filed by the parents to recover damages suffered by them as a result of their child's injuries, the negligence of the parents cannot be imputed to the child. Zarzana v. Neve Drug Co., 180 Cal. 32, 179 P. 203, 15 A. L. R. 401; Caraveo v. Pickwick Stages System, 113 Cal. App. 443, 298 P. 516. Therefore we find no merit in appellants' point.

The order appealed from is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

125 Cal.App. 461

BOURNE v. ROOT et al.

ROOT et al. v. BOURNE et al.

Civ. 729.

District Court of Appeal, Fourth District, California.

Aug. 23, 1932.

Rehearing Denied Sept. 20, 1932.

1. Corporations ⇐432(11).

Evidence that corporation's treasurer employed defendant as salesman *held* properly stricken as against corporation, notwithstanding corporation's acceptance of benefits of contract, where it was not shown that treasurer had authority, or that corporation in accepting sales had knowledge of agreement to pay commission.

2. Corporations ⇐426(12).

Corporation's acceptance of benefits of unauthorized act does not constitute ratification by corporation, unless corporation had knowledge of facts.

3. Principal and agent ⇐178(1).

Agent's knowledge of matters outside scope of agent's authority is not chargeable to principal.

4. Corporations ⇐428(3).

Corporation is not chargeable with knowledge of officer respecting matters outside officer's authority.

5. Evidence ⇐222(2).

Evidence of unauthorized agreement of treasurer of corporation to employ salesman *held* admissible against officer as admission.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

6. Appeal and error ⊂⇒1047(3).

Where evidence contradicting that on which judgment was based was improperly stricken, judgment should be reversed as not having been rendered on conflicting testimony.

Appeal from Superior Court, Tulare County; J. S. Clack, Judge.

Action by Murray Bourne against Alfred C. Root and another, in which defendants filed a cross-complaint joining the Yosemite Portland Cement Company. Judgment was entered for plaintiff on the complaint, and recovery was denied on the cross-complaint, and defendants appeal.

Affirmed in part and reversed in part.

Superseding opinion in 12 P.(2d) 739.

See, also, 4 P.(2d) 264.

Manley C. Davidson, of Los Angeles, and Bradley & Bradley, of Visalia, for appellants.

F. H. Pearson, of Fresno, for respondents.

SCOVEL, Justice pro tem.

The complaint in this action sets up a promissory note executed by defendants to plaintiff alleging nonpayment of the same and praying for judgment thereon. Defendants' answer admitted liability on the note. Defendants filed a cross-complaint upon a quantum meruit for services rendered to the plaintiff and the Yosemite Portland Cement Company. The Yosemite Portland Cement Company was made a party to the action upon the filing of the cross-complaint and both cross-defendants filed an answer thereto in the nature of a general denial. At the trial of the matter, it was stipulated that judgment might be entered in favor of plaintiff in an agreed amount upon the complaint, the trial proceeding upon the cross-complaint.

It appears from the transcript that the plaintiff was a director and the treasurer of the Yosemite Portland Cement Company, a corporation. A conversation in regard to the sale of cement by the corporation was had between plaintiff and defendant, Alfred C. Root. According to plaintiff, the conversation merely related to business being done by the company and its prospects for future sales. He denied ever having made an agreement with defendant employing him to make sales of cement.

This defendant, Alfred C. Root, was called as a witness, and testified that in the conversation plaintiff employed him for the purpose of selling cement to the Valley Paving Company, and agreed the company would pay him ten cents per sack for all sacks of cement he might sell. This testimony was objected to on the ground that no proper foundation had been laid, in that it had not been shown that plaintiff was authorized to make such an employment contract on behalf of the corporation. A ruling was reserved, but at the close of the trial, upon motion of plaintiff, the evidence was stricken from the record.

J. C. Caldwell, president of the Valley Paving Company, testified that his company purchased the sacks of cement after solicitation by defendant, Alfred C. Root, and that, in a conversation with plaintiff Bourne regarding a discount to be allowed, Bourne stated the discount would be paid through defendant Alfred C. Root. A similar objection and motion to strike was made to this testimony, and at the close of the trial it also was stricken from the record. Judgment was entered in favor of plaintiff Bourne on the complaint in accordance with the stipulation and in favor of both cross-defendants on the cross-complaint. From the whole of this judgment cross-complainants appeal. No contention is made that that portion of the judgment in favor of plaintiff on the complaint is erroneous, from which it follows that that portion of the judgment must be affirmed.

[1, 2] Appellants' sole contention on their appeal from that portion of the judgment in favor of cross-defendants on the cross-complaint is that the court erred in striking from the record the testimony above set forth. As to cross-defendant Yosemite Portland Cement Company, they concede that no direct testimony showing authority in respondent Bourne sufficient to authorize the making of the agreement for employment was introduced, and that he had no such authority merely by reason of his position as director and treasurer of the company. See 6A Cal. Jur. 1164. Appellants contend, however, that the corporation having accepted the fruits of the contract through the sale of the cement thereby ratified the action of its agent and is bound thereby. Respondents concede the general rule that, where a principal accepts the benefits of an unauthorized contract made by its agent, it is bound by the contract but contend the rule only applies where it is shown that the principal had full knowledge of the acts which it is claimed were ratified; that, since it was not shown that the respondent corporation had any knowledge of the agreement to pay a commission, it cannot be held for such commission merely because it thereafter accepted the sales made thereunder, and that the evidence as to the terms of the contract providing for a commission was therefore properly stricken from the record.

We are of the opinion that the evidence was properly stricken from the record as to cross-defendant Yosemite Portland Cement Company. Civ. Code, § 1589, provides that the acceptance of the benefits of a transac-

tion is equivalent to a consent to all the obligations arising therefrom so far as the facts are known or ought to be known to the person accepting.

In 14a Corpus Juris, 387–390, the rule that acceptance of the benefits of an unauthorized act constitutes a ratification is limited to such acceptance by the corporation with knowledge of the facts. The same principle is supported in 21 R. C. L. 928; 7 A. L. R. 1446. See, also, Huffman v. Knapp, 30 Cal. App. 759, 159 P. 456; Extension Gold Mining & Milling Company v. Skinner, 28 Colo. 237, 64 P. 198.

The record fails to show any knowledge whatsoever upon the part of the corporation as to the purported agreement to pay cross-complainant a commission other than the knowledge of cross-defendant Bourne.

[3] Knowledge of an agent, however, is not knowledge of the principal as to matters outside the scope of the agent's authority. 1 Cal. Jur. 849.

[4] A corporation not being chargeable with the knowledge of an officer or agent who has no authority to bind the corporation in the matter is not chargeable with the knowledge of the wrongdoing officer or agent. Wickersham Banking Company v. Nicholas, 2 Cal. App. 18, 82 P. 1124; 14a Cor. Jur. 375.

It follows that the evidence was properly stricken as to cross-defendant Yosemite Portland Cement Company.

[5] It seems elementary, however, that, in so far as the liability of respondent Bourne is concerned, the evidence stricken was admissible, the conversation being in the nature of admissions on his part.

[6] He contends, however, that in any event the judgment in his favor must stand, since in his testimony he denied having made any employment agreement with defendant Alfred C. Root, and that therefore the judgment was based on conflicting testimony and should not be disturbed on appeal. All of such conflicting testimony having been stricken from the record, there was at the time of judgment no conflict. We cannot on appeal assume that the court would have found in favor of plaintiff had the contradictory evidence not been stricken.

The judgment on the complaint is affirmed. That portion of the judgment in favor of the cross-defendant Yosemite Portland Cement Company upon the cross-complaint is affirmed. That portion of the judgment in favor of the cross-defendant Murray Bourne upon the cross-complaint is reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

125 Cal.App. 480

PEOPLE v. PATELLO et al.

Cr. 2228.

District Court of Appeal, Second District, Division 1, California.

Aug. 24, 1932.

1. Criminal law ⊜552(3).

Where circumstantial evidence is reasonably capable of producing to moral certainty conclusion of guilt, that by assuming some fanciful position, or absurd hypothesis, accused's innocence might be indicated, does not require acquittal.

2. Criminal law ⊜1159(2).

That it may appear to appellate tribunal that verdict of acquittal would have been justified does not require reversal.

3. Criminal law ⊜745.

Right to draw proper inferences from evidence is for jury.

4. Criminal law ⊜1159(1).

As long as jury's conclusion does no violence to reason, appellate court cannot substitute its finding therefor.

5. Criminal law ⊜1159(2).

Interference by appellate court with verdict of guilt is warranted only when evidence unmistakably leads to inference of innocence, or so preponderates in favor of accused's innocence that it clearly appears that verdict was result of passion and prejudice.

6. Arson ⊜37(1).

Conviction of arson and of burning insured property *held* supported.

7. Criminal law ⊜1023(9).

Where, following rendition of verdict, court, on defendant's application, suspended proceedings and granted probation, defendant *held* without right of appeal, there being no "final judgment of conviction" (Pen. Code, § 1237).

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words and Phrases.]

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Leoluca Patello and Leonarda Florio were convicted of the crime of arson and the crime of burning insured property, and they appeal.

Judgment affirmed as to defendant Patello, and appeal of defendant Florio dismissed.

Haines & Bisher, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., John D. Richer, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Hugh McIsaac, Deputy Dist. Atty., both of Los Angeles, for the People.

HOUSER, J.

Defendants appeal from a judgment of conviction of the crime of arson and the crime of burning insured property.

The only point raised by them on their appeal is that the evidence adduced on the trial of the action was insufficient to sustain the judgment.

A consideration of the record herein discloses the following incriminatory circumstances, to wit: The defendants sustain the relation one toward the other of brother and sister. Together they lived as the sole occupants of a six-room, one-story building, of which, to the extent that it was being purchased on a contract of sale by the defendant Patello, and that at the time of the partial burning of the same he owed about $1,500 on the purchase price thereof, of which sum he was delinquent in approximately the amount of $300, defendant Patello was the owner. The "sound" value of the building at the time it was burned was $1,858, and its "replacement" value was $2,445; but, as appears from the evidence, the defendant carried an insurance policy on the building in the sum of $3,000. Defendant Florio was the owner of the furniture stored in the said building, on which, although its "sound" value was but $594.65, she carried an insurance policy in the sum of $1,500. At the time of the fire she was in poor health. She had no income, and her cousin and her brother had been advancing money to her for the purpose of paying doctor's bills which she had contracted. The evidence shows that on the day on which the fire occurred defendant Patello left the house in question at about 3:30 o'clock in the afternoon; and that the defendant Florio left the premises at about 7 o'clock p. m. of the same day. Defendant Patello was engaged in the fruit business, and was occupied in the conduct thereof from 3:30 o'clock in the afternoon until 11:30 o'clock on that night, at about which time he was arrested. On leaving her home, defendant Florio went to the house of a neighbor, which was directly across the street from the place of business of her brother Patello, at which former place she remained during the whole of the night on which the fire occurred. It appears that at her brother's place of business she had left word for him to call for her at the place at which she was visiting as soon as he completed his business transactions for the day or the night; but that, on his failure to call for her, defendant Florio spent the night with the neighbor as aforesaid. When arrested, defendant Patello stated in substance that "he absolutely did not know where she (his sister) could be reached."

The fire in the home of the defendants was discovered at approximately five minutes after 9 o'clock p. m. On arriving at the house, the firemen found the windows closed, the shades drawn, and the front and the rear doors of the house locked. On breaking into the house, fire was discovered in each of three different rooms thereof. The door leading from the kitchen to the living room was locked on the living room side, and each of such rooms was on fire. Hose was played on the fire, and it "flashed up." An odor of kerosene was present. In the kitchen a pasteboard carton about two-thirds full of a white substance with an odor similar to that of kerosene or coal oil was found, and connected with said carton was a streamer of cotton-batting which led "up over a chair and down on the floor." The appearance indicated that a quantity of oil, apparently the draining from a crank case of an automobile, had been poured on the floor. The bathroom floor was covered with oil with the odor of a petroleum product similar to crank-case drippings. Defendant Florio denied that there ever had been kept in the house any gasoline, coal oil, or cleaning fluids of the type that was found therein. In substance, defendant Patello stated that he did not know whether he had any insurance on the property; "* * * that he believed the insurance policy had lapsed and * * * didn't remember whether he had a renewal or not." As to the furniture in the house, defendant Florio stated that "she didn't recall whether she had it insured, or not."

With reference to the effect of circumstantial evidence of the guilt of a person accused of the commission of a criminal offense, the broad rule has been generally announced that to justify a verdict of guilty such evidence "must be not only consistent with the hypothesis of guilt, but inconsistent with any other rational hypothesis. The deduction to be drawn from these circumstances is, ordinarily, one for the jury, but where * * * every circumstance relied on as incriminating is equally compatible with innocence, there is a failure of proof necessary to sustain a conviction, and the question presented is one of law for the court. * * *" People v. Staples, 149 Cal. 405, 425, 86 P. 886, 894.

In substance, the appellants contend that none of the evidence adduced against them, or either of them, nor all of the several items of such evidence combined, neither is nor was inconsistent nor incompatible with their innocence.

[1-5] Taken literally and in its strict construction, it may not be denied that, if applied to the facts of the instant case, either piece by piece, or as an entirety, the principle of law announced in the Staples Case, supra, would indicate that purely from a legal standpoint the evidence was "compatible with innocence" of the accused. But it is common knowledge that in practically every criminal prosecution that is dependent for its success upon circumstantial evidence each

fact adduced is not only susceptible of a "rational hypothesis" of innocence of the accused, but also is possibly as compatible with his innocence as it is with his guilt. As a homely illustration, let it be supposed that a negro is being prosecuted for stealing watermelons from a patch which lies across the road from a cemetery. The evidence shows that he was seen on the road just before he reached the watermelon patch, at which time he had no watermelons in his possession, but that, after he had passed the watermelon patch, he was seen running very rapidly, with a stolen watermelon under each arm. A "rational hypothesis * * * equally compatible with the innocence" of the negro might be that he found the watermelons in the road, and that he was running because he was afraid of ghosts. But in reliance upon the principle of law announced in the Staples Case, as applied to such facts, would the trial court be justified or authorized to declare that there was "a failure of proof necessary to sustain a conviction"? It is manifest that, if the answer must be in the affirmative, then must fail a very large majority of the prosecutions for the perpetration of crimes which are secretly committed, wherein the proof not only as to the corpus delicti, but as well of the criminal participation therein of the accused, must be presented, not by eyewitnesses, or by direct evidence of their commission, but perforce by facts which in their nature are wholly circumstantial. But as a legal proposition it is unthinkable that the language employed by the court in the Staples Case, to which attention has been directed, was ever intended by its author, or by the court as a whole, to have placed upon it such a construction as hereinbefore has been indicated. Rather was it intended and expected that, where the evidence as presented by relevant circumstances was reasonably inferentially capable of producing to a moral certainty a conclusion of guilt of the accused, the mere fact that, by assuming some fanciful position, or by adopting as true and correct some fantastic or absurd hypothesis favorable to the accused, his innocence might be indicated, presented no hard and fast or legally compelling situation which demanded an acquittal. Nor on appeal from a judgment of conviction is it to be understood from the mere fact that, even though it may appear to the appellate tribunal that, from its view of the cold record, all the incriminating circumstances are compatible with the innocence of the accused, and as a consequence thereof that a verdict of acquittal would have been amply justified, the evidence is sufficient in legal contemplation to require or to exact from the court an order of reversal of the judgment. The right to draw proper inferences from the evidence submitted is the function of the jury; and, as long as its conclusion does no violence to reason, an appellate court is not permitted to substitute its finding of the ultimate fact for that reached by the constitutional as well as the statutory arbiter thereof. On the ground here urged by the appellants an interference by the appellate court with a verdict of guilt of the accused is warranted only when the evidence, rightly considered, unmistakably leads to an inference of innocence; or, on the other hand, that the unquestioned and unquestionable evidence adduced on behalf of the defendant so largely preponderates in favor of the innocence of the accused, over that presented by the prosecution, that it clearly appears that the verdict was not the result of that deliberate and judicial action on the part of the jury which the administration of justice demands, but rather was induced by that sinister influence legally denominated as passion and prejudice.

In the case of People v. Muhly, 15 Cal. App. 416, 419, 114 P. 1017, 1018, where a situation similar to that here under consideration was before the appellate court, and in which the language employed by the court in the case of People v. Staples, 149 Cal. 405, 425, 86 P. 886, was construed, in part it was said: "We do not understand that case to hold that, where the circumstances are such as to reasonably justify the inference of guilt, the case will be taken from the jury because an inference of innocence might also reasonably have been drawn. Between these two inferences the jury must choose, and it is only where the evidence obviously does not warrant the inference of guilt that the court will interfere. This must be so, or the weight of the circumstantial evidence, and the inferences to be drawn from it in almost every case, must finally be determined by the appellate court, thus making the court the arbiter of both law and fact. In our judgment a verdict of a jury, and the judgment of conviction based upon circumstantial evidence, come to us as any other verdict and judgment, clothed with like presumption of support; and, unless we can say that the inference of guilt drawn from the evidence was wholly unwarranted, we cannot interfere."

Again, in People v. Martinez, 20 Cal. App. 343, 344, 128 P. 952, 953, wherein an analogous principle of law was the subject of discussion, the conclusion by the appellate court, as indicated by the following quotation, was identical with that reached in the case last cited, to wit: "Where the circumstances are such as to reasonably justify an inference of guilt, as found by the jury, the fact that an inference of innocence might likewise be reasonably drawn therefrom does not present a question of law for review by an appellate court any more than does a verdict based upon direct conflicting evidence. In neither case will the verdict be disturbed. We are not unmindful that the Supreme Court in People v. Staples, 149 Cal. 405, 86 P. 886, employs language seemingly inconsistent with

this view, and upon which appellant claims that, if upon review this court is of the opinion that the circumstances are reasonably compatible with defendant's innocence, then, notwithstanding the fact that they reasonably justify the inference of guilt drawn therefrom by the jury, he is entitled to a reversal of the judgment. * * * In this case the circumstances established reasonably justified the conclusion of the jury as expressed in their verdict, and, even though this court were of the opinion that such circumstances might be reasonably reconciled with the innocence of defendant, such fact does not warrant interference with the determination of the jury."

Likewise in People v. Mitsunaga, 91 Cal. App. 298, 301, 266 P. 1020.

Bearing upon the question here at issue is the case of People v. Stine, 110 Cal. App. 156, 293 P. 907, 910. Among the authorities there cited is that of People v. Willard, 150 Cal. 543, 553, 89 P. 124. It is there announced: "This court cannot disturb a verdict unless there is no evidence to support it, or where the evidence relied on by the prosecution is apparently so improbable or false as to be incredible, or where it so clearly and unquestionably preponderates against the verdict as to convince this court that its return was the result of passion or prejudice on the part of the jury."

And so in the case of People v. Wong Chong Suey, 110 Cal. 117, 42 P. 420, 421, wherein it is said that the finding of the jury will not be disturbed "unless the evidence preponderates so greatly against the verdict as to make it manifest that the verdict is the result of passion or prejudice."

[6] Reverting to the undisputed facts which are disclosed by the evidence adduced on the trial of the action and as hereinbefore set forth, it becomes plain that they fairly warranted the inference of guilt of the defendants which was expressed by the judgment. People v. Scott, 13 Cal. App. 301, 109 P. 498; People v. Stern, 94 Cal. App. 85, 270 P. 706.

The incriminating circumstances were such that on consideration thereof, together with the judgment, not even the suggestion of passion or prejudice on the part of the trial court may rightly be indulged.

[7] With particular reference to the appeal of defendant Florio, the record discloses the fact that, following the rendition of the judgment, each of the defendants made application for probation. In that connection, the order of the trial court was "that proceedings as to defendant Leonarda Florio be suspended and said defendant granted probation for a period of three years," etc. Thereupon she appealed "from the judgment and sentence. * * *"

Section 1237 of the Penal Code provides that an appeal may be taken by a defendant "from a final judgment of conviction; * * * from any order made after judgment, affecting the substantial rights of the party."

Since it appears that no "final judgment of conviction" had been rendered, it follows that by statutory provision defendant Florio had no right of appeal. People v. Hartman, 23 Cal. App. 72, 74, 137 P. 611; People v. De Voe (Cal. App.) 11 P.(2d) 26; United States v. Lecato (C. C. A.) 29 F.(2d) 694, 695, where in support of the rule many authorities are cited.

It is ordered that as to defendant Patello the judgment be and it is affirmed. It is further ordered that as to defendant Florio her appeal herein be and it is dismissed.

We concur: CONREY, P. J.; YORK, J.

CALIFORNIA REPORTER

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14 PACIFIC REPORTER

SECOND SERIES

216 Cal. 285

PARKER v. BOARD OF DENTAL EXAMINERS OF STATE OF CALIFORNIA et al.

S. F. 14394.

Supreme Court of California.

Sept. 1, 1932.

Rehearing Denied Sept. 28, 1932.

1. Physicians and surgeons ⇐1.

Legislature could regulate practice of dentistry and limit right to practice to natural persons (Deering's Gen. Laws 1931, Act 2048, §§ 11–13).

2. Physicians and surgeons ⇐6(2).

Corporation or unlicensed person cannot manage or control so-called "business side" of practice of dentistry, since practice of dentistry is not divisible into departments (Deering's Gen. Laws 1931, Act 2048, §§ 11–13).

3. Physicians and surgeons ⇐11(3).

Finding of board of dental examiners that dentist aided and abetted unlicensed persons to practice dentistry *held* supported (Deering's Gen. Laws 1931, Act 2048, §§ 11–13, 15).

4. Physicians and surgeons ⇐11(3).

Finding of board of dental examiners that dentist unlawfully used fictitious name in conducting and engaging in practice of dentistry *held* supported (Deering's Gen. Laws 1931, Act 2048, §§ 11–13, 15).

5. Physicians and surgeons ⇐11(2).

Acts of dentist in aiding unlicensed person to practice dentistry and in unlawfully using fictitious name in practicing dentistry constituted "unprofessional conduct" within statute authorizing revocation or suspension of dentist's license (Deering's Gen. Laws 1931, Act 2048, §§ 11–13).

[Ed. Note.—For other definitions of "Unprofessional Conduct," see Words and Phrases.]

6. Statutes ⇐173.

Delayed action by those charged with execution of laws may be considered as reason for mitigation of punishment, but cannot annul law.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

7. Evidence ⇐154.

Testimony given by witnesses under promise of immunity made in reliance on repealed statute could be considered against dentist seeking to vacate order suspending him from practicing dentistry (Pen. Code, § 1324 [repealed by St. 1917, p. 291]).

Testimony could be considered since the dentist was not in a position to raise objection that testimony was obtained through mistaken belief that Pen. Code § 1324 was a subsisting act.

8. Evidence ⇐154.

Competency of evidence does not depend on means by which it is brought into court.

9. Evidence ⇐154.

Courts on mere question of admissibility of evidence will not take cognizance of mode of production unless defendant has been compelled to produce it.

10. Physicians and surgeons ⇐11(3).

Order of board of dental examiners suspending dentist for five years could not be modified by court on ground of excessiveness (Deering's Gen. Laws 1931, Act 2048, §§ 11–13, 15).

LANGDON, J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Painless Parker against the Board of Dental Examiners of the State of California and others, to set aside an order of the Board suspending petitioner's license to practice dentistry. From an adverse judgment, plaintiff appeals.

Affirmed.

For prior opinion, see 1 P.(2d) 501.

Rehearing denied; LANGDON and TYLER, JJ., dissenting.

Harry Keyser, of Boise, Idaho, and John C. Stevenson, of San Francisco, for appellant.

Jesse W. Carter, of Redding, and Annette Abbott Adams, of San Francisco, for respondents.

SEAWELL, J.

This appeal is taken from a judgment entered by the superior court of the city and county of San Francisco in a certiorari proceeding wherein said superior court affirmed the order or judgment rendered by the board of dental examiners of this state on December 7, 1929, upon original proceedings taken and had by said board of dental examiners, suspending the license of said petitioner, Painless Parker, theretofore issued to him by said board, for a period of five years, commencing January 2, 1930. The matter is before us on an order transferring the cause to this court after decision by the District Court of Appeal, reversing the judgment of said superior court. 1 P.(2d) 501.

The provisions of the act regulating the practice of dentistry (Deering's Gen. Laws of California, 1931, title 157, Act 2048) which bear upon the questions presented are found in section 11 of said act, and are as follows: "Any person shall be understood to be practicing dentistry within the meaning of this act who shall (1) by card, circular, pamphlet, newspaper, or in any other way advertise himself as a dentist, or (2) who shall, for a fee, salary or reward, paid directly or indirectly either to himself or to some other person, perform an operation of any kind, or treat diseases or lesions of the human teeth or jaws, or correct malimposed positions thereof, or (3) in any way indicate that he will perform by himself or his agents or servants any operations upon the human teeth or jaws, or (4) make an examination of, with the intent to perform or cause to be performed any operation on the human teeth or jaws, or (5) who manages or conducts as manager, proprietor, conductor, lessor, or otherwise a place where dental operations are performed; but nothing in this act contained shall prohibit bona fide students of dentistry or dental hygienists from operating in the clinical departments of the laboratory of a reputable dental college, or an unlicensed person from performing merely mechanical work upon inert matter in a dental laboratory or a licensed physician from practicing oral surgery."

One of the penalties prescribed for the commission of the acts charged against the petitioner and appellant herein is the revocation or suspension of his license to practice dentistry in this state. Section 12 enumerates certain violations of the act which are punishable as misdemeanors, and certain other violations which are punishable either as misdemeanors or as felonies. It provides as follows: "Any person who * * * shall under any false, assumed or fictitious name, either as an individual, firm, corporation or otherwise or any name other than the name under which he is licensed, practice, advertise or in any other manner indicate that he is practicing or will practice dentistry, shall for the first offense be guilty of a misdemeanor, and shall be punishable by a fine of not less than two hundred fifty dollars or more than one thousand five hundred dollars, or by imprisonment in the county jail for not to exceed six months, or both, and for the second or a subsequent offense shall be guilty of a felony and upon conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than three thousand dollars, or by imprisonment in the state prison for a term of not less than one year nor more than three years,

or by both such fine and imprisonment. Nothing in this section shall be held to prohibit the conferring of degrees and the bestowing of diplomas by reputable dental colleges of this state which have been approved by the board of dental examiners of California."

Section 13 enumerates several grounds, any one of which is deemed sufficient cause for the revocation or suspension of a dentist's license. In the list the following appear: The rendition of a judgment by a court of competent jurisdiction finding him grossly unskillful or negligent in his practice; unprofessional conduct or gross ignorance or inefficiency in his profession. "Unprofessional conduct" is defined to consist of the employment of cappers or steerers to obtain business; aiding or abetting any unlicensed person to practice dentistry unlawfully; "the use of any false, assumed or fictitious name, either as an individual, firm, corporation or otherwise, or any practice, advertise or in any other manner indicate that he is practicing or will practice dentistry."

Section 15 of said act provides that the board of dental examiners, or any member thereof, may prefer a complaint "for violation of this act or any part thereof," and concludes with making it the duty of the district attorney to prosecute all violations of said act.

The accusation charges petitioner with unprofessional conduct in four counts. The first count charges that between August 4, 1915, and May 31, 1929, petitioner, Painless Parker, aided and abetted an unlicensed person to practice dentistry unlawfully. The gist of this accusation is that on August 4, 1915, petitioner caused to be formed and organized a corporation under the name of Painless Parker Dentist, for the purpose and with the object that said corporation should conduct, own, operate, and control dental offices throughout this state, the United States of America, and the Dominion of Canada, and thereafter, pursuant to said purpose and object, petitioner, Painless Parker, did aid and abet said corporation, Painless Parker Dentist, an unlicensed person, to practice dentistry in this state and to conduct, own, operate, and control dental offices throughout the state of California, where dental operations were performed and the practice of dentistry was carried on.

Count 2 charges that continuously between September 20, 1921, and January 22, 1929, said petitioner, Painless Parker, through the agency of said corporation, aided and abetted Ramona McShane, an unlicensed person, to participate in the profits of the dental offices so unlawfully operated, conducted, and controlled by said Painless Parker Dentist, corporation.

Count 3 charges that between the dates set forth in count 2 petitioner, Painless Parker, did willfully and unlawfully use a false, assumed, and fictitious name, to wit, Painless Parker Dentist, a corporation, in conducting and engaging in the practice of dentistry in the state of California, and during said period he did advertise and indicate that he was practicing dentistry under said false, assumed, and fictitious name.

Count 4 alleges that between September 21, 1921, and October 10, 1928, said Painless Parker did willfully and unlawfully carry on and conduct the practice of dentistry in this state under a false, assumed, and fictitious name, to wit, E. R. Parker System, which name was a name other than the name under which said Painless Parker was and is licensed to practice dentistry, and he did advertise and indicate that he was practicing dentistry under said false and fictitious name.

The board of dental examiners found against petitioner on each one of said counts.

It may be taken as conceded that the original or given name of petitioner was Edgar R. and that said original or given name was discarded and "Painless" was, under form of law, adopted in its stead as his first or given name. Prior thereto he had practiced dentistry under his original name, Edgar R. Parker, and his dental license was issued to him in that name. After he had changed his name to Painless Parker, he again reverted to the use of his abandoned name, E. R. Parker, and coupled it with a painless technique of dental operations and advertised that examinations and advice were obtainable at the dental offices of the E. R. Parker System.

On August 4, 1915, petitioner caused to be formed a corporation named "Painless Parker Dentist" for the purposes, among a long list of others, of conducting, owning, operating, and controlling dental offices throughout the state of California, the United States of America, and the Dominion of Canada. The other enumerated purposes, in addition to those already named, for which said corporation was formed, are many, including the manufacture, purchase, and sale of all kinds of dental creams and pastes; dental supplies of all and every kind; mechanical goods and apparatus; artificial teeth and crowns; anæsthetics; the purchase and sale of gold necessary for use in the practice of dentistry; the manufacture, importation, and exportation of dental articles of all kinds; buying, selling, and dealing in and with all things, solids, and liquids, necessary in the practice of dentistry; purchasing, owning, selling, leasing, and dealing in real property of every description, and buying, selling, owning, leasing, and dealing in personal property of all kinds; purchasing, owning, selling, and dealing in shares of stock, bonds, and obligations of private and public cor-

porations; buying, dealing in, and selling merchandise of all kinds; employing, engaging, and hiring any and all necessary persons in the proper performance of dental offices, in which mechanical and operative dentistry shall be carried on where such persons are needed; and finally for the purpose of carrying on and transacting any and all kinds of businesses in which *natural persons* may lawfully engage.

The amount of the capital stock of said corporation was fixed at $5,000, divided into 500 shares of the par value of $10 per share. The number of shares of stock actually subscribed was three; one, respectively, by E. R. Parker, B. T. Mohney, and Harry Morgan, who were appointed directors.

On August 27, 1915, the Associated Dental Supply Company was incorporated by Frances E. Parker, wife of Painless Parker, and Chalmers S. Baird and Frank D. French, each of whom subscribed to one share of its capital stock of the par value of $100 per share. The amount of the capital stock was fixed at $100,000. The three persons above named constituted the board of directors. The purposes for which said corporation was formed included all of those purposes set forth in the Painless Parker Dentist articles of incorporation and others not named in said articles of incorporation, and to which may be added the purposes of engaging in printing, publishing, bookbinding, advertising, publicity work, chartering, constructing, owning, leasing, and operating steam and other craft and vessels; owning, leasing, and holding property for mining purposes; to acquire by purchase trade-marks, trade-names, and the good will of any business whatever; to make and enter into contracts of every kind and character with firms, associations, and corporations, municipalities, bodies politic, including the government of the United States of America and of any state or territory.

The purposes for which the corporations Painless Parker Dentist and Associated Dental Supply Company, respectively, are formed and the powers which they assume to exercise are both multifarious and heterogeneous. While many of the purposes set out in the articles of incorporation have a connection with some of the various forms and kindred branches of dentistry, others have no relevancy whatsoever to the subject.

Said corporations, associations, or entities which Painless Parker claims as his legitimate offspring begotten of rights conferred upon him by his license to practice dentistry are: Painless Parker Dentist, in his individual capacity; Painless Parker Dentist, in his corporate capacity; Associated Dental Supply Company, a California corporation; Parker Dental System Company, a Delaware corporation; the E. R. Parker Dental System Employees' Cooperative Plan. Several of the associates of petitioner and employees of the corporation and its subsidiaries were called as witnesses by respondents for the purpose of explaining the functions of said corporations and allied bodies, but nothing was adduced to explain the rationale of the system, if it can be so called. Certainly the many appendages attached to the corporate bodies are not conducive to the conduct of the practice of dentistry in a lawful manner, but, on the contrary, they provide a means of circumventing the spirit and the letter of the law regulating the practice of dentistry. Examined strictly from a business viewpoint, they seem unnecessary and in many instances are overlapping and conglomerate. Corporation Painless Parker Dentist was incorporated by Painless Parker, the individual dentist, in 1915. He, together with his assistant or employee, B. T. Mohney, a licensed dentist, and Harry A. Morgan, a layman, constituted the board of directors.

All of the witnesses who testified on material matters in the proceedings were either assistants of petitioner or employees of the corporations which he unquestionably dominated.

Mr. Frank W. French, president of the Associated Dental Supply Company, testified that said corporation was formed in 1915, and he had been connected with it for approximately fourteen years. Frances E. Parker, wife of Painless Parker, Chalmers E. Baird, and Frank W. French were the directors. The latter had also been business manager of Painless Parker Dentist during the same period of time. None of the directors of Associated Dental Supply Company were licensed dentists. The working plan, as explained by the witnesses, between Painless Parker Dentist and Associated Dental Supply Company, the purposes of the incorporation of each being fully heretofore set out, was that Painless Parker, dentist, was general manager of Painless Parker Dentist, corporation, and the corporation leased its various offices conducted in several cities throughout the state, together with office equipment, from Associated Dental Supply Company, a California corporation. Painless Parker Dentist purchased all dental supplies used by it from Associated Dental Supply Company. All moneys collected by the several dental offices operated by Painless Parker Dentist were remitted to the Associated Dental Supply Company, which in turn paid all rentals, salaries of dentists, and operative expenses of Painless Parker Dentist. Whatever surplus remained was the property of Associated Dental Supply Company, a corporation, or the Parker Dental System Company, a Delaware corporation. The latter was incorporated some years after the former, and while both were granted substantially the same corporate powers, both continued to exist. Managers of the several dental of-

fices seemed to have exercised their pleasure as to which they should forward their earnings. Moneys earned by Painless Parker Dentist from the actual practice of dentistry were deposited in bank to the order of one or the other of said corporations. Painless Parker received an annual salary of $20,000 for his services, Painless Parker Dentist paying $15,000 of said sum and Associated Dental Supply company paying the remaining $5,000. His office was denominated chief surgeon and general manager for Painless Parker Dentist. Frances E. Parker is a controlling stockholder of the Associated Dental Supply Company, and her husband, Painless Parker, is a director of Parker Dental System Company. He makes irregular visits to the several dental offices. He holds the authority of general manager, but the employment of the help is delegated by him to an agent. The dentists in charge of the several dental offices are given wide administrative powers but are subject to the orders of petitioner. The Oakland office, in charge of Dr. Saul Robert Jacobs, employs sixteen or eighteen persons, of whom five are licensed dentists. Dr. Jacobs has been working in the employ of the Painless Parker Dentist since 1918. He is a director and vice president of the Parker Dental System Company. All moneys earned by Painless Parker Dentist in the practice of dentistry are remitted to the Associated Dental Supply Company and the sum to meet the expenses of conducting the office is returned. He, with A. W. Gage and B. T. Mohney, all licensed dentists, were trustees of a trust project known as "The Million Dollar Profit Sharing Plan," entered into by and between Associated Dental Supply Company, a corporation, Painless Parker Dentist, a corporation, and Painless Parker, guarantors, whereby the guarantors guaranteed trustee certificates and trustee participating certificates issued under and by the E. R. Parker Dental System Employees Cooperative Plan. Subscriptions were open to the public at $50 per certificate. The fund raised upon the issue—as explained by Mr. French—was for the benefit of the capital stock of the Associated Dental Supply Company and the certificate method was adopted to avoid the necessity of sales of stock of said association. The trust was ultimately dissolved. The subscribers of certificates shared in the net earnings of the venture rather than receiving fixed rates of interest on their loans. The E. R. Parker System also served as an advertising bureau for Painless Parker Dentist and other Parker organizations by circular and newspaper methods of publicity. It issued books and pamphlets treating of the introduction of economic methods as to the saving of time and money in the practice of dentistry; painless methods of treatment of teeth; instructions for dental cashiers, receptionists, dental mechanics, and janitors. It purported to give general instructions in the operation and conduct of dental offices, and treated of special dental operations which are not taught in the curriculum of the ordinary colleges.

Considerable literature in the nature of letters written by the Parker organizations and in the form of advertisements, calling attention to the "painless technique in all of E. R. Parker dental operations," is to be found in the record.

It will be seen from the above summary that the Parker organizations, of which Painless Parker is the director in chief, are interlinked in the multifarious dental projects herein mentioned.

[1] That the regulation of the practice of dentistry comes as legitimately within the powers of the Legislature as does the practice of medicine, or any other of the professions which require special scientific knowledge on the part of the practitioner, there can be no doubt. It must be conceded that the Legislature has power to regulate the practice of dentistry not only on the ground that it concerns public health, but also on the ground that it is the state's duty to enact laws which will afford protection to public morals. There is no profession, except the practice of medicine, where the patient passes so completely within the power and control of the operator as does the dental patient. Not infrequently does the operator perform his work upon the patient in the privacy of his office. The right to administer anaesthetics which produce local or general insensibility to pain, or drugs which may produce total or semi unconsciousness, or otherwise affect the nervous system, should be withheld not only from all persons who are not highly skilled in the knowledge of and the use of said drugs, but also from persons who cannot produce evidence of good moral character. Good moral character and "fitness" to practice dentistry are statutory requirements. Dentistry is referred to in the Dental Act (section 13, subd. 3) as a profession. The letter of the statute authorizes *persons* only to engage in the *practice* of dentistry. The underlying theory upon which the whole system of dental laws is framed is that the state's licensee shall possess consciousness, learning, skill, and good moral character, all of which are individual characteristics, and none of which is an attribute of an artificial entity. Surely the state, for the better regulation of the practice of dentistry, and as a means of preventing evasions of the law, and with the object of more readily fixing statutory responsibility, has the power to limit such practice to natural persons.

[2] Appellant claims that there is a distinction between the practice of dentistry which the statute undertakes to regulate and the purely business side of the practice; that the first requires skill and learning, while the latter requires only training in business transac-

tions, and if the management or conduct of the "business side" by a layman is inhibited by statute, then the inhibitions of the statute are beyond the scope of the police power of the state, and are void as being unconstitutional, citing State v. Brown, 37 Wash. 97, 79 P. 635, 638, 68 L. R. A. 889, 107 Am. St. Rep. 798; Liggett Company v. Baldridge, 278 U. S. 105, 113, 49 S. Ct. 57, 73 L. Ed. 204; Messner v. Board of Dental Examiners, 87 Cal. App. 199, 262 P. 58. If the statute should be so construed there would still remain other sustained accusations of unprofessional conduct of sufficient gravity to sustain the action of the board of dental examiners. But we are not prepared to hold with the contention that a corporation or an unlicensed person may not be prevented from managing, conducting, or controlling what petitioner terms the "business side" of the practice of dentistry. The law does not assume to divide the practice of dentistry into that kind of departments. Either one may extend into the domain of the other in respects that would make such a division impractical if not impossible. The subject is treated as a whole. If the contention of appellant be sound, then the proprietor of the business may be guilty of gross misconduct in its management and violate all standards which a licensed dentist would be required to respect and stand immune from any regulatory supervision whatsoever. His employee, the licensed dentist, would also be immune from discipline upon the ground that he was but a mere employee and was not responsible for his employer's misconduct, whether the employer be a corporation or a natural person. On grounds of public policy such a condition could not be countenanced. The logical deduction from such a proposition would render the act impotent to accomplish the purpose it was intended to serve, and it would defeat the object of the legislation, which is well stated in Ex parte Whitley, 144 Cal. 167, 77 P. 879, 884, 1 Ann. Cas. 13, in the following language: "But it must be remembered that the act regulating the practice of dentistry and similar acts are not passed to promote the personal ends of individuals, but as salutary enactments in the exercise of the police power of the state to legislate for the safety, health, and welfare of the people." This end cannot be attained if the Dental Act is to be weakened or defeated by subterfuge or circumvented by devious methods. The right of a person merely to own a dental office is not involved in this proceeding. No one would dispute the right of any person to own a dental office or dental equipment. The question most appropriate here is whether the thing owned is used for a given purpose by a person lawfully entitled to so use it. Ownership is not the absolute test of the right of use. It may be conceded that a licensed dentist would have the right to employ unlicensed persons to perform various kinds of services. In such cases the employer is responsible to and for the acts of his employees. But the converse of the proposition is not always true. In the instant case Painless Parker Dentist, a corporation, and the Associated Dental Supply Company, a corporation, are the employers of Painless Parker, the licensed dentist. If the employment is bona fide, as the uncontradicted evidence tends to prove, the corporations which are purely commercial enterprises, none of whose directors need be licensed dentists, are the masters of the situation, and may with or against the wish of Painless Parker, the dentist, employ such licensed persons as may be to their commercial advantage, having less regard for the skill or fitness of the persons so employed than would a licensed proprietor who is solemnly charged by the obligation he assumes to the state to respect the salutary enactments passed in the exercise of the police power for the safety, health, and welfare of the public. Ex parte Whitley, supra.

To whom do the licensed dentists employed by the corporations owe their statutory duty, to Painless Parker or to the commercial institutions which pay them, or to the patient assigned them to serve? If they owed their first allegiance to their employer, the corporation, as was held in People v. Merchants' Pro. Corp., 189 Cal. 531, 209 P. 363, a case involving the duty of an attorney to his client, then they owed but a secondary and divided loyalty to the patient. This was denounced as not within the intendments of the law and practice. The practice of dentistry, like the practice of the law, has long had a sufficiently definite meaning throughout this country. Legislative bodies have accepted this common understanding of the people and enacted laws consistent therewith. The methods of petitioner and his corporate associates cannot be consistently adjusted to such common understanding which is reflected in our statutes.

The practice of dentistry is not open to commercial exploitation. Such would be its fate if the methods adopted by petitioner should become general. That a corporation may not engage in the practice of the law, medicine, or dentistry is a settled question in this state. None of those professions which involves a relationship of a personal as well as a professional character, which has to do with personal privacy, can be placed in the same category as druggists, architects, or other vocations where no such relationship exists. The question here is whether the practices as jointly carried on by petitioner and his corporate associates and entities justify the inference that all are, as a matter of fact, mutually engaged in the practice of dentistry, or do the particular methods employed sustain the accusations, or any of them, charging petitioner with unprofessional conduct. The record speaks for itself, and further particularization is not necessary.

Petitioner has not shown that a greater or better public good has been promoted by the formation of the corporations and subsidiary associations by and through which he has conducted the practice of dentistry than that which has accrued to the long-established ethical standards which are founded upon experience, investigation and research, and which have so universally met with the approval of the public's conception and understanding of the legal and ethical proprieties as to have become codified into the laws of this state and practically into the laws of many of the countries of the civilized world.

[3, 4] Considering the letter and spirit of the Dental Act founded upon the universal method of practicing dentistry which has prevailed in this state for many years, we are of the view that the findings of the board of dental examiners are supported by the evidence. Especially is this true as to count I, which charges Painless Parker with aiding and abetting Painless Parker Dentist, a corporation, in the practice of dentistry. The word "person" includes a corporation as well. Section 17, Code Civ. Proc. We are further of the view that count II is included or merged in the other counts and should not be included in a separate count. Count III is sustained upon the use of the name "Painless Parker Dentist," a corporation, which was used interchangeably with the name "Painless Parker, Dentist," the adopted name of petitioner. We are of the view further that there is evidence in the record sufficient to sustain the finding that petitioner, through his associations with the Parker organizations, was using and permitting to be used the fictitious name E. R. Parker System, suggesting and indicating that E. R. Parker was engaged in the practice of dentistry. E. R. Parker was a name discarded by petitioner and so far as he was concerned it became fictitious after he voluntarily caused his name to be changed to Painless Parker. The real object, purpose, and motive of petitioner in changing his name in the first instance to "Painless" Parker, and secondly in organizing the corporation Painless Parker Dentist, which corresponded precisely to his adopted name when he placed the word dentist thereafter, which he had the right to do under the statute, and thirdly in the retention of his original name "E. R. Parker" under which he had practiced dentistry, were proper matters for the consideration of the board of dental examiners in connection with all the other evidence in the record.

[5] The only question presented by this appeal is one of jurisdiction. We are of the opinion that the acts complained against bring petitioner within the purview of the acts defining unprofessional conduct as herein set forth.

[6-10] It is insisted that the long period of time over which petitioner has operated, and the interpretation that the board and its legal adviser have placed upon said act is entitled to weight in the proceeding. For a period of some fourteen years the board and petitioner have had frequent controversies as to the legality and professional propriety of petitioner's methods employed in the practice of dentistry. At no time was the subject set at rest. Delayed action on the part of those who are charged with the execution of laws will not be permitted to annul the law. It may be considered by the court as a reason for the mitigation of punishment, but the judicial department is not absolutely bound to regard it. Several of the witnesses who were employees of the Parker organization upon being called to the stand were advised by their attorneys that they might claim their privilege and decline to testify on the ground that they were not required to give testimony against themselves. The board thereupon promised them immunity from prosecution if they would testify under the provisions of section 1324, Penal Code, which section had been repealed some fourteen years prior to the day of the hearing (see St. 1917, p. 291). Said witnesses testified and petitioner claims that this evidence was improperly admitted and cannot be considered, on the ground that it was obtained through mistake as to section 1324 being a subsisting act. There is no merit in this contention. Said witnesses, if a prosecution should be instituted aaginst them, may have urged the point, but petitioner cannot raise such an objection in a proceeding instituted against him only. The competency of evidence does not in any way depend upon the means by which it is brought into court, where it is offered in evidence. The courts upon the mere question of admittance or rejection of evidence will not take cognizance of the mode of production unless it is shown the defendant himself has been compelled to give or produce it. People v. Mayen, 188 Cal. 237, 205 P. 435, 24 A. L. R. 1383, which is the leading case on the subject, leaves no doubt as to the rule in this state. It is earnestly insisted that the suspension for a period of five years from the practice of dentistry imposed by the board of dental examiners is excessive. We may agree with petitioner that it does appear rather severe, considering the age of petitioner and the circumstances of the controversies which have been waged between him and the board of dental examiners. As above remarked, we have no power to modify it. The board that imposed the penalty has the power at any time to modify or revoke it as may appear to them to be just.

Judgment affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; TYLER, Justice pro tem.

LANGDON, J.

I dissent and adopt the opinion of the District Court of Appeal, First Appellate Dis-

trict, Division 2, as an expression of my views. 1 P.(2d) 501, 502. The opinion of that court, written by Mr. Presiding Justice Nourse, is as follows:

This is an appeal from a judgment affirming an order of the dental board suspending petitioner's license to practice dentistry.

The petitioner was tried by the dental board upon an information framed in four counts charging unprofessional conduct. The first count charged petitioner with aiding and abetting the corporation Painless Parker Dentist to practice dentistry unlawfully. The second count charged him with aiding and abetting an unlicensed person to participate in the profits of dental offices. The third count charged the use of an assumed and fictitious name—"Painless Parker Dentist," a corporation. The fourth count charged the use of an assumed and fictitious name—"E. R. Parker System." The dental board found petitioner guilty on all four counts and suspended his license to practice for a period of five years.

"Painless Parker Dentist" was incorporated by articles filed with the secretary of state August 4, 1915. The amount of the subscribed corporate stock was $30 divided into three shares of $10 each. Its designated purposes were "to conduct, own, operate and control dental offices" to manufacture, buy, and sell dental creams, dental apparatus and supplies. E. R. Parker, one of the incorporators, changed his name to "Painless Parker" by decree of court and served as manager and chief surgeon of this corporation. Associated Dental Supply Company was incorporated by articles filed September 1, 1915. The general purposes of this corporation seem to have been the dealing in all kinds of dental supplies and similar merchandise. The petitioner was not a stockholder or incorporator of this corporation. The conduct of the business down to the date of the hearing before the dental board in August, 1929, has been a gradual lessening of the functions of the former corporation and a consequent increase in the functions of Associated Dental Supply Company until the latter secured practically full control of the business and financial operations. Fourteen dental offices were operated in this state by "dentists using the E. R. Parker System." These offices were owned, or leased, by the Associated Dental Supply Company, which in turn had some arrangement with the Painless Parker Dentist Corporation whereby these offices were "leased" to the latter but all the money taken in by these offices was paid directly to the Associated Dental Supply Company. Throughout this period (or at least for the last eight or ten years before the hearing) the Associated Dental Supply Company dealt directly with the managers of the local offices, who in turn deposited all their receipts to the credit of that corporation. The Painless Parker Dentist Corporation has never paid a dividend, has no assets, and no funds on hand. So far as we can ascertain from the record, it has never organized or operated as a corporation, has not, either directly or indirectly, assumed or exercised any control over any of the offices operated by the petitioner or over any of the licensed dentists employed therein; but has simply been used by Painless Parker the individual as his "alter ego" in his conduct of these dental offices, the principal use made of the corporation being the use of the term "Painless Parker Dentist" upon the doors, windows, and letterheads of the petitioner. When this practice was discontinued and the term "Dentists using E. R. Parker System" was adopted does not appear from the evidence. But it does appear without any contradiction that the corporation, as such, has not functioned in the direct management or control of any of these dental offices and has not represented itself as a corporation practicing dentistry but has confined its activities to the appointment of petitioner as its manager, who, in turn, did manage the offices for the benefit of the Associated Dental Supply Company.

In the first count it was alleged that "between the 4th day of August, 1915, and the 31st day of May, 1929," the petitioner did aid and abet an unlicensed person to practice dentistry "by permitting, allowing and authorizing said corporation (Painless Parker Dentist), to conduct, own, operate, and control dental offices throughout the state of California, where dental operations were performed, and carry on the practice of dentistry therein." The basis of the charge is found in the provisions of section 11 of the Dental Act (Deering's General Laws 1923, Act 2048), which declare the practice of dentistry to include one "(5) who manages or conducts as manager, proprietor, conductor, or otherwise a place where dental operations are performed." By section 13 of the act unprofessional conduct is defined to include "aiding or abetting any unlicensed person to practice dentistry unlawfully."

In support of the judgment the respondents argue that any transaction within the purview of subdivision 5 of section 11 of the act constitutes the practice of dentistry; that a corporation may not be licensed to practice dentistry; that any licensed dentist who aids a corporation in the performance of any of the acts mentioned in subdivision 5 is aiding an "unlicensed person" to practice. The appellant argues that the provisions of that subdivision are unconstitutional in so far as they purport to prohibit an unlicensed person from managing the purely business or economic affairs of a dental office, and that the term "unlicensed" dentist refers only to a natural person who might be licensed under the act and not to a corporation owning or operating a dental office.

Bearing in mind that "the ultimate pur-

pose of the Dental Act is to bring about and insure skill and proficiency in the practice of the profession" (Jacobs v. Board of Dental Examiners, 189 Cal. 709, 714, 209 P. 1006, 1008), it must be manifest that, if the quoted provisions of the act mean what the respondents contend that they mean, they are unconstitutional as placing unreasonable restrictions upon the conduct of a lawful business—restrictions which are not referable to the regulatory police powers of the state. State v. Brown, 37 Wash. 97, 79 P. 635, 637, 68 L. R. A. 889, 107 Am. St. Rep. 798; Liggett Co. v. Baldridge, 278 U. S. 105, 49 S. Ct. 57, 73 L. Ed. 204. In the Brown Case the Supreme Court of Washington had under consideration the provisions of section 8 of the dental act of that state (Laws 1901, p. 317), which declared it to be a misdemeanor to "own, run, operate or cause to be operated, or manage a dental office." In holding that portion of the act unconstitutional the Washington court said that "to own and manage property is a natural right, and one which may be restricted only for reasons of public policy, clearly discernible." "But," said the court, "we are unable to say or perceive that the health, moral, or physical welfare of the public, or any of the personal or property rights of its individuals, are endangered by the ownership and management of a dental office, so long as those employed therein to do the actual dentistry work are qualified and licensed as by law required."

In the Brown Case the court gave the illustration of the widow of a licensed dentist who assumed control and management of the business of the office, and who, though she employed none but licensed dentists to perform the dental work, would be chargeable under the strict terms of the act. Other illustrations might be added. Thus the administrator, trustee, or receiver duly appointed to manage the estate of a licensed dentist would, under our statute, be guilty of a misdemeanor. Section 12. The manager or proprietor of "a place where dental operations are performed" would include the manager and owner of every hospital and clinic permitting such operations, the many charitable agencies maintaining clinics, the infirmaries and guilds maintained and operated by the students in the universities and colleges, the many dental clinics maintained by parents' organizations for the benefit of school children, as well as the owners and managers of buildings where such operations are performed.

Closely resembling the case at hand is Messner v. Board of Dental Examiners, 87 Cal. App. 199, 262 P. 58, 60, where the court of the Third Appellate District annulled an order suspending the license of a dentist on the charge that an unlicensed person was the "manager" of his office. The court said that "Cohn had charge of the purely business end of the dental office, * * * but there is no evidence that he had or exercised the slightest control or direction of the professional work performed in such office." In referring to the provisions of subdivision 5, the court said: "A reasonable construction of the quoted provisions of the statute appears to be that, to come within the terms thereof, one must in some manner, to some extent, directly or indirectly, control or direct some professional service of the kind that dentists are licensed to render."

This is about the same interpretation which was given the quoted portion of the section by the Attorney General of the state as early as 1918 when he advised the dental board that "so much of the business relating to his practice as does not concern the public may * * * be operated through the medium of a corporation. It is the evident intent of the act that the licensed dentist in his dealings with the public shall operate in his own name and that that name shall be the one under which he is licensed, but under the statute it is apparently not made of any concern to the public whether the business of the dentist other than as the public comes in contact therewith, is operated by the dentist himself or by a corporation to which he is responsible in connection therewith, or which may have an interest in the facilities employed or receipts from his practice."

The appellant insists that the foregoing interpretation was made at his request and that he has frequently informed the respondent board of his desire to conform to the law in this respect and has frequently requested the board to inform him of its desires and demands in that respect. In view of the uncertainty of the act, and in view of the fact that petitioner was charged with a violation of its terms over a period of fourteen years, we are inclined to petitioner's view of contemporaneous construction growing out of the interpretations of the board and of its legal adviser and the conduct of the board over that period of time. The ambiguity of the quoted portion of the statute is evident, and, whether we agree with the interpretation of the dental board and the attorney-general, that interpretation, employed over a long period of years, is nevertheless entitled to weight in this proceeding. Thus, in The Pocket Veto Case, 279 U. S. 655, 690, 49 S. Ct. 463, 470, 73 L. Ed. 894, the Supreme Court said: "that a practice of at least twenty years duration 'on the part of the executive department, acquiesced in by the legislative department, while not absolutely binding on the judicial department, is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.'" Quotation is from State v. South Norwalk, 77 Conn. 257, 264, 58 A. 759. This prin-

ciple is more liberally applied to the construction of statutes than to the provisions of a constitution. 6 R. C. L., p. 63, where many cases on the general principle stated in the Connecticut case are cited.

Applying the doctrine to the case at hand, we find, first, that the statute is uncertain where it refers to one who "conducts as * * * proprietor * * * or otherwise a place where dental operations are performed" because if this language includes an owner of a dental office who merely controls the purely business side of the place it is unconstitutional (State v. Brown, 37 Wash. 97, 79 P. 635, 638, 68 L. R. A. 889, 107 Am. St. Rep. 798; Liggett Company v. Baldridge, 278 U. S. 105, 113, 49 S. Ct. 57, 73 L. Ed. 204); and if the words "manage or conduct" cover such functions as do not "call for any of the professional skill required of a dentist but rather that of one trained in business transactions" (Messner v. Board, supra), then the inhibitions of the statute are beyond the scope of the police power of the state; and, second, the statute being uncertain in this respect, the petitioner was entitled to assume from the language of the information that he was required to answer that charge in the light of the interpretation placed upon the statute by the dental board and its legal adviser. For these reasons the demurrer to the first count of the information should have been sustained upon the grounds of uncertainty.

The evidence taken in support of the allegations of the first count does not aid the pleading as it merely tends to prove that, after the incorporation of Painless Parker Dentist, the petitioner became its manager. (Here it should be added that, though the charge in the information covered a period of fourteen years, none of the evidence was tied to that period and much of it was not laid in the state of California whereas it appears that the petitioner was operating during that period in other states.) Upon this charge and evidence he was convicted of aiding and abetting an "unlicensed person to practice dentistry unlawfully." In Ex parte Whitley, 144 Cal. 167, 180, 77 P. 879, 884, 1 Ann. Cas. 13, the Supreme Court, referring to a similar statute, said: "But it must be remembered that the act regulating the practice of dentistry and similar acts are not passed to promote the personal ends of individuals, but as salutary enactments in the exercise of the police power of the state to legislate for the safety, health, and welfare of the people." To reach this end the dental act has prescribed the method by which a person may obtain a license to practice dentistry, and from the language of the act, a license could be granted to a human being only and not to an artificial creation such as a corporation. The terms of the act, in so far as they relate to the licensing of individuals and to the practice of dentistry, show clearly that they were directed to persons as distinguished from corporations. Similar interpretations have been given to the act regulating the practice of architecture in Binford v. Boyd, 178 Cal. 458, 462, 174 P. 56; People v. Allied Architects' Ass'n, 201 Cal. 428, 435, 257 P. 511; the State Medical Act in Pilger v. City of Paris D. G. Co., 86 Cal. App. 277, 281, 261 P. 328; and the Nebraska Medical Act in State Electro-Med. Inst. v. State, 74 Neb. 40, 103 N. W. 1078, 12 Ann. Cas. 673. In the latter case the Nebraska court said (page 1079 of 103 N. W.): "There was no necessity of legislation to prohibit corporations, as such, from practicing medicine. It is impossible to conceive of an impersonal entity 'judging the nature, character and symptoms of the disease,' or 'determining the proper remedy,' or giving or prescribing the application of the remedy to the disease. Members of the corporation, or persons in its employ, might do these things, but the corporation itself is incapable to do them. The qualification of a medical practitioner is personal to himself. The intention of the law is that one who undertakes to judge the nature of a disease or to determine the proper remedy therefor, or to apply the remedy, must have certain personal qualifications; and, if he does these things without having complied with the law, he is subject to its penalties. Making contracts is not practicing medicine. Collecting the compensation therefor is not practicing medicine, within the meaning of this statute. No professional qualifications are requisite for doing these things."

In view of these authorities it would seem to follow that when the Legislature declared it to be unprofessional for a licensed dentist to aid an "unlicensed person" to practice dentistry it had in mind the practice of dentistry which a licensed person might carry on —"some professional service of the kind that dentists are licensed to render" (Messner v. Board, supra), and did not contemplate a corporation which could not become licensed under the act and which could do no more than conduct the business side of the office.

Putting it in a different form, the evidence discloses that some fourteen years prior to the filing of the information the Painless Parker Dentist Corporation, in some manner not made to appear, appointed the petitioner as its general manager and then ceased to function as a corporation. The petitioner had complete control and management of all the dental offices, employed licensed dentists as local managers of each office, who in turn employed licensed dentists to perform all the dental operations performed therein. If we could treat the corporation as the employer under this evidence, we would still be forced

to the conclusion that it was not practicing dentistry under the true meaning of the statute. In this respect the case is the same, except as to the number of operations performed, as Renwick v. Phillips, 204 Cal. 349, 350, 268 P. 368, 369, where the Supreme Court, in affirming a judgment annulling an order of the medical board revoking Renwick's license to practice medicine and surgery, said: "The petitioner was a licensed chiropodist. The said Roy Finney conducted a chiropodist parlor, equipped with a variety of foot remedies and appliances which he prepared and sold there. He employed the petitioner and respondent herein to act as a chiropodist in connection with his said establishment and to give such treatment and perform such operations as only could be done by the holder of a regular chiropodist's license so to do. In so far there was nothing illegal or unprofessional in the relations or conduct of Dr. Renwick in his connection with said Finney at the latter's place of business."

There is a clear distinction between this principle and that involved in the cases cited by respondent. People v. California Pro. Corp., 76 Cal. App. 354, 244 P. 1089, and People v. Merchants' Pro. Corp., 189 Cal. 531, 209 P. 363, were quo warranto proceedings to oust the corporations from the practice of law. The principle is stated in the latter case at page 538 of 189 Cal., 209 P. 363, 366, where the court said: "The essential relation of trust and confidence between attorney and client cannot be said to arise where the attorney is employed, not by the client, but by some corporation which has undertaken to furnish its members with legal advice, counsel, and professional services. The attorney in such a case owes his first allegiance to his immediate employer, the corporation, and owes, at most, but an incidental, secondary, and divided loyalty to the clientele of the corporation." To the same effect is Midland Credit Adjustment Co. et al. v. Donnelley, 219 Ill. App. 271. People v. Painless Parker Dentist, 85 Colo. 304, 275 P. 928, was also a quo warranto proceeding heard on a demurrer to a petition which alleged that the corporation was practicing dentistry and advertised to that effect. These allegations being admitted on the demurrer, the Supreme Court of Colorado held that the corporation was employed in an illegal practice as no corporation could be licensed to practice dentistry. People v. State Board, etc., 85 Colo. 321, 275 P. 933, was a proceeding in prohibition which was heard and determined on the record in the former case. As this record disclosed that the corporation was practicing dentistry the supreme court correctly denied the petition for prohibition to restrain the dental board from trying petitioner on a charge that he was aiding the corporation to practice illegally. Pilger v. City of Paris, etc., Co., 86 Cal. App. 277, 261 P. 328, merely holds that the corporation was not liable for the negligence of its employees in a chiropody department maintained by the corporation in its store because the corporation could not practice chiropody.

The cases cited follow the general rule of the authorities which is that the true purpose and intent of regulatory statutes of this character is that one who undertakes to judge the nature of a disease or other bodily ailment, or to determine the proper remedy, must have certain personal qualifications, and that, from the nature of these required qualifications a corporation may not be licensed to practice the profession. Adopting this rule the authorities then hold that when the regulatory statute refers to the licensing of "persons" it intends natural and not artificial persons. Pharmaceutical Soc. v. London and Prov. Suppl. Ass'n, Ltd., 5 L. R. (Appeal Cases) 857.

The second count charged the petitioner with unprofessional conduct in that he aided an unlicensed person named Ramona McShane to practice dentistry unlawfully in that he permitted her to participate in the profits of the dental office owned and operated by "Painless Parker Dentist, a corporation." The evidence in support of the charge was that in 1920 the Associated Dental Supply Company was in need of funds and for that reason executed a trust agreement selling trust certificates in small denominations. Ramona McShane purchased 151 shares at $1 a share. Interest in the nature of dividends was paid to each certificate holder until 1929 when the loan was repaid and the trust dissolved. As the Painless Parker Dentist Corporation leased dental offices from the Associated Dental Supply Company, the respondents found that Ramona McShane participated in the profits of the Painless Parker Corporation, that she therefore practiced dentistry unlawfully, and that the petitioner aided and abetted her in so doing. It would be just as reasonable to say that every stockholder of a bank which has loaned money to the owner of a building in which some dentist has practiced without a license is an aider and abetter in the unlawful practice of dentistry. To interpret the statute as contended for by respondents would make it unconstitutional for the reasons heretofore given, whereas, if the statute is given a reasonable and constitutional interpretation the information and the evidence both demonstrate that Ramona McShane was not practicing dentistry within any sound construction of the act.

The third count purported to charge petitioner with practicing under an assumed or fictitious name in the use of the term "Painless Parker Dentist," and the fourth count charged a similar breach of the act in the use of the term "E. R. Parker System." The evi-

dence was that petitioner, by decree of court, changed his name to "Painless Parker." This name was used by him in his practice of dentistry. The name Painless Parker Dentist was not fictitious. Spreckels v. Grace Darling Hosp. Ass'n, 28 Cal. App. 646, 648, 153 P. 718; Wetenhall v. Mabrey (Cal. Sup.) 286 P. 1015; Andrews v. Glick, 205 Cal. 699, 701, 272 P. 587. There is no evidence in the record to sustain the allegations of this count. All the evidence shows without conflict that petitioner was practicing under the name given him by decree of court which was the name under which he was licensed to practice by respondents.

The fourth count purported to charge petitioner with the practice of dentistry under the false and fictitious name of "E. R. Parker System." E. R. Parker is the name under which petitioner was engaged in business prior to the decree changing his name to "Painless Parker." Under that name he promulgated the system of studying and teaching the practice of dentistry including both the business details and technical matters of the profession. For this purpose manuals and other printed documents were prepared and circulated for the use of those engaged in the dental practice and in many of the offices maintained by petitioner the words "dentists using the E. R. Parker System" were prominently displayed. In support of the allegations of this count the evidence showed no more than that the petitioner used the expression in the teaching of the practice of dentistry. Under no possible theory could the transactions detailed be treated as the practice of dentistry.

Finally it is argued that the respondents usurped their authority in this proceeding when they compelled the witnesses French, Jacobs, and Cage to appear before them and give testimony against the petitioner. The argument is that because of section 12 of the Dental Act these witnesses were each guilty of a misdemeanor if the charges contained in the information against the petitioner were true, and that they were, therefore, entitled to be excused from giving testimony against themselves under the provisions of section 13, article 1 of the Constitution.

When the witnesses were called they were advised by their attorneys that they need not testify upon the ground that their testimony might incriminate them, but the respondents refused to heed their objections and ordered them to testify after counsel for the dental board had read to the witnesses the provisions of section 1324, Penal Code, and pretending to act in accord therewith, undertook to grant them immunity from prosecution if they would so testify. This section of the Penal Code had been repealed in 1917 (St. 1917, p. 291), and hence was not available at the time of the hearing which was in September, 1929. There can be no doubt that these witnesses were led into a false sense of security by the pretended reliance of respondents upon the repealed section and by the pretended assurance of immunity to them which neither the respondents nor their counsel had any possible right to grant. This action of the board is not defended on this appeal, and in view of the rule of Ex parte Clarke, 103 Cal. 352, 37 P. 230, and Hickman v. London Assurance Corp., 184 Cal. 524, 531, 195 P. 45, 18 A. L. R. 742, we cannot see how it could be defended. If this evidence is to be disregarded, there is no evidence to support any charge in the information as the case presented by the dental board rests (with certain exceptions which are immaterial) upon the evidence which the board compelled these witnesses to give in disregard of their constitutional rights. The great weight of the authorities is to the effect that evidence so taken must be treated as no evidence, while on the other hand authorities may be found holding that evidence, no matter how illegally obtained, must be given its full weight. We do not need to decide that question here because we are satisfied from a review of the entire record that all the evidence, including that illegally obtained, wholly fails to support any charge in the information.

The judgment should be reversed, with instructions to the trial court to enter its order annulling the order under review.

216 Cal. 324

UNITED STATES NAT. BANK OF LOS ANGELES v. STILLER et al.

L. A. 12197.

Supreme Court of California.

Sept. 14, 1932.

1. Corporations ⇨244(5).

As regards stockholders' liability, purchasers of stock became stockholders when they paid for stock and seller indorsed and delivered it.

2. Corporations ⇨243(1).

In action upon stockholders' liability, stockholders *held* liable on basis of stock actually owned, not lesser amount standing in their names on corporation's books (Civ. Code, § 322).

3. Corporations ⇨243(10).

In lender's action on stockholders' liability, president-stockholder *held* estopped to assert he owned less stock than his statement

of personal financial condition, relied upon by lender, showed.

4. Corporations ⇐237.

Stockholders' liability upon renewed note of corporation is determinable as of date of original indebtedness.

5. Corporations ⇐243(1).

Stockholders became legal owners of stock purchased on date agreed upon for issuance and transfer, although actual issuance and transfer took place later.

6. Corporations ⇐269(2).

In lender's action upon stockholders' liability, stockholder-president's personal financial statement showing his holdings in corporation, relied upon by lender, *held* admissible where plaintiff's loan to corporation was made upon strength of statements.

In Bank.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by the United States National Bank of Los Angeles against William Stiller and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

See, also (Cal. App.) 6 P.(2d) 529.

E. A. Miller (of Miller & Patterson), Louis L. Swarthe (of Wolfson & Swarthe), Oliver O. Clark, and Charles R. Nelson, all of Los Angeles, for appellants.

Patterson, Bailey & Montgomery and Charles C. Montgomery, all of Los Angeles, for respondent.

CURTIS, J.

The appellants were stockholders in the Pacific Cotton & Finance Corporation, a corporation organized under the laws of this state. This action was instituted against them upon their liability as stockholders in said company. Three causes of action were contained in the complaint, but as no point is raised as to the correctness of the judgment based upon the third cause of action, it will be necessary for us to devote attention only to the first and second causes of action.

The first cause of action was based upon an indebtedness originally created by a loan of $22,625 by the plaintiff to the Pacific Cotton & Finance Corporation on July 8, 1925, evidenced by a promissory note of that date, executed by said corporation in said sum of $22,625. The second cause of action arose out of an indebtedness originally created by a loan of $15,000 by the plaintiff to said corporation on May 4, 1925, which was also evidenced by a promissory note bearing date May 4, 1925, executed by said corporation in said sum of $15,000. Each of said notes was in plaintiff's favor and bore interest.

The court found that on July 8, 1925, the date on which the note for $22,625 was executed, the total amount of the capital stock of said Pacific Cotton & Finance Corporation issued and outstanding was 6,305 shares, and that each of the three appellants on said date owned 1,051 shares, or one-sixth of the total capital stock of said corporation, and directed judgment to be entered against each of them for one-sixth of the total amount found due on said indebtedness. The court also found that on May 4, 1925, the date on which the note for $15,000 was executed, the total amount of the capital stock of Pacific Cotton & Finance Corporation issued and outstanding was 4,000 shares; that on said date appellant Stiller was the owner of one-third of said issued and outstanding capital stock and that appellant Kay was the owner of 100 shares of said capital stock, but that appellant Cohn was not a stockholder of said corporation on said date. Appellants claim that these findings, with the exception of the one last mentioned to the effect that the appellant Kay was the owner of 100 shares and appellant Cohn was not a stockholder of said corporation on May 4, 1925, the date the note for $15,000 was executed, are not supported by the evidence. Appellants contend that on the respective dates when said indebtednesses were created, that is, on May 4, 1925, and July 8, 1925, the appellants Stiller and Kay were each the owner of only 100 shares of the capital stock of said corporation, and that the total issued and outstanding stock therein was 4,000 shares, and that appellant Cohn was not the owner of any of said stock on either of said dates.

We will first devote our attention to the transaction of May 4, 1925, when $15,000 was borrowed of the plaintiff by the Pacific Cotton & Finance Corporation, being the second cause of action set out in the complaint. At that time there were actually standing on the books of said corporation, 100 shares of its capital stock in the name of appellant Stiller and a like number of shares of stock in the name of appellant Kay. Stiller had been elected president and Kay secretary of the corporation. The corporation desired a loan of $15,000. Evidently Stiller and Kay had never done business with the plaintiff bank up to this time. They were introduced to the bank officials by Cohn. The loan was arranged, but before making it the bank required a financial statement of the Pacific Cotton & Finance Corporation and also a like statement from Stiller, the president. These statements were prepared and presented to the bank by Stiller, and upon the strength of them the loan of $15,000 was made by the

bank to the corporation. The statement of the corporation showed as follows:

Capital stock paid in		$60,300
That is made up of the		
Outstanding stock	$40,000	
Plus the stock to be issued to the new stockholders	15,000	
Plus the amount the books show the corporation owed Mr. Rosenstein on April 27th	5,300	
		$60,300

The statement of appellant Stiller, as presented to the bank at the time this loan was secured, showed, among other things, that he was the owner of "⅓ interest—Pacific Cotton and Finance Corporation, $20,100.00." In explanation of the reason why the statement of Stiller, the president of the corporation, was required by the bank officials, Mr. Heim, one of the vice presidents of the bank, and the official who conducted the negotiations preliminary to the making of the loan testified: "We relied [on making the loan] on the financial statement of the Pacific Cotton and Finance Company with the information we had of the principal stockholder and president of the corporation. We feel a corporation is just as good as the president of the corporation who manages the corporation."

[1, 2] The sole controversy involved under the second cause of action is whether appellant Stiller should be held under his stockholder's liability on his 100 shares only, or whether he should be held liable as the owner of one-third of the stock of the Pacific Cotton & Finance Corporation, as shown by the financial statement made by him at the bank at the time the loan was procured. Appellant Stiller contends that his liability for the indebtedness incurred by reason of the borrowing of said sum of $15,000 was and is fixed by the actual number of shares owned by him and standing in his name on the corporation's books at the date of the incurring of said indebtedness. On the other hand, the respondent contends that, as the loan was made on the strength of Stiller's written statement that he was the owner of one-third interest in the corporation, he is now estopped from asserting that he was in fact the owner of a less number of shares than that stated in his financial statement. Respondent further contends that under the facts proven in this case the appellant Stiller was on the date said indebtedness was incurred in fact the owner, either legal or equitable, of one third of the capital stock of said corporation. As this question involves both causes of action, we will give it first consideration.

While the evidence in many of its features is not as clear as we might wish, we think it is sufficient to warrant the statement that it shows the existence of the following series of facts: In April, 1925, the issued capital stock of the Pacific Cotton & Finance Corporation was owned by Mr. and Mrs. Levinson and a Mr. Rosenstein. These three in that month made an agreement with the three appellants, whereby the latter would advance to the corporation the sum of $15,000 in consideration of which there would be issued to them upon the receipt of a permit from the corporation commissioner to sell the unissued stock of said corporation, 1,500 shares of the treasury stock of said corporation, and in addition thereto the Levinsons and Rosenstein agreed to transfer a sufficient amount of their personally owned stock in said corporation to appellants so that there would then be 6,300 shares of stock of the said corporation issued and outstanding, which shares of stock would be owned in the following amounts: The Levinsons and Rosenstein would own one-third of said stock or 2,100 shares, appellant Stiller would own 2,100 shares, and the two appellants Cohn and Kay would together own the remaining one-third. In pursuance of this agreement, and on or about April 20, 1925, the appellants paid into the treasury of the corporation the sum of $15,000, and Mr. Rosenstein, who owned all of the stock outstanding, except qualifying shares to directors, amounting to 4,000 shares, resigned as a director of the corporation, and indorsed all his certificates of stock and delivered them to the attorney of appellants. Thereupon 100 shares were issued to each of the appellants Stiller and Kay, and Stiller was then elected president and Kay secretary of the corporation. At a later meeting of the board of directors held on April 20, 1925, an application was made to the corporation commissioner for permission to sell all unissued stock to the directors for cash. It was at this stage of the proceedings that negotiations were begun for a loan from the plaintiff bank which resulted in the bank loaning said corporation said sum of $15,000 upon the promissory note of the corporation after appellant Stiller had furnished the bank the corporation's and his own financial statements. It thus appears that, at the time this indebtedness was incurred, although only 100 shares of the stock stood in Stiller's name on the books of the company, Stiller in fact owned his portion of the stock indorsed by Rosenstein and delivered to Stiller's attorney, besides an interest in one-third of the stock for which he had paid and which was to be issued by the corporation as soon as the permit was received from the corporation commissioner. These three lots of stock amount to one-third of the stock of said corporation. The permit to sell said stock was not issued by the corporation commissioner until three days later, May 7th, and none of the stock, except the 100 shares, was actually issued in Stiller's name until July 21, 1925. Under this statement of facts, the respondent bank does not have to rely wholly upon the doctrine of estoppel in order

to hold Stiller on his liability as the owner of one-third of the capital stock of said corporation. To all intents and purposes, Stiller was on May 4, 1925, the owner of one-third of the stock of said corporation, although only 100 shares of stock stood in his name on the books of the corporation. Possibly it might be necessary on account of the strict language of the corporate Securities Act (St. 1917, p. 673, as amended) to eliminate from this calculation the unissued stock which was to be issued after the permit was received from the corporation commissioner. Even if this is done, practically the same result is obtained. At the beginning of the negotiations between appellants and Rosenstein and the Levinsons, with the exception of possibly 2 or 3 shares of stock issued to the Levinsons to qualify them to act as directors, Rosenstein was the owner of the entire outstanding stock of said corporation consisting of 4,000 shares. He indorsed and delivered to appellants' attorney certificates representing this entire block of stock. He had agreed with appellants to sell to them, either from his own stock or from the unissued stock, or from both sources, a sufficient number of shares so that the stock of said corporation would be held one-third thereof by himself and the Levinsons, one-third by Stiller, and one-third by Kay and Cohn. Had the permit never been issued by the corporation commissioner, and had no further stock been issued by the corporation, Stiller and his associates Kay and Cohn would undoubtedly have received out of the 4,000 shares in the hands of their attorney the shares of stock to which they were entitled under their agreement with Rosenstein. The evidence does not directly show the reasons why Rosenstein turned over to appellants' attorney the 4,000 shares, when by the strict letter of his agreement he was only required to deliver to them a less number of shares—2,700, as we construe their agreement. It may reasonably be inferred from his act of indorsing and delivering this excessive amount of stock to the attorney that he intended, should any slip occur in their plan to issue the new stock, the appellants would be amply protected by the deposit of the 4,000 shares with the attorney. In either event, the appellant Stiller would receive the amount of stock which Rosenstein had agreed to sell and for which Stiller had paid, and he would thus own a one-third interest in the Pacific Cotton & Finance Corporation. It is true that only 100 shares of this stock stood in Stiller's name on the books of the corporation.

Under section 322 of the Civil Code as it stood at the time of this transaction, a stockholder is liable for his proportionate amount of the indebtedness of the corporation not only for the stock standing in his name on the books of the company, but also for all stock owned by him which stands on the books in the name of another. Duke v. Huntington, 130 Cal. 272, 62 P. 510; Hughes Mfg., etc., Co. v. Wilcox, 13 Cal. App. 22, 27, 108 P. 871, 873; 6 Cal. Jur., § 384, p. 1004. Stiller's liability, therefore, extended to his entire ownership of stock in the corporation which, as we have seen, was one-third of the entire stock outstanding.

[3] Furthermore, under the theory of estoppel, we think the judgment against Stiller must be sustained. The respondent bank before it would agree to make the loan to the Pacific Cotton & Finance Corporation required of Stiller, its president, a statement showing his own financial condition. Undoubtedly one purpose of this requirement was to ascertain not only the financial standing of Stiller, but also the amount of his interest in the corporation of which he was president. The statement presented by Stiller showed that he was possessed of considerable means in his own right and was also the owner of one-third of the capital stock of the corporation. Unquestionably this statement had a material bearing upon the decision of the bank officials in making the loan to Stiller's corporation. It is reasonable to suppose that had the statement shown that Stiller was the owner of only a small amount of property, or that he was possessed of only a nominal interest in the corporation, the loan might not have been made. It has been held that where the holder of the record title is not the owner of the stock, his liability to creditors is based, not upon ownership, but upon estoppel. Hughes Mfg., etc., Co. v. Wilcox, 13 Cal. App. 22, 108 P. 871. If one, not an owner of stock, can be held liable by estoppel by permitting the stock to stand in his name on the books of the company, we think the same rule should apply when a person, even though not the owner of stock, makes a positive and definite statement that he is such owner, and by the means of such a statement obtains property or credit for himself or for his company. Appellants have cited us to no authority to the contrary, but content themselves with the statement that respondent is barred from relying upon the claim of estoppel by reason of its failure to inform itself by an investigation of the books of the corporation of the extent of Stiller's ownership of stock. Under the circumstances shown in this case, we think this contention is without merit. "Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual agreement; and he is under no obligation to investigate and verify statements to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith."

"Where one is justified in relying, and in fact does rely, upon false representations, his

right of action is not destroyed because means of knowledge were open to him. In such a case no duty rests upon him to employ such means of knowledge. * * * It is said not to be just that a man who deceives another should be permitted to say to him, 'You ought not to believe or trust me,' or 'You are yourself guilty of negligence.'" 12 Cal. Jur. § 34, p. 758.

[4, 5] This disposes of the transaction of the loan made on May 4, 1925, as set forth in plaintiff's second cause of action.

The next transaction was that occurring on July 8, 1925, and is contained in plaintiff's first cause of action. On that date, as we have previously observed, the Pacific Cotton & Finance Corporation borrowed of the respondent bank the sum of $22,625 and gave its promissory note for that amount. This note was renewed on October 6, 1925, but as the original indebtedness was created on July 8, 1925, this date must be used in fixing the liability of the several stockholders for their proportion of this indebtedness. This indebtedness at the time of the commencement of the action had been reduced to something slightly over $6,000. As stated above, the permit of the corporation commissioner to sell the unissued stock for cash had been issued on May 7, 1925, some two months before this second loan was made. This was the date fixed by the original agreement between Rosenstein and the Levinsons on the one hand and the appellants on the other when the stock purchased by appellants should be issued and transferred. On this date, therefore, the appellants became the legal owner of the stock purchased by them under their agreement with Rosenstein and the Levinsons even though the actual issuance and transfer of this stock was not made until July 21, 1925. There was no change in the ownership of the stock between May 4, and July 8, 1925, in so far as the appellants were concerned, except that there was evidence, which the court evidently accepted and acted upon, that appellant Stiller had transferred one-half of his stock to his son, Marvin Stiller. Appellant Stiller under the agreement made with Rosenstein and the Levinsons bought one-third of the stock and appellants Kay and Cohn bought one-third between them, or one-sixth each. As Stiller conveyed one-half of his third of the stock to his son, this left him with one-sixth of the stock. The court accordingly found that each of these three appellants was liable for one-sixth of the remaining amount due on the indebtedness created on July 8, 1925. The same character of defense is made by these three appellants as was made by the appellant Stiller in reference to his liability under the previous indebtedness. Stiller and Kay contend that as only 100 shares of stock stood of record in their names and as the total outstanding stock of the corporation at that date was 6,300 shares, their proportion of said indebtedness would only be 1/63 of the same, while Cohn contends that as no stock stood of record in his name, he was not liable for any part of said indebtedness. Under the authorities heretofore cited, the appellants are liable as stockholders for the proportionate amount of said indebtedness upon all stock owned by them respectively whether the same stood upon the record of the books of the corporation or not. As the appellants had previously bought and paid for their stock, they became the legal owners thereof at the date of said purchase, at least as to a part of said stock, and as to the balance thereof at the date the permit was issued by the corporation commissioner, and as they remained such owners, except as to the stock transferred by Stiller to his son, up to and at the time the indebtedness of July 8, 1925, was incurred, they are liable for said indebtedness as found by the trial court.

[6] There is no merit in appellant Stiller's contention that the court erred in admitting in evidence the two financial statements presented to the plaintiff by appellant Stiller, at the time the loan of $15,000 was made on May 4, 1925. Appellant particularly objects to the admission in evidence of his own personal financial statement claiming the same was not material to any issue in the case and that the trial court was misled thereby. The admission of this statement was proper in view of the evidence given by Mr. Heim, who testified to the effect that the loan was made, in part at least, upon the strength of Stiller's financial statement.

We find no error in the record.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SEAWELL, J.; PRESTON, J.; SHENK, J.; TYLER, Justice pro tem.

216 Cal. 321

HENDRICKS v. HENDRICKS.

L. A. 11688.

Supreme Court of California.

Sept. 13, 1932.

1. Judgment ⇐405.

Equity will not vacate judgment obtained through parties' collusive connivance.

2. Judgment ⇐405.

To warrant vacation of judgment, there must be showing of coercion, imposition, or fraud on party complaining.

3. Judgment ⇐443(1).

To warrant vacation of judgment for fraud or coercion, fraud or means of coercion must have been extrinsic or collateral to subject of dispute in action.

4. Judgment ⇐443(1).

Judgment or order which is creature of extrinsic fraud may be vacated.

5. Judgment ⇐443(1).

Equity will not vacate judgment for coercion, duress, or fraud, evidence of which could have been presented to court or attorney chosen by complainant during pendency of action in which judgment was rendered.

6. Divorce ⇐167.

Wife failing to inform her attorney of husband's threats during pendency of her divorce action *held* not entitled to annulment of interlocutory divorce decree for fraud and coercion.

In Bank.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Ada May Hendricks against Clifford Hendricks to annul and set aside an interlocutory divorce decree. From a judgment of dismissal, plaintiff appeals.

Affirmed.

For prior opinion, see 6 P.(2d) 1004.

Lorrin Andrews, of Los Angeles, for appellant.

Macfarlane, Schaefer, Haun & Mulford and Henry Schaefer, Jr., all of Los Angeles, for respondent.

WASTE, C. J.

Plaintiff appeals from a judgment of dismissal entered upon the sustaining of a general demurrer to the complaint without leave to amend.

The action is one to annul and set aside an interlocutory decree of divorce alleged to have been obtained by reason of the threats, coercion, and duress of the defendant. It appears from the complaint herein that in March, 1925, the defendant brought suit for divorce in the state of New York charging plaintiff with having committed adultery. In July of the same year the plaintiff instituted an action in California for maintenance. The defendant visited the plaintiff in California the following October and offered to dismiss the New York action if plaintiff would abandon her maintenance suit and, instead, bring an action for divorce charging the defendant with desertion. Upon this occasion and at divers other times during the ensuing years, the defendant is alleged to have stated that he had sworn confessions of certain named persons that each of them had committed adultery with plaintiff; that he would disgrace and degrade plaintiff; that her child would be taken from her by the court and that she would never be allowed to see the child again; and that he would secretly take the child from her unless she agreed to his demands. In 1925 the plaintiff apparently "partially consented," but nevertheless neglected to commence the divorce action until 1927. The matter then remained dormant until November, 1928, at which time an answer was filed and a stipulation signed by the respective attorneys that the divorce action should be tried as a default. Thereafter the interlocutory decree which it is here sought to have set aside was entered. The complaint in the present action then alleges that subsequent to the entry of said decree and between December, 1928, and April, 1929, the plaintiff for the first time ascertained that the statements and threats of the defendant were false and untrue and made solely for the purpose of intimidating and compelling plaintiff to bring the suit in divorce against her will and for the purpose of freeing the defendant from his marital obligations to plaintiff and their child.

[1-5] We find no error in the trial court's ruling sustaining the demurrer to the complaint without leave to amend. Equity will not vacate a judgment obtained through the collusive connivance of the parties to the action. To warrant such relief there must be a showing of coercion, imposition, or fraud upon the party complaining. Bancroft v. Bancroft, 178 Cal. 359, 362, 173 P. 579, L. R. A. 1918E, 1029; Lanktree v. Lanktree, 42 Cal. App. 648, 651, 183 P. 954. However, the fraud or the means of coercion must be extrinsic or collateral to the subject of dispute in the action wherein the order or judgment complained of was entered. If a judgment or order is the creature of extrinsic fraud, it may be vacated. Where, however, evidence of the coercion or duress or the fraud could have been presented to the court or to an attorney of the complainant's own choosing during the pendency of the action so that full examination of the facts could be made and full protection given to the rights of the par-

ties, equity will not interfere but will leave the parties to the fraudulent transactions where they have placed themselves. Mitchell v. Cline, 84 Cal. 409, 416, 24 P. 164.

[6] The alleged threats to blacken the plaintiff's reputation, the charges of adultery, and the threats to deprive plaintiff of the custody of her child by court order or other means, were matters over which the plaintiff herein could have had a thorough hearing during the pendency of the divorce action. The court before whom that action was pending was in a position to determine all issues pertinent thereto, including any question as to the custody of the minor child of the parties. It also possessed the necessary vitality to compel obedience to its decrees. Plaintiff should have informed her attorney in the divorce action of all the facts here alleged, and she would have received the protection of the court in all of her marital rights. Failing to seasonably do this, it is now too late to seek relief on the grounds here urged. There is nothing in the record to indicate that the attorney representing plaintiff in the divorce action was in fact the attorney for the defendant or that he was inimical in any respect to the best interests of the plaintiff. Pico v. Cohn, 91 Cal. 129, 133, 25 P. 970, 27 P. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159. The allegations of the complaint disclose, at best, intrinsic fraud and coercion, and plaintiff is therefore concluded by the interlocutory decree of divorce procured through the collusion of the parties litigant, which decree has long since become final. It is our conclusion, therefore, that the complaint fails to present a case of equitable cognizance.

The judgment is affirmed.

We concur: CURTIS, J.; LANGDON, J.; TYLER, Justice pro tem.; PRESTON, J.; SHENK, J.

216 Cal. 319

KASPER v. SHERE METAL PRODUCTS CORPORATION et al.

S. F. 14355.

Supreme Court of California.

Sept. 13, 1932.

Brokers ⇐86(4).

Evidence sustained finding that plaintiff, suing for commission on contract entered into by defendant and another, was not instrumental in bringing about contract.

In Bank.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by J. A. Kasper against the Shere Metal Products Corporation and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

D. P. Eicke, of Stockton, and Grant & Zimdars, of San Francisco, for appellant.

P. L. Benjamin, of San Francisco, for respondents.

CURTIS, J.

The defendant the Shere Metal Products Corporation, in a letter written to plaintiff on August 25, 1924, agreed to pay plaintiff a commission if the latter were instrumental in placing with a suitable firm certain products manufactured by said defendant, either on a royalty or straight sales basis. Thereafter plaintiff endeavored to interest the Stewart-Warner Company in these products, but without any definite results. Some three years after the date of said letter a contract was entered into under circumstances not necessary to state here between the Gat-Gun Lubricating Corporation, the successor in interest to the Shere Metal Products Corporation, and the Bassick Manufacturing Company, a subsidiary corporation of the Stewart-Warner Company, whereby the Bassick Manufacturing Company agreed on a royalty basis to manufacture and handle the products of the defendant the Gat-Gun Lubricating Company. The products referred to consisted of certain lubricating equipment which had theretofore been manufactured by the two defendant companies and for the manufacture of which they held patents issued by the government of the United States. Upon learning of the contract between the Gat-Gun Lubricating Corporation and the Bassick Manufacturing Company, the plaintiff instituted this action claiming that he was instrumental in bringing together said parties to the contract, and in their later execution of said contract. The trial court held against the plaintiff, and rendered a judgment in favor of the defendants.

On the appeal practically the sole question presented is whether the evidence is sufficient to support the findings. We have read with care the briefs of plaintiff, which are devoted almost wholly to a discussion of the evidence, and have examined the entire record before us. Our conclusion is that there is ample evidence in the record to support the findings of the trial court. It would serve no useful purpose whatever to set forth this evidence or to analyze it with reference to the issue presented. The length of time intervening between the efforts put forth by the plaintiff in his endeavor to interest the Stewart-Warner people, and the time when the contract was executed with its subsidiary corporation, and the unusual circumstances which existed just

prior to the execution of said contract which were the real and effective cause of the execution thereof, indicate most strongly that plaintiff's efforts were without avail, and that plaintiff was not in any way instrumental in bringing about said contract.

The only legal question which might be involved in the case was whether the defendant the Gat-Gun Lubricating Corporation was liable on the contract entered into with the plaintiff by the Shere Metal Products Corporation, but, as the court has held that the latter corporation was in no way liable to the plaintiff, this legal question fades out of the case. In our opinion, the judgment should be affirmed, and it is so ordered.

We concur: WASTE, C. J.; LANGDON, J.; TYLER, Justice pro tem.; SEAWELL, J.; PRESTON, J.; SHENK, J.

BANK OF ITALY NAT. TRUST & SAVINGS ASS'N v. BENTLEY et al.*

Sac. 4644.

Supreme Court of California.

Sept. 1, 1932.

Rehearing Granted Sept. 28, 1932.

1. Mortgages ⇐218.

Generally, in absence of statute, mortgagee is not confined to remedy of foreclosure on mortgagor's default, but may also sue on personal obligation secured by mortgage.

2. Mortgages ⇐218.

Deed of trust, not being a "mortgage," is not within statute requiring exhaustion of mortgaged property before bringing personal action against debtor (Code Civ. Proc. § 726).

[Ed. Note.—For other definitions of "Mortgage," see Words and Phrases.]

3. Mortgages ⇐386.

Creditor cannot foreclose ordinary deed of trust, in absence of unusual circumstances justifying special equitable relief; trustee's sale being only remedy.

4. Courts ⇐93(1).

Court cannot disturb long-settled property rule distinguishing between deeds of trust and mortgages and incidents thereof.

In Bank.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by the Bank of Italy National Trust & Savings Association against G. J. Bentley and others. Judgment for defendants, and plaintiff appeals.

Reversed.

For prior opinion, see 4 P.(2d) 546.

Louis Ferrari, T. J. Bricca, S. J. Tosi, and C. H. White, all of San Francisco, R. C. Minor and Gumpert & Mazzera, all of Stockton, and Cullinan & Hickey, of San Francisco, for appellant.

David F. Bush, of Oakdale, and Nutter & Rutherford, and A. P. Hayne, all of Stockton, for respondents.

PER CURIAM.

This is an action to recover on a note secured by a deed of trust. The instruments were executed on February 14, 1923. On February 11, 1928, three days before the expiration of the four-year statute of limitations (Code Civ. Proc. § 337) applicable to the note, notice of breach was filed and plaintiff sued to recover thereon. Subsequently, on June 8, 1928, a sale of the property was held under the terms of the deed of trust, the proceeds were applied to the indebtedness, and an amended complaint was filed, seeking judgment for the balance remaining due. The action was not brought to recover a deficiency, and no allegation was made that the security was valueless. The lower court gave judgment for defendants on the theory that no independent suit could be maintained upon the note, but that the security must first be exhausted by the appropriate remedy under the deed of trust, and an action brought thereafter for any deficiency.

[1] The question presented by these facts is, therefore, whether it is possible to sue on a promissory note secured by a deed of trust without first exhausting the security or showing that it is valueless. This question is of great importance, and strangely enough has never been definitely settled in California. It has, however, been frequently mentioned in our decisions and discussed in the reviews. See Herbert Kraft Co. v. Bryan, 140 Cal. 73, 73 P. 745; Smiley v. Watson, 23 Cal. App. 409, 138 P. 367; Pitzel v. Maier Brewing Co., 20 Cal. App. 737, 130 P. 705, 706; Powell v. Patison, 100 Cal. 234, 236, 34 P. 676, 677; Quinn v. Rike, 50 Cal. App. 243, 194 P. 761; United States Oil & Land Co. v. Bell (C. C. A.) 219 F. 785; Commercial National Bank of Los Angeles v. Catron (C. C. A.) 50 F.(2d) 1023; Kidd, Trust Deeds and Mortgages in California, 3 Cal. L. Rev. 381; Lewinson, Negotiable Instruments in California; 9 Cal. L. Rev. 374, 387; notes, 1 Cal. L. Rev. 297; 20 Cal. L. Rev. 318; 5 So. Cal. L. Rev. 227.

It should be made clear at the outset that the answer to this question depends sole-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 20 P.2d 940.

ly upon the provisions of section 726 of the Code of Civil Procedure. The common-law rule, and the general rule to-day in the absence of statute, is that upon default of the mortgagor, the mortgagee is not confined to his remedy of foreclosure, but may in addition bring suit upon the personal obligation. The above-mentioned section was designed to change this rule, and to make the mortgaged property the primary fund, to be exhausted before any other remedy could be had against the debtor. See Martin v. Becker, 169 Cal. 301, 146 P. 665, Ann. Cas. 1916D, 171; Fleming v. Fairmont & M. R. Co., 72 W. Va. 835, 79 S. E. 826, 49 L. R. A. (N. S.) 155, Ann. Cas. 1915D, 978; 41 C. J. 839.

[2] An examination of section 726 and of the cases which have construed it leaves no doubt as to its meaning in this connection. The statute reads in part: "There can be but *one action* for the recovery of any debt, or the enforcement of any right secured by *mortgage* upon real or personal property, *which action must be in accordance with the provisions of this chapter.*" It will be observed that there is no statement that before any remedy can be had on a *secured obligation*, the *security* must first be exhausted. There is no general reference to "security" as such. The statute deals with mortgages, and with no other type of security. It has accordingly been held that where a *pledge* of property is made to secure a debt the pledgee may disregard the security and sue on the personal debt (Ehrlich v. Ewald, 66 Cal. 97, 4 P. 1062; Jones v. Evans, 6 Cal. App. 88, 91 P. 532; Commercial Savings Bank v. Hornberger, 140 Cal. 16, 73 P. 625; Marble Co. v. Merchants' National Bank, 15 Cal. App. 347, 115 P. 59; Schwartz v. Mead, 116 Cal. App. 606, 3 P.(2d) 48); where a vendor has a *lien* as security for the money due under the contract of sale, he may disregard it and bring a personal action against the purchaser (Samuel v. Allen, 98 Cal. 406, 33 P. 273); and where a seller reserves *title* to goods sold under a conditional sale as security for the price, he is not required to proceed first to exhaust the security (People's Bank v. Porter, 58 Cal. App. 41, 208 P. 200).

It must be considered as thoroughly settled in California that a deed of trust is not a mortgage. Substantial differences between the two types of security have been recognized, and statutes applicable to mortgages have generally been held inapplicable to deeds of trust. See Bayer v. Hoagland, 95 Cal. App. 403, 273 P. 58; Weber v. McCleverty, 149 Cal. 316, 86 P. 706; Bateman v. Burr, 57 Cal. 480; More v. Calkins, 95 Cal. 435, 30 P. 583, 29 Am. St. Rep. 128; Penryn Fruit Co. v. Sherman-Worrell Fruit Co., 142 Cal. 643, 76 P. 484, 100 Am. St. Rep. 150; Stockwell v. Barnum, 7 Cal. App. 413, 94 P. 400; McDonald v. Smoke Creek Live Stock Co., 209 Cal. 231, 286 P. 693; Kidd, supra, 3 Cal. L. Rev. 381; note, 12 Cal. L. Rev. 307. It necessarily follows that the deed of trust does not come within the terms of section 726, Code of Civil Procedure. Nor do any of the California cases support a contrary conclusion. Thus, Powell v. Patison, supra, the one upon which the greatest reliance is placed by defendants, was concerned with an instrument not included in the record, and the court had no means of determining whether it was a deed of trust or a mortgage. Moreover, as pointed out in Herbert Kraft Co. v. Bryan, supra, page 81 of 140 Cal., 73 P. 745, 747, the decisions cited by the court in the Powell Case were all mortgage cases. Pitzel v. Maier Brewing Co., supra, is another decision in which the nature of the instrument was uncertain, and the language of the court's opinion shows a clear understanding of the distinction between the two forms of security.

[3] The conclusion that a deed of trust does not come within the terms of section 726, Code of Civil Procedure, is made necessary not only by the express reference therein to mortgage, but also by the rest of its provisions. It is provided that there can be but one action, and that this action "must be in accordance with the provisions of this chapter." The chapter provides for the *action of foreclosure by a judicial sale.* If the limitations of this section are applied to deeds of trust, its benefits must also be made available. But it has been definitely determined that in the absence of unusual circumstances justifying special equitable relief, the creditor cannot "foreclose" an ordinary deed of trust, i. e., he cannot, in lieu of a trustee's sale, have a judicial sale. Bayer v. Hoagland, supra; Galusha v. Meserve, 58 Cal. App. 174, 208 P. 348.

[4] It is said that such a result as we have reached would be unreasonable, being based upon the form of the instrument, rather than the spirit of the Code. The same has been said of the entire anomalous distinction between deeds of trust and mortgages. See Hodgkins v. Wright, 127 Cal. 688, 692, 60 P. 431; Sacramento Bank v. Alcorn, 121 Cal. 379, 382, 53 P. 813; Kidd, supra, 3 Cal. L. Rev. 381. But the distinction and its incidents have survived for so long a period as to render them safe from judicial attack. The remedy for the evils attending the use of deeds of trust, if there are such, must be legislative. Any disturbance by this court of these settled rules of property would cause endless confusion and great hardship.

The judgment is reversed.

216 Cal. 335

ACME INVESTMENT CORPORATION v. THOMPSON.

L. A. 13877.

Supreme Court of California.

Sept. 15, 1932.

1. Chattel mortgages ⇐127.

Mortgage of crop by tenant *held* to cover only tenant's interest in crop to exclusion of share to which landlord was entitled.

2. Bills and notes ⇐518(1).

In action on note, evidence *held* insufficient to support finding of lack of consideration for note.

In Bank.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by the Acme Investment Corporation against J. D. Thompson. Judgment for defendant, and the plaintiff appeals.

Reversed.

For prior opinion, see 12 P.(2d) 975.

Hickcox & Trude, of El Centro, for appellant.

Frank Birkhauser, of El Centro, for respondent.

PER CURIAM.

The petition for hearing in this matter was granted in order that this court might amend the judgment entered by the District Court of Appeal of the Fourth Appellate District, otherwise the opinion written by Mr. Presiding Justice Barnard and concurred in by Associate Justice Jennings and Associate Justice Scovel, sitting pro tempore, is adopted.

This is an action on a promissory note given for $487; the complaint being in the usual form. The answer admits the execution of the note; alleges that the same was obtained from the defendant by the plaintiff by means of false and fraudulent representations; and alleges that there was no consideration therefor. The court found that all of the allegations of the complaint are true, except only the allegations that the note was given for a valuable consideration and "that same is due and owing from defendant to plaintiff"; that no false or fraudulent representations were made by the plaintiff or its agents; and that there was no consideration for the note. Judgment was entered for the defendant, followed by this appeal.

The appellant argues that the findings to the effect that the note in question was given without consideration are mere legal conclusions and not properly findings at all. While the findings upon the subject are open to criticism, we will, for the purpose of this opinion, take them as sufficient and consider the main point presented, which is that the evidence is not sufficient to sustain any such finding or conclusion, which contention we think must be sustained.

It appears from the evidence that one Jackson was in possession of certain real property in Imperial county under a lease dated April 15, 1926, and expiring February 1, 1927, upon which land he raised a crop of cotton during the year 1926. While the lease was not introduced in evidence, being only marked for identification, it appears from other evidence that appellant was to receive one-fourth of the crop produced, in return for the use of the land. The respondent made certain advances to Jackson and took a crop mortgage covering this crop of cotton. After harvesting of the crop had started, an agent of the appellant, who had heard that the crop was being delivered to the respondent, called upon him and asked him about the landlord's share. This agent testified that at that time it was agreed between them that the respondent should go ahead and sell the crop and turn in one-fourth of the proceeds to the appellant. While the respondent testified he could not remember whether such an agreement was made, it is undisputed that he then said that he would come in as soon as the crop was sold and "make return." The harvesting of the crop continued through the fall of 1926 and the early part of 1927, and at its conclusion the respondent came in and reported to appellant's agent the amount of the proceeds. At that time respondent and appellant's agent took these returns and figured out "what the one quarter share would be." The money was not paid, and on September 24, and again on September 29, 1927, the appellant's agent wrote to the respondent demanding immediate payment of the money, and threatening suit. On October 1, 1927, the respondent replied as follows:

"Your letter of Sept. 29th received and note what you have to say regarding Jackson-Polle rent.

"I am sorry to say I cannot pay this at this time, as things have been very bad this year, however, if it is satisfactory I will give you my personal note if you or your people will wait until the harvesting of the barley crop as that will be the only chance I have of collecting the money. Jackson has no money at all so if it will be satisfactory I will make you a note at 6% interest payable June 15th, 1928. * * * Please let me know if this will be satisfactory as it is all I can do at this time."

On October 19, 1927, the appellant's agent wrote the respondent that they would take his note for the amount due, being $457, if he would include interest from the preceding December, "about the time the money was due,"

and inclosing a note for $487, which was signed and returned. The respondent testified that this note represented one-quarter of the proceeds of the crop sold plus "some interest." He also testified that at the time he considered that the appellant "was entitled to its rent," that the appellant had threatened to sue him, and that he gave the note because he could not afford to be sued at that time. While there is some conflict in the testimony, there is no conflict on the essential facts.

[1, 2] Under well-settled rules the crop mortgage held by the respondent covered only Jackson's interest in the crop and did not cover the one-fourth share in the same to which the appellant was entitled. Sunol v. Molloy, 63 Cal. 369; Woodsend v. Chatom, 191 Cal. 72, 214 P. 965. While we think the evidence shows an agreement on the part of the respondent to sell the crop and turn over one-fourth of the proceeds to the appellant, regardless of whether or not such an agreement was made, respondent was obligated to turn over to appellant one-fourth of such proceeds, since he had sold that part of the crop to which he had no right and which belonged to the appellant. In such a situation he offered to give the note if he were given time to pay, which offer was accepted. It also appears that he gave the note to avoid being sued, which, as he says, he could not afford to have happen at that time. It not only appears that there was ample consideration for the note, but the record is without any evidence to sustain a finding and conclusion to the contrary. The respondent points out that he answered "None whatsoever" to a question as to whether there was any consideration for his signature to this note. This conclusion, of course, is not evidence.

Some contention is made by the respondent that the evidence shows that the note was given upon a representation that the appellant would let the same tenant have the land to put into a crop of barley the succeeding year. While respondent's letter of October 1, 1927, indicates that he hoped to get some money from a barley crop, it falls far short of making the note conditional upon such an event. If this contention could be sustained, it would not establish an absence of consideration; there being ample consideration, otherwise, for the note. Had such a promise been made by the appellant, it would appear to be without consideration, since the amount of the note was due from the respondent anyway. If such a representation had been made, it might have been material to a defense of misrepresentation, but the court found that no misrepresentations were, in fact, made. Furthermore, the evidence does not show a misrepresentation in this respect. When asked if the appellant or any of its agents had ever told him that either he or Jackson could have the land for the purpose of putting in a barley crop, the respondent replied that he did not remember, but that he thought one of these agents said "he would help us out." Not only is there no satisfactory evidence that such a representation was made, but there is no evidence that, if made, the appellant did not do all within its power to comply therewith. When asked how he happened to execute this note, the respondent answered: "Because when Jackson and Polle had failed that $420.00 of paying me what they owed me, I thought possibly if we could get Jackson to put this barley in, his partner had died, he got killed accidentally while this transaction was pending, to put this same piece of ground into barley, we could get the rent for the Acme Investment Corporation and I could get my $420.00, which I was in the hole on the cotton crop previous. That was my idea in signing this note and sending it to them, and Jackson failed to put the barley in."

The respondent also testified that he understood that Jackson "could not get finances to put the barley in." The respondent asks us to consider two affidavits which were filed in connection with a motion he made asking to reopen the case for further evidence. Not only are these affidavits not in the record and not properly before us, but we may add that, if they were to be considered, they would only strengthen the view we have here taken.

The note provided for an attorney's fee, and the court found, in accordance with the allegation of the complaint, that a reasonable attorney's fee in this case is $100.

The judgment is reversed.

MOULTON, State Director of Agriculture, v. WILLIAMS FRUIT CORPORATION et al. *

Civ. 8383.

District Court of Appeal, First District, Division 2, California.

Sept. 10, 1932.

Rehearing Denied Oct. 10, 1932.

Hearing Granted by Supreme Court Nov. 9, 1932.

1. Factors ⇐2½.

Agriculture director's action on produce dealer's bond, based on dealer's failure to pay consignors, *held* maintainable, although there was neither allegation nor proof of fraud, deceit, or willful negligence (St. 1927, p. 1814, § 5).

St. 1927, p. 1814, § 5, provides for both an action on the produce dealer's bond sounding in tort, based on fraud, deceit, or willful negligence and brought by the consignor, and an action sounding in debt for

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 21 P.2d 936.

failure to pay consignors, brought by the director of agriculture.

2. Factors ⊂⊃2½.

That "$15 per ton guarantee" was inserted in consignment contracts did not convert them into contracts of sale so as to preclude recovery on produce dealer's bond for breach of consignment contracts (St. 1927, p. 1814, § 5).

3. Factors ⊂⊃2½.

That surety on produce dealer's bond did not know that dealer's consignment contracts contained price guaranty *held* not to bar recovery on bond for breach of contracts (St. 1927, p. 1814, § 5).

4. Factors ⊂⊃34.

Absent clear language in consignment contract, produce dealer cannot sell to himself (St. 1927, p. 1816, § 9).

5. Factors ⊂⊃2.

State statute regulating produce dealers *held* not in conflict with federal produce agency act (St. 1927, p. 1812; 7 USCA § 491 et seq., and § 496).

6. Commerce ⊂⊃57.

State statute regulating produce dealers *held* not violative of commerce clause (St. 1927, p. 1812; Const. U. S. art. 1, § 8, cl. 3).

St. 1927, p. 1812, is an attempt on the part of the Legislature to regulate dealers, not commerce; the statute does not purport to regulate the price, size, or form of the package, the grade or grades of the contents, the weight of the package or of the shipment, the manner of the shipment, the route of the shipment, or any other feature of commerce, but it seeks to prohibit fraud and impositions on the part of the shipper as against the producer, and to this end requires that the produce dealer give a bond and take out a license.

7. Commerce ⊂⊃48.

That state statute incidentally or indirectly affects interstate commerce does not render statute invalid, if otherwise reasonable exercise of police power (Const. U. S. art. 1, § 8, cl. 3).

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Dudley Moulton, as State Director of Agriculture, against the Williams Fruit Corporation and the American Surety Company of New York. Judgment for plaintiff, and the last named defendant appeals.

Affirmed.

Joseph G. De Forest, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Frank English, Deputy Atty. Gen. (C. J. Carey, of San Francisco, of counsel), for the People.

STURTEVANT, J.

The plaintiff commenced an action to recover on a statutory bond. It named as defendants the Williams Fruit Corporation, the principal on the bond, and American Surety Company of New York, the surety on the bond. Both defendants were served, but the surety company only appeared and answered. The trial court made findings in favor of the plaintiff, and from the judgment entered thereon the surety company has appealed.

By chapter 860 of the Statutes of 1927 (page 1812), a statute was enacted for the bonding, licensing, regulation, and supervision of produce dealers. On March 1, 1928, the Williams Fruit Corporation applied to the state director of agriculture for a license. As a part of its application, it delivered to the director of agriculture the bond in suit. Later a license was issued and the principal commenced business. Thereafter, being informed that the Williams Fruit Corporation had not paid the producers in accordance with the terms of its contracts, the state director of agriculture caused them to file their claims, and thereon he commenced this action in their behalf. Five producers filed claims. Each claim was based on a written contract which was made on a printed blank. Each contract was identical except as to names of persons and places and the quantity of produce covered by the contract. Under each document the grower "* * * places on consignment with shipper the entire crop. * * *" The shipper "* * * accepts said consignment and agrees to market same to best possible advantage in its judgment at various cities in the United States, Canada and Cuba." In one of the blanks on each document there was inserted with pen and ink, "$15 per ton guarantee." The verified claims showed that the shipper afterwards paid each grower something, but that it had not paid any one of the growers the full sum of $15 per ton, and that the balance so unpaid amounted to $5,225.21.

[1] 1. The defendant contends it is not liable because there was no breach of any provision of the bond. It then asserts that there was neither allegation nor proof of "* * * fraud, deceit or wilful negligence * * *" on the part of the Williams Fruit Corporation. It was not necessary that there should be. In section 5 of the statute it is provided: "* * Said bond shall be conditioned upon compliance with the provisions of the act and upon the faithful and honest handling of farm products in accordance with the terms of this act." In the same section it is provided: (a) "Any consignor of farm products claiming to be injured by the fraud, deceit or wilful negligence of any produce dealer may bring action upon said bond against both principal and surety in any court of competent jurisdiction

to recover the damages caused by such fraud, deceit and wilful negligence, or the failure to comply with the provisions of this act. (b) In case of failure by a produce dealer to pay consignor creditors for farm produce received from said consignors to be sold, the state director of agriculture shall proceed forthwith to ascertain the names and addresses of all consignor creditors of such produce dealer, together with the amounts due and owing to them and each of them by such produce dealer, and shall request all such consignor creditors to file a verified statement of their respective claims with the state director of agriculture. Thereupon the state director of agriculture is hereby authorized to and shall proceed forthwith to bring an action on the bond in behalf of said consignor creditors which has been filed in the department by said produce dealer." (Parentheses ours.) As we read this statute, actions sounding in tort are provided for in subdivision (a) and actions sounding in debt are provided for in subdivision (b). Actions of the class first named are to be maintained by the producer, while those of the second class are to be maintained by the director. Each may sue on the bond. Looking back at the condition of the bond, it will be seen that it covers all of the actions just mentioned. The allegations of the complaint in the instant case were addressed to claims in debt, and those allegations were fully sustained by the proof.

[2-4] 2. The defendant asserts that the contracts made between the dealer and the producers show a sale and not a consignment. The statement is not sustained by the record. Before the blanks were filled, each contract was a clean-cut contract of consignment. In each contract, with pen and ink, there was inserted "$15 per ton guarantee." Stressing the matter of that insertion, the defendant claims that it converted a contract of consignment into a contract of sale. We think it had no such effect. Each document was but a consignment contract which guaranteed to the grower $15 per ton. As such it was enforceable in this state. In Pugh v. Porter Brothers Co., 118 Cal. 628, at page 631, 50 P. 772, 773, the court said: "His position under the guaranty is similar to that which would have arisen had he taken the goods on a del credera commission, only that, instead of merely guarantying the sales that he may make, he also guarantees that the goods shall be sold for a fixed amount. His liability to his principal for this amount becomes absolute upon a sale for cash, or, if upon credit, upon the maturity of the credit. [Citing cases.]" The defendant says: "In the case at bar it is not merely a consignment, because the produce dealer guarantees to the grower a price of $15 per ton—this makes it a sale, and we are not liable on the bond for the purchase price." It will be conceded at once that cases can be conceived in which the parties executed a contract to buy and sell whereas it might have been the intention of one or both to execute a contract of consignment containing a guaranty of the price or some other guarantee. In the instant case it will suffice to state that the words used by the contracting parties did not constitute a contract to buy and sell, but did constitute a contract of consignment. The fact that the contract contained a guaranty of the price was not out of the ordinary. Such contracts are common and are enforceable. Pugh v. Porter Brothers Co., supra; 25 C. J. 367. This defendant asserts that it had no information regarding the insertion of the guaranty covenant. Perhaps not. Perhaps it did not have any information regarding other covenants, but those were matters for it to take up with the dealer and with which the plaintiff was in no manner concerned. The defendant also asserts that the producers consented that the dealer might sell to itself. There is not a word in the contract to that effect. There was no proof to that effect. In the absence of clear language on that subject in the contracts, the right did not exist. It was expressly inhibited by the provisions of section 9 of the statute.

[5] 3. It is next contended that the state statute is in conflict with the Act of Congress known as the "Produce Agency Act" (7 USCA § 491 et seq.). A comparison of the two shows no conflict, and, furthermore, section 3 of the congressional act (7 USCA § 496) expressly contemplates such enactments by the states. The language is as follows: "This chapter shall not abrogate nor nullify any other statute, whether State or Federal, dealing with the same subjects as this chapter, but it is intended that all such statutes shall remain in full force and effect, except in so far only as they are inconsistent herewith or repugnant hereto."

[6, 7] 4. Finally the defendant asserts that the state statute is unconstitutional because it conflicts with the commerce clause of the Federal Constitution. It cites and relies on Lemke v. Farmers' Grain Co., 258 U. S. 50, 42 S. Ct. 244, 66 L. Ed. 458; Shafer v. Farmers' Grain Co., 268 U. S. 189, 45 S. Ct. 481, 69 L. Ed. 909; Stafford v. Wallace, 258 U. S. 495, 42 S. Ct. 397, 66 L. Ed. 735, 23 A. L. R. 229. Those cases are not at all helpful in the instant case. It will be conceded that wholesale quantities of grapes were the subject-matter of the contract executed between the producers and the dealer, and that the grapes were intended to go, and did go, into interstate commerce. It will be conceded also that grapes were one of the products within the contemplation of the Legislature when it enacted chapter 860 of the Statutes of 1927. However, a reading of that statute shows an attempt on the part of the Legislature to regulate dealers, but it does not contain a trace of an attempt to regulate commerce. The statute does not purport to regulate the price,

the size, or form of the package, the grade or grades of the contents, the weight of the package or of the shipment, the manner of the shipment, the route of the shipment, or any other feature whatsoever of commerce. It does seek to prohibit fraud and impositions on the part of the shipper as against the producer. That one dealing in interstate commerce may not commit acts of fraud and other unfair dealings and claim that he is protected by the commerce clause of the Constitution is perfectly clear. No one of the cases cited by defendant is authority to the effect that a sovereign state may not, because of article 1, § 8, clause 3, of the Federal Constitution, enact and enforce statutes confined within the police powers reserved unto the states. Many cases hold it can. Some of the leading cases so holding are Missouri, Kansas & Texas R. Co. v. Haber, 169 U. S. 613, 628, 18 S. Ct. 488, 42 L. Ed. 878; Plumley v. Massachusetts, 155 U. S. 461, 15 S. Ct. 154, 39 L. Ed. 223; Savage v. Jones, 225 U. S. 501, 525, 32 S. Ct. 715, 56 L. Ed. 1182. In Plumley v. Massachusetts, supra, at page 468 of 155 U. S., 15 S. Ct. 154, 156, Mr. Justice Harlan, writing the opinion of the court, said: "If any one thinks that oleomargarine, not artificially colored so as to cause it to look like butter, is as palatable or as wholesome for purposes of food as pure butter, he is, as already observed, at liberty, under the statute of Massachusetts, to manufacture it in that state, or to sell it there in such manner as to inform the customer of its real character. He is only forbidden to practice, in such matters, a fraud upon the general public. The statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it really is, by preventing its sale for what it is not. Can it be that the constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the states demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country?" Chapter 860, Statutes of 1927, does nothing more, and even then it but demands that a bond be given and a license taken out. No claim is even made that it goes further. No case is cited and we have found not one that holds that such a statute is invalid. Several well-considered cases hold such provisions are not invalid. Real Silk Hosiery Mills v. City of Portland (D. C.) 294 F. 587; Engel v. O'Malley, 219 U. S. 128, 31 S. Ct. 190, 55 L. Ed. 128; Hall v. Geiger-Jones Co., 242 U. S. 539, 37 S. Ct. 217, 61 L. Ed. 480, L. R. A. 1917F, 514, Ann. Cas. 1917C, 643; Payne v. State of Kansas, 248 U. S. 112, 39 S. Ct. 32, 63 L. Ed. 153; State v. Wagener, 77 Minn. 483, 80 N. W. 633, 778, 1134, 46 L. R. A. 442, 77 Am. St. Rep. 681, 689; Brass v. Stoeser, 153 U. S. 391, 14 S. Ct. 857, 38 L. Ed. 757. The mere fact, if it be a fact, that the state statute incidentally or indirectly affects interstate commerce, does not operate to render the state statute invalid, if it is otherwise a reasonable exercise of the police power. In Savage v. Jones, supra, at page 525 of 225 U. S., 32 S. Ct. 715, 722, the court said: "But when the local police regulation has real relation to the suitable protection of the people of the state, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority. [Citing many cases.]"

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

125 Cal.App. 717

In re WARD'S ESTATE.

Civ. 8640.

District Court of Appeal, First District, Division 2, California.

Sept. 12, 1932.

Rehearing Denied Oct. 11, 1932.

Hearing Denied by Supreme Court Nov. 10, 1932.

Wills ⇐16.

Bequest to pastor to procure masses to be celebrated for repose of testator's soul *held* not bequest in "trust for charitable uses" within statute requiring execution of will containing such bequest to be made more than 30 days before testator's death (Civ. Code, § 1313).

[Ed. Note.—For other definitions of "Charitable Trust," see Words and Phrases.]

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

In the matter of the estate of Margaret Ward, deceased. From a decree of final distribution, Kate O. Cusack, a next of kin, appeals, opposed by John Doyle as executor of the estate of Margaret Ward, deceased, and another.

Affirmed.

Hubbard & Hubbard, of San Francisco, for appellant.

David M. Burnett and John M. Burnett, both of San Jose, for respondents.

SPENCE, J.

Appellant, the next of kin of the deceased, appeals from the decree of final distribution in the above-entitled case.

By said decree the estate was distributed in accordance with the provisions of the will and codicils of the deceased. In the trial court appellant objected to such distribution on the ground that a provision of the second codicil, which was executed within thirty days of the death of the testator, was invalid under section 1313 of the Civil Code (now section 41 of the Probate Code). The provision of the codicil claimed to be invalid reads as follows: "In addition to the bequest and devise of one-fourth of the rest and residue of my estate in paragraph 'Twelfth' of my said will and testament made to the person who at my death shall be the pastor in charge of St. Patrick's Roman Catholic Church at San Jose, California, I give, devise and bequeath unto such person, one-half of the rest and residue of my estate of every kind and character and wheresoever situated to be used by such person to procure masses to be said for the repose of my soul."

Under this provision the specified portion of the residue of the estate, amounting in value to about $5,000, was distributed to Rev. Richard Collins, who was the pastor of the designated church at the time of the death of the deceased, "to procure masses to be celebrated for the repose of the soul of the decedent."

The question presented on this appeal requires a consideration of the nature of a bequest to a pastor for the purposes of masses for the repose of the soul of the testator. On this general subject the authorities are far from harmonious. As pointed out in the Estate of Lennon, 152 Cal. 327, 92 P. 870, 125 Am. St. Rep. 58, 14 Ann. Cas. 1024, masses for the dead were called "a superstitious use," and were forbidden by statute in England. In this country we find no such statutes, but nevertheless bequests for masses have not always been upheld. The case of Festorazzi v. St. Joseph's Catholic Church of Mobile, 104 Ala. 327, 18 So. 394, 25 L. R. A. 360, 53 Am. St. Rep. 48, illustrates the difficulty which the courts have encountered in attempting to classify this type of bequest. There the bequest was "to be used in solemn masses for the repose of my soul." The court was divided, but held the bequest invalid. The writer of the opinion reasons that the bequest could not be upheld as a direct gift as it was in the nature of a trust; that it could not be upheld as a trust for a charitable use as the bequest "is, according to the religious belief of the testator, for the benefit alone of his own soul, and cannot be upheld as a public charity without offending every principle of law by which such charities are supported;" and further, that "it is not valid as a private trust, for the want of a living beneficiary."

Such bequests, however, have been looked upon with favor and upheld in most jurisdictions, but not always upon the same grounds. In some jurisdictions bequests to pastors for the purpose of masses have been treated as valid gifts to the pastors and not as trusts. Sherman v. Baker, 20 R. I. 446, 40 A. 11, 40 L. R. A. 717; Harrison v. Brophy, 59 Kan. 1, 51 P. 883, 40 L. R. A. 721; In re Zimmerman's Will, 22 Misc. 411, 50 N. Y. S. 395; In re Howard's Estate, 5 Misc. 295, 25 N. Y. S. 1111. This view appears to be the one adopted by our own Supreme Court. Estate of Hamilton, 181 Cal. 758, at page 764, 186 P. 587. In other jurisdictions bequests for masses have been sustained as private trusts despite the fact that there is no living beneficiary. Moran v. Moran, 104 Iowa, 216, 73 N. W. 617, 618, 39 L. R. A. 204, 65 Am. St. Rep. 443. Still other jurisdictions have felt the necessity of treating such bequests as charitable trusts in order to sustain them. Obrecht v. Pujos, 206 Ky. 751, 268 S. W. 564; In re Kavanaugh's Will, 143 Wis. 90, 126 N. W. 672, 28 L. R. A. (N. S.) 470; Morris v. Edwards, 227 N. Y. 141, 124 N. E. 724; Hoeffer v. Clogan, 171 Ill. 462, 49 N. E. 527, 40 L. R. A. 730, 63 Am. St. Rep. 241. In Moran v. Moran, supra, the bequest read, "I will and bequeath to the Catholic priest who may be the pastor of the Beaver Catholic Church when this will shall be executed three hundred dollars, that masses may be said for me." The court held that no charitable trust was created, but sustained this provision as a valid private trust. The court said at page 622 of 73 N. W., 104 Iowa, 216, 39 L. R. A. 204, 65 Am. St. Rep. 443: "We have said that this bequest, if the priest should accept the money, is a private trust; and we think it possesses the essential elements of such a trust, as much as it would if the object were the erection of a monument or the doing of any other act intended alone to perpetuate the memory or name of the testator. But even if there is a technical departure, because of no living beneficiary, still the bequest is valid." The court there also said on the same page: "It is not wise, in such cases, for courts to quibble about technical trusts or beneficiaries. Results are of greater importance than technical names, and a bequest for a known lawful purpose, where the power of execution is prescribed and available, should never fail for want of a name or a legal classification, unless it is in obedience to a positive rule of law."

Before discussing the authorities in this jurisdiction, we should further analyze the precise question before us. Section 1313 of the Civil Code, so far as it may have any application to the present case, reads as fol-

lows: "No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator." In the present case we find no bequest to "any charitable or benevolent society or corporation." We are dealing with a bequest to a person, and, unless such bequest was "in trust for charitable uses," the above-mentioned section has no application. Appellant contends that such bequest is one "in trust for charitable uses," while respondent contends that there is no trust, and at any rate that there is no trust for a charitable use. In our opinion, appellant's contention cannot be sustained.

Our attention has been called to but two cases in this jurisdiction dealing with this question of bequests for masses. In Estate of Lennon, 152 Cal. 327, 92 P. 870, 871, 125 Am. St. Rep. 58, 14 Ann. Cas. 1024, a bequest of $3,500 to Bishop Conaty "to have the same amount of masses celebrated as soon as possible for my soul" was held not to be "a bequest for charity or charitable use" within the meaning of section 1313 of the Civil Code. Subsequently the Supreme Court had under consideration several bequests of a somewhat similar nature in Estate of Hamilton, 181 Cal. 758, 186 P. 587. On pages 764 and 765 of the opinion in 181 Cal., 186 P. 587, 589, the court considered the bequests made by the testator to the pastors of several churches "for masses for the repose of the soul of one John P. Gallagher," and held said section 1313 was not applicable as these bequests created no trust. The court points out that, while the pastors "receive the money upon the obligation to offer masses as required, such obligation does not go to the use or disposition of the money." The court there considered other bequests to certain bishops of the Roman Catholic Church for masses for the repose of the souls of the testator and other persons to be said in certain designated churches within the jurisdiction of said bishops, and held section 1313 of the Civil Code to be applicable to such bequests. The distinction made by the court was that the last-mentioned bequests created trusts, as it was intended that the bishop "would use the legacy, not for his own benefit or as he saw fit, but for paying the stipends of the pastors in whost churches and by whom the masses were to be offered," and that the obligation of the bishop "was one as to the disposition and use of the money given him." The court then proceeded to declare that under the evidence before it, "as to the purposes and results of the mass according to the doctrine of the church," such a bequest "in trust for masses is a trust for charitable uses."

We do not believe that the evidence before us on this subject is the same as the evidence considered by the court in Estate of Hamilton, supra. The Supreme Court there discussed the opinion in Estate of Lennon, supra, and said that the question of whether the bequest for masses is a bequest for a charitable use is "purely a question of fact, a question as to the purposes and results of the mass according to the doctrine of the church, and if in the present case the evidence as to the fact is different and requires a different conclusion, effect must be given to it." But it is unnecessary for us to discuss the evidence in the present case relating to the primary object, character, purposes, and results of the masses said for the repose of the soul of a particular person. Here we are concerned with a bequest to a pastor for the purpose of such masses, and, even if the evidence in this case relating to such masses led to the conclusion on that subject reached by the court in Estate of Hamilton, supra, still there is no trust, for, while such pastor "will receive the money upon the obligation to offer masses as required, such obligation does not go to the use or disposition of the money."

A bequest to an individual does not come within the meaning of section 1313 of the Civil Code, unless it is a bequest both "in trust" and "for charitable uses." This is clearly indicated in Estate of Hamilton, at page 772 of 181 Cal., 186 P. 587, 592, where the court said: "Section 1313, Civil Code, provides no limitation upon gifts in general for charitable purposes. It places such limitation only upon gifts to charitable corporations or societies or in trust for charitable uses. The bequests in this case to the pastors do not come in either of these classes."

In the present case the bequest was to the pastor with no direction as to the place or places in which or the person or persons by whom the masses should be said. The pastor was himself a Catholic priest who was capable of celebrating the masses, and he could celebrate all of the masses himself or he could, if he saw fit, obtain the co-operation of other priests for that purpose. There is nothing to show that the testator intended to impose any obligation on the pastor other than the obligation to see that the masses were said and he was not required to go beyond his own efforts to fulfill this obligation. In other words, the obligation did not "go to the use and disposition of the money" and there was no trust. Estate of Hamilton, supra; Sherman v. Baker, supra; Harrison v. Brophy, supra; In re Zimmerman's Will, supra; In re Howard's Estate, supra.

The decree of final distribution is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

125 Cal.App. 688

KNIGHT v. PAULTON.

Civ. 7461.

District Court of Appeal, Second District, Division 1, California.

Sept. 8, 1932.

Rehearing Denied Oct. 4, 1932. Hearing Denied by Supreme Court Nov. 7, 1932.

1. New trial ⇐155.

In absence of notice of judgment entry, 60-day period for filing order denying new trial began on date notice of intention to move for new trial was served (Code Civ. Proc. §§ 660, 662).

2. Evidence ⇐460(2).

In suit on note, evidence showing that receipt acknowledging all claims and obligations between parties had been settled, did not apply to note, *held* admissible.

Appeal from Superior Court, Santa Barbara County; E. N. Rector, Judge.

Action by L. N. Knight against William C. Paulton. From a judgment for plaintiff, defendant appeals.

Affirmed.

Alfred W. Robertson and L. M. Crawford, both of Santa Barbara, for appellant.

James W. Briscoe, of Santa Barbara, for respondent.

CONREY, P. J.

The defendant executed and delivered to the plaintiff his promissory note dated November 2, 1922, made payable ninety days after date. There is ample evidence to sustain the court's finding that the note remains wholly unpaid. By defendant's answer to the complaint he denied the alleged fact of nonpayment, and asserted that the entire amount had been paid. Defendant further set forth that on March 19, 1923, defendant settled the entire obligation of the said promissory note and received a receipt in full satisfaction therefor from the plaintiff. Said receipt was introduced in evidence and was signed by both plaintiff and defendant on its date March 19, 1923. The body of the instrument reads as follows: "The undersigned, each for himself, acknowledges that all claims, demands and obligations existing between them to this date, have been settled; except that W. C. Paulton acknowledges that he holds forty (40) shares of stock of the Paulton Oil Company which belong to L. N. Knight, and will be delivered to him on demand."

The amount of the promissory note was a balance due from defendant to plaintiff for the drilling of an oil well by plaintiff for defendant. Under a separate contract the plaintiff drilled another oil well for the Paulton Oil Company, which company had been organized for the purposes of the business which theretofore was the individual business of defendant, Paulton. The defendant claimed that the foregoing receipt constituted conclusive evidence of payment of the note. Plaintiff on the other hand claimed that the receipt related entirely to the business transactions of the plaintiff with the Paulton Oil Company, of which Paulton was president.

According to the testimony of the plaintiff there was a settlement on March 19, 1923, of his transactions with Paulton Oil Company, but it did not include said promissory note or relate to the same in any manner, and in fact said note remains wholly unpaid. The court by its amended findings decided that the said receipt was obtained by the defendant from the plaintiff by fraud, and that it was not intended by the parties that said instrument was an acknowledgment of payment of the promissory note. From an examination of the evidence we conclude that the evidence is sufficient to sustain this finding. And even if the defendant did not have any fraudulent intent in the drafting and execution of the receipt, nevertheless, in view of the finding that the parties did not intend that said receipt should refer to the note, and that the note has not in fact been paid, the attempted defense based upon said receipt must fail.

The amended finding to which we have referred was made in connection with the court's ruling on defendant's motion for a new trial. Such amendment is permitted by section 662, Code of Civil Procedure.

[1] Appellant contends that the order denying new trial and the amended findings of fact were filed more than sixty days after notice of entry of judgment, and that therefore the court was without authority to make such amended findings. Code Civ. Proc. § 660. But appellant has not made reference to any page of the record showing that there ever was any notice of entry of judgment in this case either served or filed. Therefore the sixty-day period began to run on the day of service of the notice of intention to move for a new trial. The record shows that the court acted within that time.

[2] Appellant contends not only that the instrument relied upon by him constitutes a release, but further contends that the court erred in admitting the evidence which was admitted to show that the receipt did not apply and was not intended to apply to said promissory note. We are of the opinion that the said instrument does not on its face definitely purport to say that the said note or any such instrument has been paid. It is merely an acknowledgment by the respective parties "that all claims, demands and obligations existing between them to this date, have

been settled." It is entirely consistent with such an admission that the settlement referred to may have been a settlement accomplished by the giving of the note and not by its payment. We see nothing in the nature of the instrument which makes it sufficient in its force and effect to exclude the explanatory testimony which was received by the court.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

125 Cal.App. 726

TREECE v. TREECE.

Civ. 7945.

District Court of Appeal, First District, Division 1, California.

Sept. 13, 1932.

Rehearing Denied Oct. 3, 1932. Hearing Denied by Supreme Court Nov. 10, 1932.

1. Courts ⇐116(4).

Court's power to correct record to accord with facts where error appears on face of record is not lost by mere lapse of time.

2. Judgment ⇐524.

Where judgment admits of two constructions, that one will be adopted which is consonant with judgment which should have been rendered on facts and law of case.

3. Divorce ⇐163.

Order directing that divorce decree be amended by rejecting obvious surplusage so as to follow admitted stipulation of parties as appeared on face of record to have been court's intention *held* proper.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action for divorce by Roy E. Treece against Carolyn L. Treece, in which defendant cross-complained. From the order amending an interlocutory decree of divorce and denying plaintiff's motion to set aside the judgment as amended, plaintiff appeals.

Order affirmed.

George Ingraham, of Oakland, for appellant.

H. L. Richardson, of Oakland, for respondent.

PER CURIAM.

An appeal by plaintiff from an order entered on March 17, 1931, amending an interlocutory decree of divorce and denying plaintiff's motion to set aside the judgment as amended.

At the conclusion of the trial of the action findings were waived, and on January 2, 1930, an interlocutory decree of divorce was granted to the plaintiff. The material parts of the decree are as follows: "* * * It is hereby ordered, adjudged and decreed that a divorce ought to be granted to said plaintiff from said defendant, and that said plaintiff is entitled to a divorce from said defendant on the grounds of defendant's extreme cruelty toward plaintiff, and (it being stipulated in open court by the parties hereto as and for a property settlement herein) that defendant and cross-complainant have the community household furniture, and that plaintiff pay to defendant and cross-complainant the sum of twelve hundred fifty ($1,250) dollars in the following manner, to wit: not less than sixty-five ($65.) dollars on the 1st day of January 1930, and not less than sixty-five ($65.) dollars on the first day of each and every month thereafter until the whole sum of said twelve hundred fifty ($1,250) dollars has been paid in full."

The order complained of directed that the decree be amended by inserting therein the following: "That in pursuance of said stipulation it is hereby ordered, adjudged and decreed that plaintiff pay to defendant the sum of twelve hundred and fifty ($1,250) dollars in the following manner, to wit, not less than sixty-five ($65.) dollars on the 1st day of January 1930, and not less than sixty-five ($65.) dollars on the 1st day of each and every month thereafter until the whole sum of twelve hundred fifty ($1,250) dollars has been paid in full."

Plaintiff claims that the error, if any, sought to be corrected by the motion was judicial rather than clerical, and that the court had lost jurisdiction by lapse of time to correct its judgment.

[1-3] As to this objection it will be sufficient to say that the power to correct its record to accord with the facts, where the error appears on the face of the record, is not lost by mere lapse of time. City and County of San Francisco v. Brown, 153 Cal. 644, 96 P. 281. But whether the alleged error was clerical or judicial in its nature we think it unnecessary to determine. Judgments are to have a reasonable intendment (34 Cor. Jur., Judgments, p. 502), and where it admits of two constructions, that one will be adopted which is consonant with the judgment which should have been rendered on the facts and law of the case. Watson v. Lawson, 166 Cal. 235, 135 P. 961. It has been said that: "Wherever the entry of a judgment is so obscure as not to clearly express the exact determination of the court, reference may be had to the pleadings and the other proceedings; and if, with the light thus thrown upon such entry, its obscurity is dispelled and its

intended signification made apparent, the judgment will be upheld and carried into effect * * * as though its meaning and intendment were made clear and manifest by its own terms." Black on Judgments, § 123; Clay v. Hildebrand, 34 Kan. 694, 9 P. 466, 470. By rejecting that part of the decree as originally entered which reads "(it being stipulated in open court by the parties hereto as and for a property settlement herein)" —which is obviously surplusage—we have a decree following exactly the terms of the admitted stipulation between the parties, as clearly appears on the face of the record to have been the court's intention, namely, that its judgment should be in accordance therewith. This being true, appellant was not injured by the order subsequently made, and not being an aggrieved party, had no grounds for appeal. 2 Cal. Jur., Appeal and Error, sec. 56, p. 215; Custis v. Gehele, 177 Cal. 455, 170 P. 1109.

The order is affirmed.

125 Cal.App. 779

ERICKSON v. WILSON.

Civ. 7210.

District Court of Appeal, Second District, Division 2, California.

Sept. 14, 1932.

1. Fixtures ⊜35(3).

Erection of building upon realty does not necessarily make it fixture, question whether building so placed becomes fixture being for trial court.

2. Appeal and error ⊜1058(2).

Excluding conversations, in action for removing building, regarding whether building was fixture, need not be considered where conversations were afterwards admitted.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by J. A. Erickson against A. L. Wilson. From a judgment for plaintiff, defendant appeals.

Affirmed.

J. D. Murphey, of Oakland, for appellant.

D. K. Gault, of Los Angeles, for respondent.

CRAIG, Acting P. J.

In an action for damages by the owner of real property against the vendor of a building for its removal therefrom prior to foreclosure of a deed of trust of such owner and his purchase at a sale thereunder, judgment was rendered in favor of the plaintiff, and the defendant appealed.

[1] The arguments are devoted mainly to a controversy as to whether or not said building was a fixture. It appeared that the appellant had sold the same to one Miller, the original owner and trustor under the respondent's deed of trust, and had placed it upon a foundation built on the premises for said building. It is earnestly insisted that there was evidence tending to show that the building was not actually set upon its foundation, but the appellant concedes that "on the other hand there was evidence on the part of the plaintiff that the house was let down on the foundation." The finding below was that "a foundation was constructed under said house and that a framework was built on said foundation under said house; and that thereafter said house was lowered upon said framework and rested firmly upon said foundation and became affixed and attached thereto." The mere erection of a building upon realty does not necessarily make it a fixture, but whether in any case a building so placed has become such is a question of fact to be determined by the trial court. Miller v. Waddingham, 91 Cal. 377, 27 P. 750, 13 L. R. A. 680. In view of the finding of the trial court upon a conflict of evidence the question presented does not permit of serious consideration upon appeal.

[2] The appellant sought to prove conversations asserted to have occurred between Miller and the defendant, at which the respondent was not present, and the court, at one point, excluded them. This might have shed light on the intention of these parties as to whether or not the house was to be affixed to the realty, but it is unnecessary to give this assignment consideration because the defendant was afterwards permitted to relate the entire conversation between Miller and himself when the bargain was made.

Finally, it is contended that the original owner and trustor by a fraudulent representation to the appellant as to the amount of the respondent's lien upon the premises, entitled the appellant to introduce evidence of such fact. It is not denied that the deed of trust was recorded at the time of the sale of the building, nor does it appear that the respondent was a party to any such representation or fraud.

From what has been said, we think the appellant's contentions are covered, and that error does not appear.

The judgment is affirmed.

We concur: IRA F. THOMPSON, J.; STEPHENS, Justice pro tem.

⊜For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

125 Cal.App. 522

BERZIN v. STATE INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8200.

District Court of Appeal, First District, Division 1, California.

Aug. 26, 1932.

1. Master and servant ⇐403.

Compensation claimant has burden of proving injuries complained of.

2. Master and servant ⇐405(4).

Evidence in compensation proceeding failed to establish that grinder's impaired vision, sores, and infection of lungs resulted from dust and sparks of grinding processes (St. 1917, p. 831, as amended).

Facts disclosed that claimant was employed as a grinder whose work consisted of grinding brass, iron, and steel castings on an emery wheel, that a small particle of steel had injured claimant's eye, but that, after such speck was removed, the eye was cured and no disability resulted, that the open sores complained of were not from sparks while employed as grinder, but skin infections known as boils, and that, though there was some evidence of bronchial and heart affection, there was no positive evidence of pneumoconiosis calling for liability under Compensation Act.

3. Master and servant ⇐405(4).

To create liability under Compensation Act, there must be established by preponderant evidence an unbroken causal connection between injury and employment or working conditions (St. 1917, p. 831, as amended).

Proceeding under the Workmen's Compensation Act by H. Berzin, claimant, for injuries, opposed by the Pacific Electric Manufacturing Corporation, employer, and the State Compensation Insurance Fund, insurer. To review an order of the Industrial Accident Commission awarding compensation for injuries, claimant brings certiorari.

Modified, and, as modified, affirmed.

Arthur D. Klang and William Sea, Jr., both of San Francisco, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

JOHNSON, Justice pro tem.

This is a proceeding to review an award made by the Industrial Accident Commission in favor of the petitioner, H. Berzin, but which he contends furnishes insufficient compensation for the injury suffered.

From February, 1927, to July 16, 1930, Berzin was employed by the Pacific Electric Manufacturing Corporation as a grinder, whose work consisted of grinding brass, copper, iron, and steel castings on an emery wheel. In such grinding operations dust is created, and, unless drawn off by mechanical devices, beclouds the atmosphere. Moreover, at times sparks fly from the metals as they are ground, and exposed parts of the body may thereby be burned. To carry off the dust and catch the sparks, blowers and guards were installed in October, 1929; but the system previously employed was not equally effective, and, while that system was in use, considerable dust generated by the grinding machines spread through the factory.

In June, 1930, sores appeared on Berzin's chest and arms, which, he said, were caused by burns due to flying sparks. He applied to the nurse in attendance at the plant, who, upon examination, concluded that he was suffering from boils or carbuncles, and applied a salve used to give relief from such ills.

Berzin left work on June 28, and on June 30 he was sent by his employer, or its insurance carrier, the state compensation insurance fund, to Dr. A. C. Armstrong, whose diagnosis was that there were numerous second degree infected burns on the chest and left forearm, for which treatment was given. There was also found to be a small piece of steel in the right corneal margin which had been there a few days; and for the removal of this Berzin was sent to an oculist, who did what was needful. After receiving treatment for his ailments, Berzin returned to work on July 17, and continued to August 12. While he was under treatment, he had made application to the Illinois Pacific Coast Company for employment, and on August 22 he began work there in the corrugated fiber products department, and continued to October 15, 1930, when lack of work caused him to be laid off.

Berzin presented his application for compensation to the commission on July 15, 1930, and thereafter an amended application was filed on which a hearing was had. In this latter application he specified that he had sustained injury to the lungs through inhaling the dust produced in the grinding processes, that the chest had been burned by sparks, and that there was an infection of the right eye. After taking considerable testimony, the commission found that Berzin had sustained an injury in that a foreign body entered the right eye and sparks had caused minor burns on the chest, but that any other symptoms were not caused or exacerbated by such injury. The commission found further that Berzin was entitled to compensation for temporary total disability from June 28 to July 16, 1930, in the sum

of $23.48, and made an award in that amount less a certain payment made. It is contended on behalf of the petitioner that the vision of the right eye was impaired, that infection from burns is continuing to cause sores to break out on various parts of the body, and that the lungs have been infected by dust inhaled in the grinding processes. And it is insisted that, as a result of such injuries, the petitioner has been incapacitated for work, and that the award does not afford reasonable compensation.

So far as the eye is concerned, the evidence shows that there was a small particle of steel in the corneal margin of the right eye, and that, after that speck had been removed, and office treatment had been given for seven days by the oculist, the inflammation in the eye was cured, and no disability resulted. The weakened vision of which the petitioner complains appears to be that common to advancing years.

Regarding sores on the body, which have broken out from time to time since Berzin's employment as a grinder ceased, the medical testimony of Dr. Newman and Dr. Kruse is strongly to the effect that he is a sufferer from small skin infections, known as furuncles or boils, and that they are attributable to two causes having no relation to his employment, but due to Berzin's own bodily conditions. The medical reports show that he has an oily skin, technically called seborrheic skin, which spontaneously develops furuncles; and, in addition, there are evidences of diabetes, which is also a frequent cause of the same trouble. These two conditions are said to be sufficient to cause recurring furuncles.

In making its findings the commission gave Berzin the benefit of Dr. Armstrong's report that at the time his treatment of Berzin began Berzin was suffering from burns; but there is no evidence that would justify a finding that any sores which developed at a later time were caused by any of the conditions of the employment.

In respect of alleged injury to the lungs, Berzin said that about January, 1930, his chest began to feel heavy; that he suffered from dizziness and loss of appetite, and felt sick all the time. According to the medical report made by Dr. Kruse in June, 1931, Berzin complained to him at that time of continual pounding in the chest, and of shortness of breath, especially when exerting himself and when lying down at night. The X-ray report showed "increased bronchial markings" in the lungs but no active disease. Berzin's general health was affected by inflammation of the bladder, infection due to pyorrhea, and some degree of arteriosclerosis. Dr. Kruse attributed the shortness of breath, the pounding of the heart and the feeling of weakness to constitutional factors, and not to any industrial injury.

[1-3] The burden of proving the injuries of which the petitioner complained was upon him; and from the evidence it cannot be said as a matter of law that at the time of the hearing he was suffering from a compensable disability proximately caused by the conditions of his former employment, or that there was at any previous time a disability other than that for which due compensation was awarded.

There is some evidence of bronchial and heart affection, and there is a possibility that these conditions may have some connection with Berzin's employment as a grinder. While blowers to carry off the dust were installed in October, 1929, Berzin was exposed to a dust-laden atmosphere from the time of his employment in February, 1927, to October, 1929, or a period of about two years and eight months. Such conditions sometimes cause a latent and progressive disease known as pneumoconiosis, denoting a disease of the lungs due to dust, which may induce respiratory infections, and which may not culminate in a disability until long after exposure has ceased. At the time of the hearing, however, there were no positive evidences of pneumoconiosis in this case, and liability under the Workmen's Compensation Act (St. 1917, p. 831, as amended) cannot be made to rest on surmise or conjecture. There must always be established by preponderant evidence an unbroken causal connection between the injury and the employment or the conditions under which the employee was required to perform his work, and any award made must have for its basis a firm foundation of fact. London G. & A. Co. v. Ind. Acc. Com., 202 Cal. 239, 241, 259 P. 1096, 54 A. L. R. 1392; Singlaub v. Ind. Acc. Com., 87 Cal. App. 324, 332, 262 P. 411; Madore v. New Departure Mfg. Co., 104 Conn. 709, 712–716, 134 A. 259.

In the record before us in this case we find nothing that would justify us in annulling the award of the commission. But, inasmuch as the medical report indicates traces of bronchitis, which sometimes develops from pneumoconiosis as a secondary effect long after exposure has ceased, we do not think that the findings and award should bar the petitioner from renewing his application in case there shall hereafter be proof that a latent and progressive disease was contracted by Berzin by reason of inhalation of dust in performing the duties of his employment, and that a compensable injury has proximately resulted therefrom. Such privilege can be safeguarded by modification of the award so that it shall be without prejudice to a right of renewal under the conditions stated.

It is ordered that the last sentence of the award, now reading, "It is ordered that the employer herein be dismissed and discharged from liability herein," be, and it is, modified

to read: "It is ordered that the employer herein be dismissed and discharged from liability herein, but without prejudice to the right of the applicant, H. Berzin, to renewal of his application for adjustment of claim for compensation, in case there shall hereafter be proof that a latent and progressive disease was contracted by said applicant by reason of inhalation of dust in the course of, and out of, his employment by his said employer, Pacific Electric Manufacturing Corporation, and that a compensable injury has proximately resulted therefrom." As so modified, the award is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

125 Cal.App. 513

SCOTT v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al.

Civ. 8208.

District Court of Appeal, First District, Division 1, California.

Aug. 26, 1932.

Rehearing Denied Sept. 24, 1932.

Hearing Denied by Supreme Court Oct. 24, 1932.

1. Wills ⇐423.

Proceeding for probate of will is proceeding in rem, and order of admission to probate, when it becomes effective, is binding on all interested persons.

2. Wills ⇐260.

One year within which to file petition to revoke probate of will commenced when remittitur affirming order of probate was filed (Code Civ. Proc. § 1327).

Proceeding in prohibition by Maud Scott, also known as Marion Scott, against the Superior Court in and for Alameda County and another.

Alternative writ discharged, and application for peremptory denied.

Wm. J. Cullinan and Stanley Burke, both of San Francisco, for petitioner.

Livingston & Livingston, of San Francisco, for respondents.

Robert E. Fitzgerald and Leo R. Friedman, both of San Francisco, amici curiæ in support of petitioner.

JOHNSON, Justice pro tem.

This is a proceeding in prohibition instituted to restrain the court having jurisdiction of the estate of Leon Morrison, deceased, from entertaining any proceedings upon a petition filed on January 7, 1927, to revoke an order made August 14, 1923, admitting to probate an instrument purporting to be the last will of the decedent. The applicant for the writ contends that the petition for revocation was filed too late, and that consequently the court is without jurisdiction to entertain it.

Leon Morrison died on June 20, 1921, and, after a contest by the state of California, an instrument dated January 12, 1921, purporting to be the will of the decedent, was admitted to probate. An appeal from the order was then taken by the state, resulting in an affirmance by the Supreme Court on January 15, 1926, evidenced by the remittitur filed February 17, 1926. Estate of Morrison, 198 Cal. 1, 242 P. 939. Under the instrument in dispute the petitioner, Maud Scott, was named as sole legatee and devisee.

On January 7, 1927, a petition to revoke probate was filed by alleged sisters and nieces of the deceased. Citation was issued on that day, directing Albert E. Hill, administrator of the estate with the will annexed, and Maud Scott, the petitioner here, to show cause on February 4, 1927, why the order admitting the instrument to probate should not be vacated. Service of the citation was not made, the respondents averring in their answer to the petition in this proceeding that service was impossible.

On September 1, 1931, Maud Scott made a motion, upon notice, for an order of dismissal of the contest on the ground that the petition for revocation was not filed within one year after admission of the will to probate, pursuant to section 1327 of the Code of Civil Procedure as it read before the amendment of 1929, St. 1929, p. 860, § 2 (now embodied in section 380, Probate Code); and also on the ground that the citation issued was not issued within the time prescribed by law and had not been served. That motion was denied on October 1, 1931; and upon motion of the contestants an alias citation was issued and made returnable November 2, 1931. As the contestants were still unable to make service, the return day was postponed to March 1, 1932, and an order was made for service by publication of a new alias citation. The order denying the petitioner's motion to dismiss the contest not being appealable, the petitioner here seeks a writ prohibiting the court from proceeding with any further hearing upon the petition in question.

As appears in the opinion filed this day in a companion case, In the Matter of the Estate of Leon Morrison (Cal. App.) 14 P.(2d) 102, the petition for revocation filed on January 7, 1927, had been preceded by a like petition filed by the alleged sisters on October 23, 1923, and another filed by the al-

leged nieces on July 18, 1924. These petitions were dismissed by the petitioners on June 16, 1926, but were reinstated by order of court on December 2, 1926. Subsequently the contests so initiated were set for trial for May 26, 1931; but, motions to dismiss the contests under section 583 of the Code of Civil Procedure having been made by Miss Scott, the motions were granted by the court on July 22, 1931. Such orders of dismissal are the subject of appeal in the companion case.

We are concerned in this present proceeding with the question whether the petition filed on January 7, 1927, considered apart from the prior petitions, was filed within the time prescribed by law; and that depends on whether the time began to run from the date of the order of the probate court admitting the proffered will or the date of the filing of the remittitur from the Supreme Court affirming that order.

Prior to the amendment of 1929, section 1327 of the Code of Civil Procedure provided that, when a will has "been admitted to probate," a petition to revoke probate might be filed by any interested person "at any time within one year after such probate"; and, subject to a saving clause in favor of persons under disability, section 1333 made probate of a will conclusive, if no person contested it within one year after its probate.

The petitioner here contends that, in computing the time, the appeal is to be ignored, and that the order of the probate court at once established for the will a commanding legal status which, despite the loss of operative effect in the interim, preserved the will's vitality unimpaired for purposes of any contest.

Section 1327 had a double aspect. It was both a statute conferring jurisdiction and a statute of repose. In the absence of an appeal, the order admitting a will to probate is controlling, and the court is without jurisdiction to entertain a petition for revocation by persons under no disability, unless filed within the prescribed time after probate. Estate of Sbarboro, 63 Cal. 5; Estate of Smith (Cal. Sup.) 3 P.(2d) 921; 26 Cal. Jur. 1087.

There are, however, no decisions in this state as to the construction to be given to section 1327 in the event of an appeal from the order of admission.

[1] When such an appeal is perfected, the trial court loses jurisdiction of the subject-matter of the order, including all questions concerning the status of the instrument affected. Under section 949 of the Code of Civil Procedure the appeal in this case stayed all proceedings upon the order, and hence during the pendency of the appeal the court could not entertain a new proceeding directed against the matters under review. The proceeding for probate of a will is a proceeding in rem, and the order of admission to probate, when it becomes effective, is binding on all persons in interest. Estate of Parsons, 196 Cal. 294, 299, 237 P. 744; Estate of Allen, 176 Cal. 632, 633, 634, 169 P. 364; Estate of Baker, 170 Cal. 578, 585, 150 P. 989.

[2] If the order is affirmed on appeal, then, saving rights of persons under disability, it is affirmed as to all who have any interest in the estate; and, if the probate of the will is vacated, it is vacated as to everybody. Estate of Freud, 73 Cal. 555, 15 P. 135.

Upon affirmance of the order, the powers of the probate court over the will are revived; but the will, though possessing testamentary status, is still subject to the statutory right to contest its validity notwithstanding probate. On the other hand, reversal of the order of admission would render needless an independent proceeding for revocation. The law does not require idle acts; and since an appeal, if taken from the order of admission to probate, is an integral part of the probate proceedings, it is a reasonable conclusion that the time for filing a petition for revocation of probate was not meant to start until the proceeding to establish admissibility had been finally adjudicated.

If a contest filed pending the appeal were to be brought to a hearing before a decision of the appeal, and were to result in favor of the contestant, the very purpose of the appeal from the original order admitting the will would be defeated, and confusion would ensue. Not until the determination of the appeal can it properly be said for the purposes of a contest under section 1327 that a will, meanwhile in a state of suspended animation, has been admitted to probate.

There are indications in some of the recent decisions of the Supreme Court that such qualification was visioned by the court when, in the absence of an appeal, it reiterated the rule requiring a contest under section 1327, Code of Civil Procedure, to be initiated within one year after probate. Thus in Estate of Parsons, supra, where a will showing several erasures and interlineations was admitted to probate, and subsequently was attacked in a proceeding for partial distribution, the court said at page 298 of 196 Cal., 237 P. 744, 746: "*The order was never appealed from*, nor was any contest of the will after probate initiated within one year after its admission to probate or at all. The petition for partial distribution, upon which the present proceeding arose, was filed after the time for contesting the provisions of the will had fully expired." (Italics ours.) Again, in the Estate of Smith (Cal. Sup.) 3 P.(2d) 921, an order had been made admit-

ting a holographic will to probate. That order was afterwards vacated and then restored. A contest was filed within one year after the order admitting the will, but that contest was struck out by the court. Then a second contest was filed after the year had expired; and when the probate court denied a motion to strike out that contest, a writ of prohibition was issued upon the ground that the time for such a contest had expired. But there, too, the court, after noting the dismissal of the first contest, was mindful to say: "No appeal was taken from this order or *from any of the orders made by the court involving the probate of said olographic will.*" (Italics ours.)

There is an analogy between cases such as this and actions upon an ordinary judgment, which must be begun within five years after the right of action thereon accrues. If there is an appeal from the original judgment, the statute of limitations does not begin to run until the determination of the appeal. Feeney v. Hinckley, 134 Cal. 467, 470, 66 P. 580, 86 Am. St. Rep. 290; Hills v. Sherwood, 33 Cal. 474, 479.

As in the case of a judgment, so in the case of the order of admission to probate, it was final as to the probate court when made, and, as such, subject to appeal; but it was not final as to the subject-matter until the final disposition of the appeal.

Under somewhat similar provisions of law in Illinois, allowing one year after probate of a will within which to contest its validity, it has been held that an appeal from the order of admission to probate suspends its operative effect, and that the time for contest after probate does not begin to run until the status of the will is finally established by the judgment of the appellate court. In O'Brien v. Bonfield, 220 Ill. 219, 77 N. E. 167, there was first an order of the county court, sitting in probate, admitting the will on October 5, 1903. Then, as is permissible in Illinois, the matter was heard de novo on appeal in the circuit court, which made its order admitting the will on March 24, 1904. An appeal was then taken to the Supreme Court, which affirmed the order of the circuit court on February 7, 1905; and the remittitur was filed in the county court on March 6, 1905. Thereafter, and on April 11, 1905, a contest was instituted by certain parties in interest. To this contest demurrers were filed on the ground of lack of jurisdiction of the court to entertain the contest, because it had not been begun within one year from the time of probate in the county court. The demurrers were sustained, and the contest was dismissed. But upon appeal to the Supreme Court it held that the probate was not complete until the remittitur had gone down to the county court reinvesting that court with jurisdiction, and that the time for initiating a contest ran from the filing of the remittitur on March 6, 1905, and not from October 5, 1903, when the order of admission to probate was first made. Accordingly, the judgment of dismissal of the contest was reversed. Again, in Harney v. Wilson, 198 Ill. App. 477, the probate court was declared to have jurisdiction over a contest, begun within one year after the filing of a remittitur evidencing affirmance of an appeal from an order admitting a will to probate.

So, also, in Lewis v. Cook, 89 Hun, 183, 34 N. Y. S. 1037, an order admitting a will to probate was reversed on appeal; and, after the matter had been remanded to the Surrogate's Court, the will was again admitted. Within the statutory period of two years after the second order of admission, but more than two years after the first order, a contest was instituted; and, the answer thereto having set up, among other defenses, that of expiration of the time limit, the contestant's demurrer to the answer was sustained by the trial court. Upon appeal to the general term of the Supreme Court, the judgment sustaining the demurrer was affirmed, and the court expressed the view that the judgment reversing the first order admitting the will had restored the contestant to his original position, and as a consequence the time for contest did not begin to run until the will had finally been admitted on the second hearing. While the decision of the general term in regard to the demurrer was reversed on appeal to the Court of Appeals in Lewis v. Cook, 150 N. Y. 163, 44 N. E. 778 the reversal was based on the ground that the contestant lacked the necessary qualification for his contest, and not on the ground that the time for a contest by one qualified had lapsed. What was said in the opinion of the general term on that point was left unchallenged.

The petitioner here finds in Hellman Bank v. Alden, 206 Cal. 592, 275 P. 794, an alleged parallel to the present case. In the case cited, it was held that a judgment of incompetency was conclusive as to status from the time of its entry in the Superior Court, and that the incompetent was therefore incapable of making a valid contract, notwithstanding pendency of an appeal from the judgment. It is therefore contended by the petitioner that the same conclusiveness attaches to the order admitting a will to probate despite an appeal. But what we have to consider is not merely the effect on the status of the will by reason of an appeal from the order of admission, but the effect on the limitation of time for a separate and independent contest of the validity of the will after probate. The order admitting the will determines, subject to appeal, only the question of admissibility, or, in other words, determines whether or not the instrument offered is the last will of the deceased. The

order is not conclusive, nor has it the effect of a judgment in rem as to the underlying facts on which validity of the will depends. Estate of Dorn, 190 Cal. 343, 344, 212 P. 206; Estate of Bloom (Cal. Sup.) 2 P.(2d) 753.

To test the validity, the law permits a new proceeding for revocation of probate within a fixed time after admissibility has been adjudicated. This is the distinction between the situation before us and that of one adjudged incompetent. In his case there is no provision of law for an attack by himself upon the judgment otherwise than by appeal; nor may one interested in a contract made by him pending the appeal institute an independent contest of the adjudication in his own behalf. The adjudication has the effect of constructive notice of the incompetent's incapacity to contract, and all who enter into business relations with him do so at their own risk. But, in reference to wills, the question of validity remains open, even though the admissibility has been determined; and, while the admissibility is sub judice, it would be unreasonable to require persons interested in the estate to institute proceedings to revoke probate of an instrument not yet finally determined to be legally admissible to probate.

Where a subsequent statutory proceeding is correlated with a judgment purporting to establish a definite status, jurisdiction to entertain the subsequent proceeding is, in some instances at least, dependent on the result of an appeal. This is illustrated in Re Riccardi, 182 Cal. 675, 189 P. 694. That was a proceeding for disbarment of Riccardi, an attorney, based on his conviction of a felony involving moral turpitude, and instituted against him while an appeal from the judgment of conviction was pending. The law, as it read at the time, provided that, upon conviction of such an offense, the name of the attorney should be stricken from the roll, and he should be precluded from practice thereafter. The question was whether "conviction," for purposes of the separate disbarment proceeding, was established by the judgment rendered by the trial court or by the final judgment pronounced on appeal. The Supreme Court, adhering to earlier decisions involving like questions, held that action looking to disbarment must be deferred until the determination of the appeal.

In like manner, we are of the opinion that the relation between an order admitting a will to probate and a petition for revocation of probate is such that, in case of an appeal from the order, the time for institution of a contest after probate does not begin to run until the appeal has resulted in a final determination in favor of the admission of the will. Until that time there is, in the legal aspect, no admitted will to revoke.

We conclude, therefore, that, inasmuch as the petition in question in this proceeding was filed within one year after the affirmance of the order admitting the will to probate, it was filed in due time, and the motion to dismiss the petition was properly denied.

If the conclusions expressed in this and the companion case prevail, there will be before the probate court not only the petition to revoke probate filed on January 7, 1927, but also the previous petitions filed by the same contestants; and it will devolve upon the lower court and the parties in interest to determine upon which petition or petitions the trial of the issues raised shall be had.

The alternative writ is discharged, and the application for a peremptory writ is denied.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

125 Cal.App. 504

In re MORRISON'S ESTATE. GOLDBORTEN et al. v. SCOTT. GRYZOLET et al. v. SAME.

Civ. 8322.

District Court of Appeal, First District, Division 1, California.

Aug. 26, 1932.

Rehearing Denied Sept. 24, 1932.

Hearing Denied by Supreme Court Oct. 24, 1932.

1. Dismissal and nonsuit ⇐60(1).

Statute requiring dismissal of "action" not brought to trial within five years applies to contest to revoke probate of will (Code Civ. Proc. §§ 583, 1713).

Code Civ. Proc. § 1713, prescribed that, except as otherwise specially provided, proceedings in probate court should be governed by rules of practice in civil actions. The word "practice" means that which regulates formal steps in an action or other judicial proceeding, and it deals with writs, summonses, pleadings, affidavits, notices, motions, petitions, orders, trials, judgments, appeals, costs, and executions.

[Ed. Note.—For other definitions of "Action; Action at Law" and "Practice (In Law)," see Words and Phrases.]

2. Dismissal and nonsuit ⇐60(1).

Time intervening between conventional dismissals of will contest and reinstatement of contest could not be counted in computing five-year period for dismissal (Code Civ. Proc. § 583).

Facts were that contestants dismissed petitions to revoke probate of will on June 16, 1926, but, on learning that wit-

nesses in favor of will confessed that testimony given by them in support of will had been false, contestants filed notice of motion to vacate the dismissals, and motion was granted December 2, 1926.

Appeals from Superior Court, Alameda County; Lincoln S. Church, Judge.

Petitions by Zysla Brucha Goldborten and another and by Chaja Malta Gryzolet and others against Maud Scott, also known as Marion Scott, to revoke the probate of the will of Leon Morrison, deceased. From orders of dismissal, contestants appeal.

Orders reversed.

Livingston & Livingston, of San Francisco, for appellants.

William J. Cullinan and Stanley Burke, both of San Francisco, for respondent.

JOHNSON, Justice pro tem.

In this proceeding there are consolidated appeals from orders dismissing two petitions to revoke probate of the will of Leon Morrison, deceased, one filed by persons describing themselves as sisters of the deceased, the other by persons declaring themselves to be nieces. The orders of dismissal were based on section 583 of the Code of Civil Procedure, under which, in the absence of a written stipulation for an extension of time, it is made the duty of the court to dismiss an action not brought to trial within five years after the filing of the answer.

Leon Morrison died on June 20, 1921; and, after a contest by the state of California, an instrument dated January 12, 1921, purporting to be the will of the deceased, was admitted to probate on August 14, 1923. An appeal from the order was taken by the state, and on February 17, 1926, the remittitur from the Supreme Court was filed showing affirmance of the order. Estate of Morrison, 198 Cal. 1, 242 P. 939.

Meanwhile a petition by the alleged sisters of the deceased to revoke probate of the will was filed on October 23, 1923, and another petition by the alleged nieces on July 18, 1924. Answers to these petitions were filed respectively on March 16 and March 23, 1926, by the respondent, Maud Scott, as the proponent of the will. A date was then set for the trial of the contests; but, as the time drew near, the contestants concluded that the evidence available to them would not suffice to overcome testimony in favor of the will given at the time of its admission by two witnesses, John W. McKenzie and Barney Hoffman. Accordingly a settlement was arranged whereby the contestants received $2,000, and thereupon, on June 16, 1926, dismissed their contests. A minute order to like effect was made by the court on the same day.

Thereafter, on July 8, 1926, McKenzie and Hoffman made a confession to the district attorney of Alameda county that the testimony given by them in support of the will had been false, and they stated that they had been procured to commit perjury by said Maud Scott and others acting in her behalf. These men, on being brought to trial on a charge of perjury, pleaded guilty, and were sentenced to serve a term in the penitentiary.

Upon learning of these disclosures, the contestants on August 13, 1926, filed notice of motion to vacate the dismissals of their contests, and by order signed December 2, 1926, in fulfillment of a minute order made November 18, 1926, that motion was granted with authorization to the contestants to proceed in due course with the prosecution of their contests. A period of six months, lacking fourteen days, thus intervened between the dismissal of the contests on June 16 and their reinstatement on December 2, 1926. An appeal from the order of reinstatement was undertaken by Miss Scott, but was dismissed on July 1, 1929, on the ground that the order was not appealable. While that appeal was pending, efforts were made by the contestants to procure depositions of McKenzie and Hoffman and also of witnesses in Chicago, but delays ensued, due largely to continuances requested by attorneys for Miss Scott.

On motion of the contestants, the contests were finally set for trial for May 26, 1931; but on May 1 Miss Scott filed notice of motion to dismiss both contests. By reason of such motions, the trial of the contests was postponed by the court to August 5, 1931; and meanwhile, on July 23, the court made its orders granting the motions on the sole ground that the contests had not been brought to trial within five years after the answers were filed. The time which elapsed between the earlier answer of Miss Scott and the date of the dismissals by the court was five years, four months, and seven days.

From the orders of dismissal, the contestants prosecute these appeals.

In addition to the contests filed by the contestants as already mentioned, a petition to revoke probate of the will of said deceased was filed anew by the same contestants on January 7, 1927. Certain questions affecting the status of that petition are dealt with in the companion proceeding in prohibition of Maud Scott v. Superior Court (Cal. App.) 14 P.(2d) 99, in which our opinion is this day filed.

Upon the present appeal, there are two questions presented for consideration, one as to the applicability of section 583 of the Code of Civil Procedure to a contest to revoke probate of a will, the other as to the disallowance of credit in the computation of time for the interval of approximately six months during which the contests were suspended by vir-

tue of the dismissals effected by concurrence of the parties. If this period of time is deductible, then the contests cannot be treated as having been at issue for five years before the dismissals in question.

[1] While section 583 must necessarily have a limited application to probate proceedings in general, we are of the opinion that it may properly be extended to include a contest to revoke probate of a will.

Such a contest is an adversary proceeding, and in its essence is an action for recovery of property claimed to be unlawfully taken, or about to be taken, from the ownership of the contestant. He comes into court in the character of a possessor of a chose in action, founded on the violation of a vested property right by means of an instrument not truly testamentary; and, subject to certain qualifications, he is entitled to have the merits of his cause determined by a jury. Estate of Baker, 170 Cal. 578, 586–588, 150 P. 989; Estate of Clark, 94 Cal. App. 453, 460–461, 271 P. 542. The trial of a will contest has the characteristics of a trial of an ordinary civil action involving title to property; and, by section 1713 of the Code of Civil Procedure in force at the time of the orders of dismissal, it was prescribed that, except as otherwise specially provided, proceedings in probate should be governed by the rules of practice in civil actions.

In People v. Central Pac. R. R. Co., 83 Cal. 393, 404, 23 P. 303, 307, the court, quoting from a law lexicon, defined practice as "that which regulates the formal steps in an action or other judicial proceeding. It therefore deals with writs, summonses, pleadings, affidavits, notices, motions, petitions, orders, trials, judgments, appeals, costs, and executions."

Rules of practice are designed to establish the manner of bringing parties into court, and, when they are there, prescribe the course to be followed by the parties and the court throughout the various stages of the litigation, in hearing, dealing with, and disposing of the matters in dispute. 49 C. J. 1312. The purpose is to harmonize and facilitate the conduct of litigation; and, since such rules deal with all phases of a case from its inception to final judgment, the time within which an action or proceeding shall either be brought to trial, or dismissed as burdensome to an adversary and to the court as well, is a proper subject for an administrative formula in aid of a definite and uniform mode of procedure.

It is the policy of the law to expedite the administration of estates; and it would seem that the reasons which influenced the adoption of section 583 justify an interpretation of the word "action" sufficiently broad to include a proceeding such as the contest of a will.

The appellants rely with much confidence, however, on the ruling of the court in Estate of Simmons, 168 Cal. 390, 395, 143 P. 697, whereby section 581a, Code of Civil Procedure, authorizing dismissal for failure to have summons issued in an action within one year, was held to be inapplicable to a will contest, wherein a year had been allowed to pass without issuance of a citation. The rationale of that decision is that, as section 1328, Code of Civil Procedure, then in force, prescribed the period of one year for issuance of a citation, without annexing any penalty for the omission, the court was free to exercise its discretion in relieving the contestant from default and authorizing the issuance of a citation, notwithstanding the lapse of time. In other words, the court took the view that there was a probate rule which forbade application of the rule governing similar defaults in civil actions.

Appellants invoke also the decision in Estate of Joseph, 118 Cal. 660, 50 P. 768, rendered in 1897, wherein insistence was laid upon the distinction between an action and a special proceeding; and, by a strict interpretation of the word "action," the right to demand an undertaking from a nonresident plaintiff as security for costs was limited to the defendant in a civil action only. By an amendment made in 1903, however, the benefit of the section was made available in special proceedings also.

While no sure guide to the extension of the rules of civil practice to proceedings in probate is furnished by the numerous decisions in this state on various points of probate procedure, it may at any rate be said with certainty that the use of the word "action" by itself in a Code section is not controlling. This is illustrated in Estate of Knauft, 59 Cal. App. 536, 211 P. 29, where section 354, Code of Civil Procedure, was made to toll the statute of limitations in behalf of an alien enemy who had instituted a will contest after expiration of the ordinary statutory period; and in the course of its opinion, in reference to a dismissal without prejudice, the court declared that it saw no reason why section 581, Code of Civil Procedure, subdivision 4, was not applicable to a proceeding in probate. A portion of that opinion is quoted with approval in Estate of Cook, 205 Cal. 581, 588, 271 P. 1083, and is followed by the statement of the Supreme Court that the pronouncement approved is authority that the rule governing dismissal of actions generally under section 581 is applicable to probate proceedings.

Since the orders under review were made, section 1713 of the Code of Civil Procedure has been reframed in section 1233 of the Probate Code; and, with a view to clarification, that section now provides that the rules of civil practice shall be applicable to proceedings under the Probate Code "with regard to trials, new trials, appeals, records on appeal,

and all other matters of procedure." In so far as trials are concerned, we do not interpret this section as enlarging the scope of former section 1713, Code of Civil Procedure; and to our minds section 583, depriving the court of jurisdiction to try an action when there has been a delay of five years, is, and always has been, as much a general rule, affecting actions and special proceedings alike, as a rule declaring when an action or special proceeding is at issue and ready for trial.

[2] We are now brought to the second question, the elimination of the period of suspension intervening between the conventional dismissals on June 16, 1926, and the reinstatement of the contests by the court on December 2, 1926.

The respondent insists that the suspension had no effect whatever so far as section 583 is concerned, and relies on a statement of the court in Miller & Lux, Inc., v. Superior Court, 192 Cal. 333, 338, 219 P. 1006, that nothing short of a written stipulation expressly extending the time of trial beyond the five-year period, or expressly waiving the right to a dismissal, will suffice to toll the running of the statutory time. The court was there reiterating the general rule in its relation to a stipulation in that particular case which was found insufficient to meet the requirements of the law. Attention was not then being centered upon a situation which temporarily deprived the trial court of jurisdiction to proceed with the trial of the action. If such a situation had been in the mind of the court, reference would doubtless have been made to Kinard v. Jordan, 175 Cal. 13, 164 P. 894, 895, where it was held that, while an appeal was pending, the case was removed from the jurisdiction of the trial court, and necessarily exempt from the operation of section 583. Again, in Allyne v. Superior Court, 200 Cal. 661, 664, 254 P. 564, in dealing with the application of the section to the prosecution of an action after entry of an order granting a new trial, the court declared that the plain and obvious purpose of the section was to regulate the matter of compulsory dismissals only under one set of circumstances, namely, where the action had not been brought to trial within five years after filing of the answer, and that, so far as a retrial was concerned, the section had no relevancy.

In Kruly v. Superior Court (Cal. App.) 10 P.(2d) 178, several years intervened between the resting of the case after introduction of certain evidence and the resetting for trial. The trial court having denied a motion to dismiss under section 583, a writ of mandamus was applied for, but was denied upon the ground that suspension of proceedings after commencement of the trial did not set the statute in motion.

Situations are thus recognized which repel a strained construction of the statute.

No logical distinction can be made between a temporary suspension of proceedings in the trial court, consequent upon a dismissal induced by fraud or mistake, and a suspension of the power of the trial court to proceed by reason of the pendency of an appeal. In either case, the action or proceeding is withdrawn from the cognizance of the court of first instance during the period of suspension. And as in Kinard v. Jordan, supra, the case was taken out of the operation of section 583 while an appeal was pending, so in like manner the period of suspension here should be excluded in computing the quinquennium at the end of which the jurisdiction of the court expires by operation of law. In Kinard v. Jordan, begun in March, 1906, there was a motion to dismiss the action, made in September, 1914, and based on that portion of section 583, which empowers the court in its discretion to dismiss an action, if not brought to trial within two years after filing of the answer. There had previously been a judgment for the plaintiff on the merits, but on appeal that judgment had been reversed in March, 1909. 10 Cal. App. 219, 101 P. 696. Thereupon certain proceedings were had which resulted in another judgment in November, 1911, and another reversal on appeal therefrom in March, 1914, 167 Cal. 333, 139 P. 797. Then came the motion to dismiss, which was granted, but upon appeal the order was reversed. In reversing the order, the Supreme Court, after referring to the judgment of November, 1911, said: "That judgment, however erroneous it may be, purported to determine the case. The aforesaid appeals taken therefrom suspended all power of the court below to proceed, and necessarily took the case out of the operation of section 583 while the appeals remained pending."

The respondent, citing Wolters v. Rossi, 126 Cal. 644, 59 P. 143, and Page v. Superior Court, 76 Cal. 372, 18 P. 385, contends that the dismissals in question, being based upon a written request to the clerk by the attorneys of the contestants, did not suspend proceedings at all, but left the contests at all times pending.

But the dismissals in the cases cited were before the amendment made in 1897 to section 581 of the Code of Civil Procedure, authorizing dismissal by entry in the clerk's register upon written consent of the attorney of the party requesting dismissal. Consequently, those cases are no longer declaratory of the law on that point. Hopkins v. Superior Court, 136 Cal. 552, 555, 69 P. 299. Moreover, there does appear to have been a minute order of dismissal by the court.

It is contended further on behalf of respondent that the order vacating the dismissals had the effect of nullifying the intermission and placing the contests in the same situation in all respects as if there had been no dismissals at all. While the order

of restoration brought the contests again under the jurisdiction of the court, it cannot be said that by its own fiat the court could create for itself a retroactive jurisdiction. When it is stated that upon the vacation of an order or judgment the case is restored to the previously existing status, that means that the parties are placed in their original situation for the purpose of litigating the matters in controversy. The restoration revives the right to enforce whatever claims or obligations existed at the commencement of the action, and makes them subject to future determination in due course. That is far from indulging a fiction that the case was in court for purposes of trial when it was not.

Thus the question is merely whether the time when the contests were out of court shall be counted. In Kinard v. Jordan, supra, the Supreme Court established the precedent of disregarding the time during which the jurisdiction of the trial court was suspended, thereby setting reality above artificiality; and in our judgment it is our duty, under the circumstances shown in the record before us, to follow that precedent.

The orders dismissing the petitions of said contestants to revoke probate of the will of said deceased are each reversed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

125 Cal.App. 419

STEINBAUER v. BONDESEN et al.

Civ. 8343.

District Court of Appeal, First District, Division 1, California.

Aug. 22, 1932.

Rehearing Denied Sept. 21, 1932.

Hearing Denied by Supreme Court Oct. 20, 1932.

1. Dismissal and nonsuit ⇐60(1).

Independently of express authority therefor, courts have inherent power to dismiss actions for unreasonable delay in prosecution.

2. Statutes ⇐267(2).

Change in procedural law may be made during progress of matter in litigation, and will not have retroactive effect, although directly bearing upon procedure to be followed.

3. Dismissal and nonsuit ⇐60(1).

Burden is upon plaintiff to call to court's attention necessity for setting trial for time within period fixed by statute (Code Civ. Proc. § 583, as amended by St. 1929, p. 683).

4. Dismissal and nonsuit ⇐60(1).

Duty rests upon plaintiff at every stage of proceeding to expedite his case to final determination.

5. Appeal and error ⇐973.

Unless gross abuse of discretion appears, trial court's decision dismissing action for unreasonable delay in prosecution will not be disturbed (Code Civ. Proc. § 583, as amended by St. 1929, p. 683).

6. Dismissal and nonsuit ⇐60(3).

That court refused to set case for trial when it was not at issue *held* not to excuse plaintiff for unreasonable delay in prosecution (Code Civ. Proc. § 583, as amended by St. 1929, p. 683).

7. Dismissal and nonsuit ⇐60(1).

Granting motion to dismiss action for want of prosecution *held* not error, where nearly four years elapsed between date of filing complaint and date of submission of motion (Code Civ. Proc. § 583, as amended by St. 1929, p. 683).

Code Civ. Proc. § 583, as amended by St. 1929, p. 683, provides that the court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed two years after action is filed to bring such action to trial.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Frances Steinbauer against P. N. Bondesen and others. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Goldman & Nye & Reed M. Clarke, of San Francisco, Charles B. Rosendale, Edson G. Thomas, and C. C. Baker, all of Salinas, Heim Goldman, of San Francisco, and Douglas A. Nye, of Mill Valley (Morgan V. Spicer and Charles J. Janigian, both of San Francisco, of counsel), for appellant.

J. A. Bardin and J. T. Harrington, both of Salinas, for respondents.

LAMBERSON, Justice pro tem.

Appeal by plaintiff from an order and judgment of dismissal, granted upon motion of certain defendants, now respondents herein, made upon the ground that there had been an unreasonable delay in bringing the action to trial.

Plaintiff is the assignee of eighty claimants against eighty-six defendants, and the action is to enforce certain claims against the defendants upon their liability as stockholders of a corporation known as Pacific Preserve Company, the claims being variously for goods, wares, and merchandise sold, or services rendered, to said corporation.

The original complaint in the action set forth eighty causes of action, and was filed

November 22, 1926. Summons was thereupon issued, and between December 3, 1926, and June 5, 1928, demurrers of various defendants were filed. On August 9, 1928, the respondents, with the exception of Joseph Seconda, filed their answer to the so-called "Amended Complaint," and he, on August 29, 1928, filed his answer to such complaint, it being the only answer filed by Seconda.

On May 22, 1928, appellant filed a pleading denominated "Amendments to Complaint," the same being amendments as to matters of detail, and on August 21, 1928, also filed "Amendments to Complaint," setting forth in one single paragraph a list of the stockholders of the corporation.

On January 3, 1929, the respondents, with the exception of Seconda, filed their "Answer to Second Amended Complaint," their answer consisting of a general denial. None of the pleadings were verified.

On September 3, 1930, respondents filed their notice of motion to dismiss the action. The motion was submitted to the court on September 15, 1930, resubmitted on December 31, 1930, and granted on May 5, 1931. After the resubmission of the motion on December 31st, one of the attorneys for appellant, on January 21, 1931, presented to the trial judge in his chambers, an affidavit sworn to by said attorney, but made no request or motion to reopen the hearing, or any showing of good cause for the presentation of the affidavit. The court declined to consider it upon the ground that it was filed after the submission of the motion.

On January 11, 1929, plaintiff filed a memorandum of motion to set the case for trial, and on March 17, 1929, filed a similar memorandum. The case was placed upon the civil active list, but the court refused to set it for trial upon the ground that all of the defendants had not been served, and the cause was not at issue. It appeared on the civil active list at each regular calling thereof, from December 11, 1929, to July 30, 1930, with a notation beside it, "Not at Issue." On August 16, 1930, the court having refused to set the action for trial because it was not at issue as to all of the defendants, the plaintiff caused a dismissal to be entered as to certain defendants, and requested that the default of others be entered. In the record it nowhere appears that plaintiff at any time presented to the court the matter of the necessity of having the case tried as to the respondents.

The appellant contends that the granting of the motion for a dismissal was an abuse of discretion, and that the order and judgment of dismissal was against law, because based upon a motion made within less than two years after the answer of the respondents to plaintiff's last pleading denominated "Amendments to Complaint" was filed, the appellant urging that that was the time at which issues were finally joined.

Respondents base their argument for the affirmation of the judgment upon two grounds: (1) That the dismissal was a proper exercise of the discretion of the court, because the time for bringing the action to trial should have been measured from the date of filing the original answer; and (2) assuming that the facts do not bring the case within the provisions of section 583 of the Code of Civil Procedure as it stood prior to 1929, the amendment of 1929 controlled, and the action should have been dismissed because it was not brought to trial within two years after it had been commenced. We shall first consider the second point made by the respondents.

Prior to the amendment of section 583 of the Code of Civil Procedure in 1929, it read in part as follows: "The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after answer filed to bring such action to trial." In 1929 (St. 1929, p. 683) section 583 was amended by changing the words "whenever plaintiff has failed for two years after answer filed," to these words, "whenever plaintiff has failed two years after action is filed."

[1] This section is one of a series of sections of the Code of Civil Procedure, having the same general object; that is, to compel reasonable diligence in the prosecution of an action after it has been commenced, thereby extending to the party or parties against whom it is brought an opportunity to properly present any defense which may be available at the time of the commencement of the action. Independently of any express authority therefor, the courts have inherent power to dismiss actions for unreasonable delay in prosecution. Dupuy v. Shear, 29 Cal. 238; Romero v. Snyder, 167 Cal. 216, 138 P. 1002. Section 583, as enacted in 1905 (St. 1905, p. 244) created a restriction upon this power, and was a legislative determination that a delay of two years or less in bringing an action to trial after answer filed is not to be regarded as unreasonable. Johnston v. Baker, 167 Cal. 260, 139 P. 86. Section 583 established a rule of procedure, and is similar in purpose to sections 581a, 581b and 582 of the Code of Civil Procedure.

[2] In the case of People v. Kings County Dev. Co., 48 Cal. App. 72, 79, 191 P. 1004, 1006, the court said: "The provisions of the section, in other words, involve merely a matter of procedure—that is the regulation of the conduct of the parties plaintiff with respect to actions after the commencement thereof for the same reason or purpose which is at the bottom of many other provisions of

the code as to procedure, to wit, to facilitate or bring about a final or as speedy a disposition of the litigation as possible or as is deemed by the Legislature to be consistent with the rights, not alone of the plaintiff, but also of the adversary party or parties, and also to clear court calendars of cases as expeditiously as possible, thus and thereby preventing an accumulation upon such calendars of actions in which, by reason of long delays in their prosecution, it may become difficult, if not in some instances impossible, to adjudicate the issues according to the real merits or justice of such causes. Indeed, the terms of the section are, in their nature and purpose, analogous to the provisions of the Code of Civil Procedure which prescribe a time limit within which a bill of exceptions, or a notice of appeal, or a notice of intention to move for a new trial, or petition for a hearing in the Supreme Court after a cause has been heard and decided by a District Court of Appeal, must be filed." The objection is made that section 583, as amended in 1929, cannot apply to the case under consideration, because it was not expressly made retroactive by declaration of the Legislature, section 3 of the Code of Civil Procedure providing that no part of such Code is retroactive unless expressly so declared. A change in the adjective or procedural law may be made during the progress of a matter in litigation, and will not have a retroactive effect, although it has a direct bearing upon the procedure to be followed. Rice v. Dunlap, 205 Cal. 133, 270 P. 196; Bassford v. Earl, 172 Cal. 653, 158 P. 124.

In support of this principle is the case of Kerckhoff-Cuzner Mill & Lumber Co. v. Olmstead, 85 Cal. 80, 24 P. 648, 649, involving the construction of an amendment of section 1187, Code of Civil Procedure, shortening the time within which a materialman might file a lien, in which the court said: "It is also argued that the amendment cannot apply to or affect the respondent's claim, for the reason that as a portion of the materials were furnished before the amendment was passed, to hold it applicable would be giving it a retroactive effect, and that this is forbidden by the Code, which says: 'No part of it is retroactive unless expressly so declared.' Section 3, Code Civ. Proc. We do not think that the amendment, when applied to the case in hand, is retroactive in effect. It is true it shortened the time which the respondent would otherwise have had to file its claim, and thus seek its remedy. But the authorities are numerous to the effect that a change of remedy, or in the time within which it must be sought does not impair the obligation of a contract, provided an adequate and available remedy be left. Thus it has been held that an enactment reducing the time prescribed by the statute of limitations in force when the right of action accrued is not unconstitutional, provided a reasonable time be given for the commencement of an action before the bar takes effect. Terry v. Anderson, 95 U. S. 628 [24 L. Ed. 365]. In that case the court, by Waite, C. J., said: 'The parties to a contract have no more a vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remain.' And see Scarborough v. Dugan, 10 Cal. 305; Hibernia S. & L. Soc. v. Hayes, 56 Cal. 297; People v. Campbell, 59 Cal. 243 [43 Am. Rep. 257]."

In the case of Davis & McMillan v. Industrial Acc. Com., 198 Cal. 631, 636, 246 P. 1046, 1047, 46 A. L. R. 1095, the court said: "It is clear from the decisions of the courts of this state as well as those of other jurisdictions that a person has no vested right in the running of a statute of limitations unless it has completely run and barred the action. Before the action is barred by the statute, the Legislature has absolute power to amend the statute and alter the period of limitations prescribed therein, subject only to the requirement that a reasonable time must be allowed for the prosecution of an action or proceedings after the passage of an amendment shortening the period. Doehla v. Phillips, 151 Cal. 488, 91 P. 330; Swamp Land Dist. v. Glide, 112 Cal. 85, 90, 44 P. 451; Crothers v. Edison Electric Co. (C. C.) 149 F. 606, 609; 5 Cal. Jur. 755; Vance v. Vance, 108 U. S. 517, 27 L. Ed. 808, 2 S. Ct. 854; 19 Am. & Eng. Ency. of Law (2d Ed.) pp. 167, 168, 171; 36 Cyclopedia of Law (Cyc.) 1201. It is equally well settled that an amendment to a statute of limitations enlarging the period of time within which an action can be brought as to pending causes of action is not retroactive legislation, and does not impair any vested right. Weldon v. Rogers, 151 Cal. 432, 90 P. 1062; Allen v. Allen, 95 Cal. 184, 16 L. R. A. 646, 30 P. 213; Kerckhoff-Cuzner Mill & Lumber Co. v. Olmstead, 85 Cal. 84, 24 P. 648. * * * In 36 Cyclopedia of Law (Cyc.) p. 1201, the rule is laid down in the following language: 'A retroactive or retrospective law, in the legal sense, is one that takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions or considerations already past. Retrospective laws, in their general sense, include ex post facto laws, and laws impairing the obligation of contracts, but the term

"retrospective" is frequently used as applicable only to civil laws by way of distinguishing them from ex post facto laws. Retrospective statutes are usually considered to embrace only those which relate to substantial rights, as those which destroy or impair an existing right, or give a right which never before existed; and statutes which affect remedies only are not within the scope of the inhibition against retrospective laws unless the remedy is entirely taken away, or is encumbered with conditions which render it impracticable.' Again, on page 1213 of the same volume, we find the following: 'The presumption against the retrospective construction of statutes is founded on the principle that they should not be given such a construction as will make them unconstitutional or unjust, and therefore as a general rule does not apply to statutes that relate merely to remedies and modes of procedure. The Legislature has full control over the mode, times, and manner of prosecuting suits; and whenever, upon consideration of an entire statute relating to these matters, it appears to have been the legislative intent to make it retroactive, it will be given this effect. A retroactive effect has accordingly been given statutes * * * relating to the limitation of actions. * * *'"

[3-5] The effect of the 1929 amendment of section 583 (St. 1929, p. 683) was simply to change the remedy applicable to a pending proceeding. To meet the provisions of that section requiring that the action be brought to trial within two years after the filing of the answer, it was not sufficient that the plaintiff should have had the action set for trial, or be in court ready for trial. The trial must have been actually begun. Boyd v. Southern Pacific R. R. Co., 185 Cal. 344, 197 P. 58. The burden is upon the plaintiff to call to the attention of the court the necessity for setting the trial for a time within the period fixed by the section. Holt v. Miller (Cal. Sup.) 6 P.(2d) 937. The duty rests upon the plaintiff at every stage of the proceeding, to use diligence and to expedite his case to final determination. Oberkotter v. Spreckels, 64 Cal. App. 470, 221 P. 698. Unless it is made to appear that there has been a gross abuse of discretion, the decision of the trial court will not be disturbed on appeal. Barry v. Learner, 113 Cal. App. 651, 299 P. 82.

[6] Appellant urges that the task of preparing the complaint, settling the pleadings, taking numerous depositions, and otherwise preparing the case for trial, involved a tremendous amount of work on the part of her counsel, of whom there were several, which kept them occupied from January 11, 1929, when the first memorandum to set was filed, until March 17, 1930. There is nothing in the record to indicate that the case was in anywise complicated. The pleading of each cause of action was simple, and not involved in any way, the statement of each cause of action being largely a repetition of the allegations contained in the other causes of action, and aside from the fact that there were a large number of assigned claims, the case appears to have presented no unusual difficulties. A period of nearly four years elapsed between the date of filing the complaint and the date of the submission of motion to dismiss the action as to respondents. The record discloses no excuse for the long period of delay in bringing the case to trial, or any state of facts which justifies the conclusion that the lower court abused its discretion in granting the motion to dismiss. The action of the court in refusing to set the case for trial, when it was not at issue, did not constitute an obstacle on the part of the court which would excuse the appellant. The court, in requiring that a showing be made that the case was at issue, was following the provisions of the rules established by that court for the conduct of its business. This situation is to be distinguished from the state of facts under consideration in the case of Raggio v. Southern Pacific Company, 181 Cal. 472, 185 P. 171.

[7] We are of the opinion that the action of the trial court in granting the motion to dismiss should be sustained.

In view of this conclusion, it is unnecessary to discuss other matters urged by appellant and respondents, particularly the argument of appellant that the motion to dismiss was made prematurely for the reason that the motion was made within less than two years after the filing of the amended answer. As heretofore pointed out, the so-called "Amendments to Complaint" did not change the original issues in any material way. In Gray v. Hall, 203 Cal. 306, 310, 265 P. 246, 250, the Supreme Court said: "It has been generally held that where a plaintiff amends his declaration or complaint so as to change the cause of action, or add a new one, it constitutes an abandonment of the original issues, and judgment by default may be taken against the defendant if he fails to file a new or amended answer or plea within the time allowed therefor, notwithstanding the original answer or plea is still on file. 34 C. J. 164, § 375d, and authorities there cited. This rule is without application, however, where the amendment is merely as to formal or immaterial matters, and does not change the cause of action; nor does it apply where the original plea or answer set forth a sufficient defense to the declaration or complaint as amended. Lincoln County Bank v. Fetterman, 170 Cal. 357, 360, 361, 149 P. 811; Brock v. Martinovich, 55 Cal. 516; Fox v. Hale & Norcross, etc., Co., 5 Cal. Unrep. 980, 53 P. 32, 40, 41,

169; Ermentrout v. American Fire Ins. Co., 63 Minn. 194, 65 N. W. 270; Kelly v. Bliss, 54 Wis. 187, 11 N. W. 488, 490; Yates v. French, 25 Wis. 661, 663–665; Kuhuke v. Wright, 22 Kan. 464; Cohen v. Hamill, 8 Kan. 621; 3 Freeman on Judgments (5th Ed.) 2640, § 1268a; 1 Encyc. of Pl. and Pr. 628, and authorities there cited."

The language of the court is very applicable to the case now before the court. Such objection would, in no event, apply to the case of the respondent Joseph Seconda, who filed only one answer, that being on August 29, 1928. The answers filed were sufficient to place all the issues before the trial court. As was said in Fox v. Hale & Norcross, etc., Min. Co., 5 Cal. Unrep. 980, 1000, 53 P. 32, 41, 169: "The answer already in was as appropriate to the complaint as amended as before the amendment, for it was in all material respects the same identical pleading." The situation was therefore not analogous to that under consideration in Southern Pac. Co. v. Superior Court, 69 Cal. App. 106, 230 P. 952, in which a supplemental answer and plea in abatement were filed after leave had been granted by the court. Those pleadings injected new issues into the case not comprehended by the original complaint and answer.

It is ordered that the judgment be affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

125 Cal.App. 248

WOOD et al. v. AMERICAN NAT. BANK et al.

Civ. 602.

District Court of Appeal, Fourth District, California.

Aug. 5, 1932.

1. Trusts ⇐112.

Uncertainty in language of trust will be construed, if possible, in favor of beneficiary and against trustee.

2. Trusts ⇐191(1), 206(1).

Settlor's letter regarding creation, duration, and objects of trust, and trustee's declaration of trust did not authorize trustee to execute trust deed and grant deed to trust property.

Letter disclosed it was the desire of the settlor that the property should be preserved as a home for her children until her youngest child became of age, and to effect this intention, she desired that the property be deeded to her sister as trustee, while in the declaration of trust it was stated that the sister as trustee had no legal, equitable, or beneficial ownership in the property but held it in trust for the named beneficiaries.

3. Trusts ⇐182.

In absence of authority to convey or incumber trust property, trustee had duty to keep property and deliver it to designated beneficiaries on termination of trust.

4. Trusts ⇐171.

Trustee can adopt measures and do acts which, though not specified in trust instrument, are implied in its directions, and proper for making it effectual.

5. Trusts ⇐206(1).

Where settlor desired property to be preserved as home for her children, trustee would have implied authority to execute trust deed on trust property to secure money borrowed for carrying out trust.

Trustee would be impliedly authorized to execute trust deed on trust property to secure payment of money borrowed for preserving property as a home because, although not specifically authorized by the settlor, such act was nevertheless implied in the general directions contained in the letter of the settlor to effect that she desired the property should be preserved as a home for her children, and because such act was a reasonable and proper means for carrying out the settlor's expressed desire, "preservation of property" particularly for the specific purpose of providing a home implying care and management.

6. Trusts ⇐262.

Trustee executing trust deed to trust property to secure money borrowed for trust purposes, and bank taking such trust deed as security had burden of showing its execution was implied in settlor's directions, and proper for effecting settlor's intention.

7. Trusts ⇐262.

Evidence did not sustain finding trustee's execution of trust deed on trust property was required to effect settlor's intention.

8. Trusts ⇐203, 206(6).

Bank taking grant deed and trust deed to trust property from trustee with actual knowledge of circumstances of trust *held* not "good faith purchaser"; hence grant and trust deeds were void (Civ. Code, § 869a).

Bank taking such deeds was not a "good faith purchaser" under Civ. Code, § 869a, because it had actual notice that the original deed, although absolute on its face, in fact, conveyed title to the trustee to be held in trust for named beneficiaries, and had notice of the objects of the trust, length of time it was to continue, and of

the declaration of trust executed by the trustee to effect that she had no equitable, legal, or beneficial interest in the property, but held only as trustee, phrase "good faith" generally importing lack of notice by a purchaser of equities of third parties, and term "bona fide purchaser" being defined as one who buys property of another without notice that some third person has a right therein, and who pays full price for the same before he has notice of the claim of the other party.

[Ed. Note.—For other definitions of "Bona Fide Purchaser" and "Good Faith," see Words and Phrases.]

9. Vendor and purchaser ⇐228(1).

Purchaser or incumbrancer with notice of equities of third persons cannot claim protection afforded purchasers in good faith.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Chester Brooks Wood and another, minors, by Chester G. Wood, their father and guardian ad litem, against the American National Bank and others. From an adverse judgment, plaintiffs appeal.

Reversed.

Charles Bagg, of San Bernardino, for appellants.

David W. Richards, of San Bernardino, and Donald Plympton Mayhew, of Los Angeles, for respondents.

JENNINGS, J.

This action was instituted by the plaintiffs, Chester Brooks Wood and Carolyn Lyde Wood, minor children of Letta Wood, deceased, through their duly appointed guardian ad litem, to have certain instruments affecting the title to real property in the county of San Bernardino declared void and canceled. From a judgment denying to them the relief sought, plaintiffs have prosecuted this appeal.

The record herein presents the following facts: On March 16, 1925, the real property, the title to which was affected by the instruments alleged by plaintiffs to be void, was conveyed by grant deed to the defendant Bess Brooks. This deed was absolute on its face and conveyed title in fee to the grantee named therein. On the same day Bess Brooks executed an instrument wherein she certified that the real property which had been conveyed to her was in fact the property of her sister, Letta Wood, and that she held title thereto in trust for her said sister and would upon her request execute a deed to the property as she might direct. On March 9, 1925, a letter was written by Mrs. C. G. Wood, who is shown by the record to be the same person as Letta Wood, addressed to R. D. McCook, president of the American National Bank in San Bernardino. That portion of the letter which is of importance to the questions herein involved is in the following language:

"Your letter rec'd today. Thanks very much for being so prompt in making payments on this property of mine. So I told you over the phone this property was given me by my father to be kept always as a home and I want to follow out his wishes & I know it would be my father's wish that if I do not recover that this property should be kept intact until my children are grown.

"I realize that Mr. Wood drinks quite heavily and so is not responsible.

"Yes, I would like to follow your suggestion and have the property deeded to her my sister as Trustee.

"If anything happens I do not recover would like the property held in trust for my daughter Carolyn when she become of age. If you will phone my sister she will place the $20. at your disposal.

"Unless my sister is appointed trustee, I realize my son & daughter would never have the benefit of this property should anything happen I don't recover. Especially since you advised me that Mr. Wood wished $1,000.00 placed to his credit. You know a man who drinks is not responsible."

On March 16, 1925, R. D. McCook signed a letter which was addressed to Mrs. C. G. Wood. That part of the communication important to be here noted reads as follows:

"We have prepared Deed for signature of W. E. Daimwood and wife to the home property here, deeding it to your sister Bess Brooks. Your sister has executed a Declaration of Trust which I inclose herewith. This declaration is evidence, as you will note, that the property is actually yours, held in her in trust only. Will say that I have had her sign this in duplicate and we have another copy of same here, which I am attaching to the copy of this letter and which will be filed in our regular letter file for use in case you should lose or mislay your copy.

"It will be impossible to deed or mortgage this property now without the signature of your sister."

Letta Wood died March 21, 1926. On April 6, 1926, Bess Brooks executed a trust deed conveying the property which is the subject of the present controversy to the defendant American National Bank in trust to secure the payment of a promissory note for $2,200, executed by Bess Brooks on the same date in favor of said bank. On April 12, 1927, Bess Brooks executed a grant deed conveying title to the said property to the American National Bank. This deed recited that title to the property was conveyed to the bank subject

to the trust deed theretofore executed in favor of the bank. On the same date on which the grant deed was executed an instrument entitled "Declaration of Trust" was executed by the American National Bank of San Bernardino. This instrument recites the conveyance of the property to the bank by a deed absolute in form executed by Bess Brooks, denominated the trustor; that no consideration was paid by the bank for the conveyance, but that it was accepted and will be held upon the trust, terms, and conditions and for the purposes specified in the declaration of trust until such time as the beneficiaries named therein shall have attained the age of 21 years. The beneficiaries designated in the instrument are the two minor children of Letta Wood. It is stated in the declaration that it is understood and agreed between the trustee and trustor that, prior to the conveyance of the property by the trustor to the trustee, the trustor had no legal, equitable, or beneficial interest in the property, but that she held legal title thereto as trustee for the sole benefit of the beneficiaries named in the declaration. It is provided that the trustee bank may at any time, either upon written order of the trustor, or, when in the judgment of the trustee, it appears advantageous to the trust estate, sell and dispose of the property holding the proceeds therefrom in trust for the sole benefit of the beneficiaries. It is further provided that the trust shall cease when the younger of the two beneficiaries attains the age of 21 years. Appended to this declaration is a certificate signed by Bess Brooks wherein she certifies that she is the person named in the instrument as trustor and that the declaration of trust fully and correctly states the terms and trust under which the property is to be held, managed, and disposed of by the trustee and that she consents to, approves, ratifies, and confirms the same in all particulars. At some time subsequent to the execution of the grant deed to the defendant bank and the execution of the above-described "Declaration of Trust" the bank entered into a contract with the defendant Robert H. Emery by which the bank agreed that, upon the payment by him or his assigns of a specified sum of money, it would execute a deed conveying the property to said purchaser. Thereupon the purchaser under this contract took possession of the property.

[1-3] The question whether the respondent, Bess Brooks, was authorized to execute the trust deed and the grant deed to respondent bank depends ultimately upon an analysis of the letter of March 9, 1925, written by Letta Wood, addressed to the president of respondent bank. This communication constituted the only evidence before the court which shed any light upon the intention of the owner of the property regarding the nature and terms of the trust which she desired to create with respect to her real property. The interpretation of this letter therefore furnishes the only key to the solution of the problem here presented. Title Ins. & Trust Co. v. Duffill, 191 Cal. 629, 642, 218 P. 14. The first paragraph of the letter states that the property had been given to the writer by her father "to be kept always as a home"; that it is her desire to follow out his wishes; and that she knows it would be her father's wish that, if she should not recover, the property "should be kept intact" until her children are grown. In the third paragraph the writer states that she would like to have the property deeded to her sister, as trustee. She further declares in the fourth paragraph that, if she should not recover, she would like to have the property held in trust for her daughter, Carolyn, when she becomes of age. The fifth paragraph contains the following statement: "Unless my sister is appointed trustee, I realize my son & daughter would never have the benefit of this property should anything happen I don't recover." The remainder of this paragraph and the single sentence which constitutes the second paragraph indicate clearly the reason for the writer's anxiety concerning the property. She here adverts to the fact that her husband drinks heavily and is therefore not responsible. It thus clearly appears from the language of the letter that it was the desire and intention of the settlor that the property should be preserved as a home for her children until the daughter, who appears to be the younger of the two children, should become of age and to carry this intention into effect she desired that her property be deeded to her sister as trustee and that it be held in trust for the two children. It is true that she states that she wishes the property held in trust for the daughter alone, but other language contained in the letter and its general scope and purpose indicate that it was the desire and intention of the writer that the property be held in trust for both children. The clearly expressed statement that, if she should not recover, she knows that it would be her father's wish that the property, which had been given to her to be kept always as a home, should be kept intact until the children are grown, and that she desires to fulfill his wishes does not warrant the contention of respondents that it was the intention of the settlor that the property be sold and the proceeds be preserved for the beneficiaries. It may well be that great benefit would be derived by the beneficiaries should this interpretation be adopted. But the language employed by the settlor so clearly evidences her desire that the property shall be preserved as a home until the younger child has become of age that strained effort would be required in order that the interpretation contended for by respondents should be adopted. Furthermore, it is the rule that, if there be any doubt or uncertainty in the language of the trust, it will be construed, if possible, in favor of

the beneficiary and against the trustee. Title Ins. & Trust Co. v. Duffill, supra; Ringrose v. Gleadall, 17 Cal. App. 664, 667, 121 P. 407. It is to be remembered also that the grantee in the deed from the Daimwoods, dated March 16, 1925, the respondent herein Bess Brooks on the same day on which the deed conveying title in fee to her was made, executed an instrument wherein she declared that the property deeded to her by the Daimwoods is in fact the property of her sister, Letta Wood, that she holds title to the property in trust for her, and will upon her request execute a deed thereto as she may direct. Herein is contained no intimation or suggestion that the person who thus admits that she holds title merely as trustee considered that she had any authority to do anything with the property other than to execute a deed to it as her sister might direct. It is significant that, although Letta Wood lived for a year after the deed conveying title was executed, she gave no directions, so far as appears, to her sister, Bess Brooks, to execute a deed to the property to any one. It thus appears that neither in the letter in which the settlor expressed her desire for the creation of the trust, its duration, its object, and the beneficiaries for whom she desired its creation nor in the instrument by which the trustee declared that she held title to the property in trust is to be found any authority given directly or by implication to the trustee to convey the property. In the absence of such authority the duty was imposed upon the trustee to keep the property and to deliver it to the designated beneficiaries upon the termination of the trust. Goad v. Montgomery, 119 Cal. 552, 560, 51 P. 681, 63 Am. St. Rep. 145; Huntoon v. Southern T. & C. Bank, 107 Cal. App. 121, 290 P. 86. Unless, therefore, the conveyance by the trustee, Bess Brooks, to the respondent bank is protected by the statute it would seem to follow logically that it was void and that the judgment refusing so to declare it is incorrect. It is contended by respondents and was evidently the opinion of the trial court that the situation thus presented is covered by the provisions of section 869a, Civil Code. This contention will receive consideration in a later part of the opinion herein.

[4-7] Appellants urge that the trust deed executed by respondent Bess Brooks on April 6, 1926, in favor of the respondent bank to secure the payment of the promissory note for $2,200 is likewise void as an unauthorized act on the part of the trustee, Bess Brooks. In this connection, it is said that the trust under which the trustee held title to the property is a dry, passive trust requiring the performance of no active duty by the trustee who was the mere depositary of the naked title charged with no duty and without power to take possession or manage or exercise any control over the property. But again seeking to discover the settlor's intention in this regard as it may be derived from an interpretation of her letter of March 9, 1925, addressed to the president of the respondent bank, it appears that she undoubtedly desired that the property should be preserved as a home for her children, and, therefore, because of her expressed belief of her husband's irresponsibility, desired that title be conveyed to her sister as trustee for the children. Manifestly, her desire for the preservation of the property as a home for her children might be effectually and rapidly thwarted by the involuntary imposition of liens against the property for various charges, e. g., tax liens. When it is remembered that at the time the letter of March 9, 1925, was written, the daughter of Letta Wood was but 5 years and 2 months of age and her clearly expressed desire and intention was that the trust should continue until this child should attain her majority, it is apparent that, in order to carry into effect the settlor's desire that the property be preserved as a home, something more than mere passive holding of title by Bess Brooks would be required. Preservation imports some degree of activity. Preservation of property particularly for the specific purpose of providing a home implies care and management. Therefore, although the execution of the trust deed by the trustee was not authorized by the letter of the settlor from whose interpretation we deduce her intentions respecting the nature and objects of the trust, it is nevertheless the rule that a trustee has "authority to adopt measures and to do acts which, though not specified in the instrument, are implied in its general directions, and are reasonable and proper means for making it effectual." 2 Pomeroy's Eq. Jur. § 1062; Gilbert v. Penfield, 124 Cal. 234, 238, 56 P. 1107; Kipp v. O'Melveny, 2 Cal. App. 142, 144, 83 P. 264. We are then of the opinion that, upon proper showing by the trustee, Bess Brooks, of the necessity of borrowing money to discharge valid claims and liens against the property held by her in trust in order that she might protect and preserve it as a home for the minor children of the settlor, the trial court might properly conclude that the execution of a trust deed by the trustee to secure payment of money borrowed for such purposes, although not specifically authorized by the settlor was nevertheless an act implied in the general directions contained in the letter of March 9, 1925, and a reasonable and proper means for carrying out the settlor's expressed desire and intention that the property be preserved as a home for her minor children. We are also of the opinion, however, that the burden of making such showing rested upon respondents Bess Brooks and the American National Bank of San Bernardino. This burden was not sustained by the above-named respondents. The only evidence respecting this important fea-

ture of the case contained in the record consists of the testimony of the witness R. D. McCook, president of respondent bank. This witness testified that the money to secure whose repayment the trust deed was executed was disbursed under very careful supervision and was used in the payment of claims against the property and for bills and accounts against Letta Wood, most of which were accumulated during her last illness, and that the money was borrowed by the trustee because of the very urgent necessity of paying the charges that had accumulated. This testimony, in our opinion, was not sufficient to authorize the trial court in finding, as it did, that the execution of the trust deed to respondent bank was an act required to be done in order that the object and purpose for which the trust was created should be accomplished.

[8] There remains for consideration the question of the application of section 869a, Civil Code, to the grant deed and the earlier trust deed executed in favor of the respondent bank by the trustee, Bess Brooks. It is the contention of respondents that, since it satisfactorily appears that the transaction between the trustee, Bess Brooks, and the respondent bank whereby the sum of $2,200 was loaned by the bank to the trustee who thereupon executed the trust deed to secure the repayment of the loan was free from fraud and valuable consideration, to wit, the loan of $2,200, was given, therefore the presumption that the trustee held title to the property covered by the trust deed in her own individual right free from any trust became conclusive in favor of the incumbrancer as to the beneficiaries undisclosed by the original deed which conveyed title to the trustee. It cannot be maintained nor is it suggested that the respondent bank, incumbrancer under the trust deed, did not have actual notice that the original deed, whereby title was conveyed to respondent Bess Brooks, although, on its face, it conveyed absolute title, in fact conveyed merely legal title which was to be held in trust for the beneficiaries named in the letter written by Letta Wood on March 9, 1925. The letter of March 16, 1925, signed by the president of the respondent bank addressed to Letta Wood shows that the deed from W. E. Daimwood and wife to Bess Brooks was prepared by the respondent bank and that the declaration of trust executed by Bess Brooks on the same date on which the deed to her was executed was sent to Letta Wood with the letter. Further, the declaration of trust executed by the respondent bank on April 12, 1926, recites that "it is understood and agreed by and between the parties hereto namely, the trustee and trustor, that prior to the conveyance of the above described real property to the trustee, the trustor had no legal, equitable or beneficial interest in the above described real property but that the trustor held legal title to the property as trustee for the sole benefit of the two beneficiaries hereunder." Nevertheless, although it is undisputed that the incumbrancer had full knowledge of the fact that respondent Bess Brooks held title, not in her own right, but merely as trustee, it is said that, since the original deed purported to convey title to her absolutely without naming any beneficiaries, therefore the respondent bank which accepted the trust deed in good faith and for valuable consideration is protected by the conclusive presumption raised by the statute. It may be conceded that the loan of $2,200 by the bank constituted valuable consideration. It may also be conceded that the transaction between the bank and Bess Brooks was free from any taint of fraud. It is obvious that the solution of the problem depends ultimately on the meaning of the phrase "good faith" as used in the statute. If, as stated in Heney v. Sutro & Co., 28 Cal. App. 698, 702, 153 P. 972, 974, it "imports that in any given case the transaction involved was honestly conceived and consummated without collusion, fraud, or knowledge of fraud, and without intent to assist in a fraudulent or otherwise unlawful design," the contention of respondents that the statute was framed to cover just such a situation as is here presented possesses merit. In this connection it is pointed out that section 869, Civil Code, provides that, where an express trust is created in relation to real property but is not declared in the grant to the trustee or in an instrument signed by him and recorded in the same office with the grant to the trustee, the grant to the trustee must be deemed absolute in favor of purchasers from such trustee, without notice, and for a valuable consideration. It is said that the failure of the Legislature to incorporate in a statute adopted at a much later date the element of lack of notice by a purchaser or incumbrancer from a trustee imports an intent on the part of the lawmaking body that lack of notice shall not be regarded as a necessary element of good faith as this phrase is used in the statute under consideration. The very fact that section 869, Civil Code, requires lack of notice by a purchaser from a trustee under an express trust in order that the grant from such trustee shall be deemed absolute while the statute later enacted dealing with a similar situation but broader in terms contains no requirement that a purchaser from the trustee shall have received the grant without notice of rights of the original grantor or of beneficiaries unnamed in the instrument conveying title to the original grantee is said to be significant and to indicate conclusively a legislative intent that lack of notice by a purchaser or incumbrancer shall not be an essential prerequisite to the protection of a purchaser or

incumbrancer who acts in good faith and parts with valuable consideration in return for a grant or instrument of incumbrance from one who holds title under a deed of conveyance which fails to designate the beneficiaries for whose benefit the trust was created. Careful search fails to disclose any decision of the Supreme Court of California or of any Court of Appeal of this state wherein that portion of section 869a, Civil Code, here under consideration has been construed. The phrase "good faith" generally imports lack of notice by a purchaser of equities of third parties. In Bouvier's Law Dictionary a bona fide purchaser is defined to be "one who buys property of another without notice that some third person has a right to, or interest in, such property, and pays a full and fair price for the same at the time of such purchase, or before he has notice of the claim or interest of such other in the property." In Eversdon v. Mayhew, 65 Cal. 163, 167, 3 P. 641, it is said that a purchaser of property who has notice, actual or constructive, of the prior equity of a third person is not a bona fide purchaser. The rule thus declared is approved in Davis v. Ward, 109 Cal. 186, 41 P. 1010, 50 Am. St. Rep. 29. In County Bank of San Luis Obispo v. Fox, 119 Cal. 61, 51 P. 11, 12, the rule is thus stated: "Again, it is well settled that one who claims to be a bona fide purchaser must plead the facts essential to make him such; that is that he purchased for value, and paid the consideration, before he had notice of the prior conveyance or mortgage."

In Kenniff v. Caulfield, 140 Cal. 34, 45, 73 P. 803, 806, the court speaking of a bona fide purchaser said: "To entitle a party to protection as such a purchaser, he must aver and prove the possession of his grantor, the purchase of the premises, the payment of the purchase money in good faith, and without notice, actual or constructive, prior to and down to the time of its payment; for, if he had notice actual or constructive, at any moment of time before the payment of the money, he is not a bona fide purchaser."

[9] This language is quoted with approval in Title Guarantee, etc., Co. v. Henry, 208 Cal. 185, 192, 280 P. 959. It would appear therefore that a purchaser or incumbrancer of real property who is shown to have had notice of prior equities of third persons is not a purchaser or incumbrancer in good faith. It is obvious that, if the deed by which the property was originally conveyed to Bess Brooks had contained the names of the beneficiaries, the respondent bank could not have been heard to maintain that it was a purchaser or incumbrancer in good faith for the reason that it would then have had notice that the beneficiaries had rights in the property which could not be destroyed or nullified even though the bank had paid a fair price and the transaction was untainted by fraud. How then can the bank with full and actual knowledge of all the circumstances under which the trust was created, the names of the beneficiaries, the object of the trust, and the length of time it was to continue, maintain that it acted in good faith in accepting a deed of trust from the person known by it to be merely a trustee, holding legal title for the sole benefit of such beneficiaries? It will not do to say that in this particular case the transaction was in reality for the benefit and protection of the cestuis que trustent and therefore should be upheld. The general rule is that a purchaser or incumbrancer with notice of the equities of third persons cannot claim the protection afforded to purchasers in good faith. To hold that a purchaser or incumbrancer with such knowledge shall prevail because it appears that such purchaser or incumbrancer had no intention of defrauding the beneficiaries would serve to open the door to the perpetration of fraud. The reasoning which applies to the trust deed applies with equal force to the grant deed executed by respondent Bess Brooks in favor of respondent American National Bank of San Bernardino.

For the reasons herein set forth the judgment is reversed.

MARKS, J.

I concur in the foregoing opinion and judgment. Nothing said therein should be construed as holding that the superior court, sitting as a court of equity, might not have power to order a sale of the real property forming the corpus of the trust, in a proper proceeding if circumstances should arise showing that such an action were necessary and the only method in which any portion of the trust estate could be preserved for the beneficiaries. 26 R. C. L. 1282, § 133; 39 Cyc. 552. This question is not presented on this appeal and has not been considered by us.

I concur: BARNARD, P. J.

125 Cal.App. 697

ROWLAND v. BRUTON.

Civ. 8135.

District Court of Appeal, Second District, Division 1, California.

Sept. 8, 1932.

1. Venue ⇐41.

Defendant is entitled to have action removed for trial to county of his residence if no cause of action be stated against codefendants who reside in county where complaint is filed.

2. Sheriffs and constables ⇐113(1).

Sheriff who seized automobiles under execution, and complied with statute in receiving bonds indemnifying third party claimant, is not liable for conversion (Code Civ. Proc. § 689, as amended by St. 1929, p. 661).

3. Venue ⇐22(1).

Presence of foreign corporation as codefendant cannot deprive individual defendant of trial in county of his residence (Code Civ. Proc. § 392 et seq.).

This is so since a foreign corporation, by doing business in California, does not establish a residence in any particular county, such as is contemplated by the provisions of Code Civ. Proc. § 392 et seq. relating to place of trial.

4. Venue ⇐52½.

When in opposition to motion for change of venue, convenience of witnesses is alleged, and requires that action be tried in county where brought, place of trial will not ordinarily be changed.

5. Venue ⇐37.

Unless answer has been filed at time demand for change of venue is made, countermotion to retain case on ground of convenience of witnesses will not lie.

Appeal from Superior Court, Los Angeles County; John F. Pullen, Judge.

Action by Adele Rowland against Martin P. Bruton, administrator of the Estate of Josephine Park Tearle, deceased, and others. From an order denying motion for change of place of trial, named defendant appeals, and files motion to submit cause on his brief.

Motion to submit cause granted; order denying motion for change of place of trial reversed.

Marcel E. Cerf, Henry Robinson, and Herbert A. Leland, all of San Francisco, for appellant.

Edward E. McCullough, of Los Angeles, for respondent.

CONREY, P. J.

The cause pending herein is an appeal from an order of the superior court of Los Angeles county, denying an application for change of place of trial of the action from the superior court of the county of Los Angeles to the superior court of the city and county of San Francisco. The transcript was filed on November 19, 1931, and the appellant's brief was filed on December 22, 1931. Upon application of the attorney for respondent, his time for filing brief was extended to February 1, 1932. No further extension of time was requested or granted and no brief has been filed for respondent. On this condition of the record, appellant has submitted his motion that the cause be submitted for decision upon appellant's brief.

In rule V, section 1, of the rules of this court, it is provided that, if respondent shall not file his points and authorities within the time allowed therefor, the cause may be submitted for decision upon appellant's brief, in which case the court may, in its discretion, decide the case upon the statement of facts contained in such brief. It appears that the motion is meritorious and should be granted. We will therefore proceed to determine the appeal on its merits.

This action was brought against appellant Bruton, administrator of the estate of Josephine Park Tearle, and against National Surety Company, Wm. I. Traeger (sheriff of Los Angeles county), and Conway Tearle, to recover damages for conversion of two automobiles alleged to have been the property of the plaintiff. It appears from the complaint that these automobiles were seized by the sheriff under a writ of execution issued out of the superior court of the city and county of San Francisco, in an action of Mrs. Tearle as plaintiff, wherein she had obtained a judgment against Conway Tearle. Plaintiff duly filed a third party claim to said automobiles, and thereupon, July 12, 1930, Mrs. Tearle filed with the sheriff indemnity bonds and required the sheriff to retain the property under the writ of execution. Thereafter the property was sold under said writ. The plaintiff alleged her ownership of said automobiles and the facts showing her damages by reason of the unlawful seizing, taking, withholding, and sale of her property.

Defendant Bruton, upon the filing of his demurrer to the complaint in said action, filed an affidavit showing his status as a resident of the city and county of San Francisco, and demanded that the place of trial of the action be transferred to that city and county. A motion to that end was duly presented to the court and was denied. Thereupon defendant appealed from the order denying change of place of trial.

[1, 2] At the hearing of said motion for change of place of trial, the fact of appellant's residence in San Francisco was not denied; but the attorney for plaintiff filed an affidavit purporting to set forth reasons for retaining the case in the county of Los Angeles on the ground of convenience of witnesses. But no issue of fact had then been joined. A defendant is entitled to have the action removed for trial to the county of his own residence if no cause of action be stated against the codefendants who reside in the county where the complaint is filed. Donohoe v. Wooster, 163 Cal. 114, 124 P. 730. The complaint did not state any cause of action against Conway Tearle, who was a judgment debtor in the action wherein the execution was issued. No cause of action was stated against the sheriff; for the complaint in this action does not show that, in demanding and receiving the indemnity bond provided for by section 689 of the Code of Civil Procedure, the sheriff did not comply with the requirements of the law. Under the provisions of said section 689, as amended in the year 1929 (St. 1929, p. 661), it appears that, where the facts are as above stated, as existing in this case, the sheriff is not liable in damages as for conversion of the property. This question came before the Fourth District Court of Appeal in Cory v. Cooper, 4 P.(2d) 581, 583. The provisions of said code section and the intention and effect of the amendment, are there carefully stated. Among other things, the court said: "While the section, before it was amended, provided that the sheriff was not bound to hold the property unless he received an undertaking which was to protect him from the liability he was assuming, as amended the section makes no provision for any bond in his favor, although providing that he must hold the property when a bond is given for the protection of the third party. It is thus made mandatory upon him to hold the property, while his former protection is removed, and at the same time a new protection is given to the third party. We think these respective portions of the act should be considered together, and that, so taken, their meaning is that a third party claimant may not look to a sheriff who has in all respects complied with the statute, in so far as recovering damages for conversion is concerned."

[3] The remaining codefendant is the National Surety Company, a New York corporation. A foreign corporation by doing business in this state does not establish a residence in any particular county, such as is contemplated by the provisions of the Code of Civil Procedure relating to place of trial (section 392 et seq.). It follows that the presence of a foreign corporation as a codefendant cannot deprive an individual defendant of a trial in the county of his residence. San Jose Hospital v. Etherton, 84 Cal. App. 516, 258 P. 611.

[4, 5] It may be that, in denying the motion for change of place of trial, the court below rested its decision upon the claim that the convenience of witnesses required that the trial be held in Los Angeles county. "When, in opposition to a motion for a change to the residence of the defendant, the convenience of witnesses is alleged, and requires that an action be tried in the county where it was brought, the place of trial will not ordinarily be changed. This rule, however, is subject to the exception that, unless answer has been filed at the time the demand for change of venue is made, a countermotion to retain the case on such ground will not lie, for the obvious reason that, until the issues are settled, the court cannot determine what testimony will be material." Gordon v. Perkins, 203 Cal. 183, 263 P. 231.

The motion to submit cause is granted, and the order denying motion for change of place of trial is reversed.

We concur: HOUSER, J.; YORK, J.

125 Cal.App. 725

CLARKEN et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 8600.

District Court of Appeal, Second District, Division 2, California.

Sept. 12, 1932.

Wills ⇐423.

On expiration of six months after probate of will, probate *held* conclusive against all persons not under disability, subject only to modification made by testamentary document thereafter probated (Probate Code, § 384).

Application by George A. Clarken and another against the Superior Court in and for Los Angeles County, and Charles S. Crail, as Judge thereof, for a writ of prohibition to restrain respondents from proceeding with the hearing of a contest to probate of will.

Writ granted.

A. J. Mullen and Ray E. Nimmo, both of Los Angeles, for petitioners.

STEPHENS, Justice pro tem.

The will was probated and the statutory six months had run without any contest having been filed. Thereafter a writing was admit-

ted to probate as a codicil to the will. On the same day the proponent of the codicil filed a contest alleging that the will (not including the codicil) was drawn, signed, and published while the testatrix was under the undue influence of the executor named in the will, and that he substituted his will for hers. The executor, the petitioner here, filed a demurrer and motion to strike the contest on the ground that the contest comes too late. The rulings on both were adverse to the executor and he is here requesting this court to prohibit the superior court from proceeding with such contest, alleging that the costs of preparation for the trial, the trial itself, and the delay in the administration of the estate will be expensive to the estate.

No response whatever has been made to this petition either by the superior court or the contestant therein.

We think the entertainment of the contest by the superior court is beyond its jurisdiction. Section 384, Probate Code. When the statutory six months after probate of the will had expired, its probate was conclusive against all persons not under a disability, subject only to any modification that might be made by a testamentary document thereafter probated. Estate of Moore, 180 Cal. 570, 182 P. 285.

The peremptory writ of prohibition prayed for has heretofore issued.

We concur: WORKS, P. J.; CRAIG, J.

125 Cal.App. 781

PEOPLE v. CAIN.

Cr. 1225.

District Court of Appeal, Third District, California.

Sept. 14, 1932.

Criminal law ⇐1169(1).

In robbery prosecution, admitting pistol as exhibit *held* not prejudicial, irrespective of sufficient identification, where evidence showed that defendant was armed with similar pistol at time of robbery.

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Clarence Cain was convicted of robbery, and he appeals.

Affirmed.

George E. Foote, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The appellant was convicted upon an information charging that he did wilfully, unlawfully, feloniously, and forcibly take from the person of one J. A. Olson lawful money of the United States of the value of $20. That the taking was accomplished by means of force, and at the time of the taking appellant was armed with a deadly weapon, to wit, an automatic pistol. From the judgment following the conviction, the defendant appeals, and presents for our consideration an alleged error on the part of the court in permitting a certain automatic pistol to be admitted as an exhibit in the cause. No briefs were filed; no other objection was made upon oral argument to any of the rulings of the court, nor to the instructions given by the court to the jury.

The record shows that J. A. Olson was the keeper of a gas filling station at Alhambra boulevard and O street, in the city of Sacramento; that on or about the 8th day of March, 1932, at about 10 o'clock in the evening, while Olson was sitting in the service station just referred to, reading a story in the Saturday Evening Post, the defendant pushed open the door leading into the room where Olson was sitting and commanded him to put up his hands. Olson noticed that the defendant had an automatic pistol which the defendant held in one of his hands. The defendant ordered Olson to open the cash register, which Olson did. While the defendant was taking the money from the cash register, he ordered Olson to lie down on the floor. After taking the money, the defendant ordered Olson to get up, and asked if there was a telephone in the building, and where it was. Being informed that there was a telephone in an adjoining room, the defendant marched Olson into the room, compelled him to lie down on a cot, and, while Olson was lying in this position, the defendant jerked the telephone from the wall, and told Olson to lie still for a few minutes until he made his "get-away." During all of this time the defendant was unmasked, and Olson had a clear view of the defendant, and was able to identify him when the defendant was subsequently arrested. Following the robbery just explained, the defendant ran out of the building, and Olson sought the services of the police department. The defendant, however, was not arrested until some time the following April.

At the time of the arrest of the defendant, it appears that he was armed with an automatic pistol similar to the one in his possession at the time of the robbery. This pistol was admitted in evidence over the objection of the defendant. Some testimony was introduced as to the attempted flight of the defendant at the time he was arrested, and of the scuffle between the defendant and officers when they

dispossessed him of the pistol just referred to. This testimony, however, appears to have been stricken out by the trial court, and all that was left in the record in relation to the gun was that the defendant was armed with a gun at the time of his arrest, similar to the one described by Olson as being in the possession of the defendant at the time of the robbery.

Irrespective of whether the gun was or was not sufficiently identified as being the gun which the defendant used at the time of the robbery, the evidence shows beyond controversy that the defendant was armed with an automatic pistol at the time of the robbery, and that it occurred in the nighttime, which fixes the degree of the offense.

The record also shows that the defendant, after his arrest, admitted that he had previously held up a service station.

Finding no merit in the appeal in this cause, the order denying defendant's motion for a new trial and the judgment are affirmed.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

126 Cal.App. 1

EDWARDS et ux. v. CITY OF SAN DIEGO.

Civ. 925.

District Court of Appeal, Fourth District, California.

Sept. 14, 1932.

Rehearing Denied Oct. 14, 1932.

Hearing Denied by Supreme Court Nov. 10, 1932.

1. Municipal corporations ⇐851.

Constructive notice of dangerous condition of park tree may render city liable, long-continued neglect of conditions that should have been known being sufficient constructive notice (St. 1923, p. 675).

2. Municipal corporations ⇐857.

Generally, where there is substantial evidence of facts which should impute notice of dangerous condition to city, whether facts constitute notice is jury question.

3. Municipal corporations ⇐857.

In suit for death of child killed by falling tree, evidence sustained finding that city should have known of condition of tree (St. 1923, p. 675).

Evidence disclosed that a nurseryman had recently seen a limb of a tree in the park fall; that the limb was rotten; that a police officer came over and made some notes; that he looked at other trees in the park and found some of them rotten; that the nurseryman observed the tree involved and that it looked rotten just below where the limb branched out; and that a number of other witnesses gave similar testimony showing that the dangerous condition of the tree had been observable for about two years.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by Charles H. Edwards and wife against the City of San Diego. From judgment for plaintiffs, defendant appeals.

Affirmed.

C. L. Byers, City Atty., of San Diego, for appellant.

Gray, Cary, Ames & Driscoll, of San Diego, for respondents.

BARNARD, P. J.

On July 28, 1930, while standing in what is known as the "Plaza" in the city of San Diego, Dorothy Edwards, a girl of 19, was struck and killed by the falling top of a palm tree. This is an action for damages brought by her parents under the provisions of the statute adopted in 1923 (Stats. 1923, p. 675). The Plaza is a small public park in the heart of the business section of San Diego. Around this park and just within the sidewalk lines there is a row of cocos plumosa palms, the trees being approximately 35 or 40 feet in height. The park is much used by the general public, including some 3,500 to 5,000 people who daily wait there for street cars. On the day named, Dorothy Edwards was standing in the park awaiting a street car. Without sound or other warning the top of one of these palm trees, weighing from 350 to 400 pounds, suddenly fell, striking the girl and causing injuries from which she died. There is evidence that the day was calm and clear with only a slight breeze blowing. While the head of the tree which fell was green and to all appearances like the other trees growing near by, it appears that the trunk of the tree was affected with dry rot and badly decayed. The break occurred about 1½ or 2 feet below the point where the fronds of the palm branched out and some 25 or 30 feet above the ground. At the point of the break the tree had a diameter of about 10 inches; but that portion of the trunk inside the bark was decayed to within a couple of inches of the center, leaving only a central heart through the tree about 2 inches in diameter which was not decayed. A verdict for $20,000 was returned by a jury, which was later reduced by the court to $12,000 in connection with a motion for a new trial. From the judgment which followed, this appeal is taken.

[1] The first point raised is that actual knowledge of the condition of the tree was not brought home to the appellant and that

constructive notice thereof is not sufficient under the statute. It has now been settled that constructive notice in such a case is sufficient and that this may be established by showing long continued neglect of conditions that should have been known and seen. Boyce v. San Diego High School Dist. (Cal. Sup.) 10 P.(2d) 62; Dawson v. Tulare Union High School, 98 Cal. App. 138, 276 P. 424; Bennett v. Kings County (Cal. App.) 12 P.(2d) 47.

[2] The only other point raised is that the verdict and judgment are entirely unsupported in that the evidence is wholly insufficient to establish constructive notice to the appellant city of the dangerous condition of the tree in question. The usual rule is that where there is any substantial evidence of a state of facts or circumstances which should impute notice, the question as to whether such facts are sufficient to constitute notice to a party is one of fact for the jury. The rule is thus stated in 43 Corpus Juris, 1288, 1289: "Except where the evidence is legally insufficient, or the facts are undisputed and but one inference can be reasonably drawn from them, it is ordinarily a question for the jury whether, under all the circumstances, the municipality had notice, actual or constructive, of the particular defect or obstruction, as whether under the circumstances the defect or obstruction existed for such a length of time as to charge the municipality with constructive notice thereof; or whether, considering its nature, location, and duration, the exercise of ordinary care and diligence by the municipal authorities would have disclosed its existence and danger in time for repair or warning before plaintiff received his injury therefrom; and if there is any evidence of notice the court cannot order a nonsuit, although it may set aside a verdict for plaintiff if contrary to or against the weight of the evidence."

The question as to the length of time necessary to constitute long-continued neglect is also largely one of fact which naturally depends on surrounding circumstances and varies with the facts of each case. A higher degree of care and diligence and a correspondingly shorter time might well be required in discovering and remedying a dangerous condition in a small park in the center of a populous city, largely used by the public and with few trees to inspect, than might be required in a more isolated spot frequented by fewer people and with a larger number of trees.

[3] In the light of these rules, we think there is evidence in the record which supports this judgment in the respect complained of. An experienced nurseryman testified that about two months prior to the injury in question, while standing in the Plaza, he observed a good-sized limb fall from a tree and strike a woman; that this limb was rotten and decayed on the end; that a police officer came over and made some notes; and that at that time he went around and looked at the other trees in the park and noticed that several of them were rotten, cracked open, and spongy in appearance. He further testified that on that occasion he observed the tree which is involved here; that about 3 feet below where the limbs branched out the tree looked spongy or rotten; that there was a spot about 6 or 8 inches in diameter; and that this condition was apparent from the sidewalk. Another witness, a gardener, testified that he had observed this tree at various times during the latter part of 1928 and during a part of 1929; that the tree was partly decayed; that the decayed part was 1 or 2 feet below the "shingles"; that the tree appeared to be afflicted with dry rot and that in his opinion approximately one-third of the circumference was thus affected; and that in October, 1929, this decay was observable from across the street. He further testified that he examined the tree both from the sidewalk across the street and from the sidewalk immediately beneath the tree; that the decayed portion covered an area of at least 2 or 3 inches; and that the decayed spot "was not covered with outer bark, it was all decayed and falling down, the outer bark had decayed inwardly, the bark had fallen off." An agricultural inspector for the county of San Diego testified that he saw the trunk of this tree as it remained standing after the accident and that it showed other places where the dry rot had attacked the tissue, and that he saw this condition from the ground. He also testified that a person could tell that this particular tree was diseased without probing it. Another witness testified that he examined the portion of the tree which had broken off; that it was rotten and decayed; that it looked like a dry rot; that he looked up at the trunk of the tree which remained standing and observed that 3 or 4 feet down from the top of the standing portion "there were decayed places, that you could tell where it was sloughed off, the bark had sloughed off." Several other witnesses testified to the effect that the butt end of the fallen portion of the tree was rotten and that the decayed portions could be crumpled in the hands, and that a similar condition prevailed at the top of the stump where the break occurred. There was also evidence that it would take several years for the rot starting from the outer portion of the tree to reach the stage of development existing at the time of the break.

Under the charter of the city of San Diego, all parks and plazas were under the control of the board of public works, and directly in charge of a superintendent of parks. This superintendent of parks testified that, in the line of his duty, he examined the trees in the Plaza several times a year to see if they needed trimming; that there were 24 or 26 trees in this park; that he observed the tree involved

in this case, among others, at such times; that he made such an examination the latter part of June, 1930; that "prior to June" he made no examination of these trees for disease; and that: "There were no symptoms of disease discernible anywhere that I saw. Of course I only gave it a cursory overlook so as to see the necessity for trimming."

While a number of witnesses testified that on various occasions they had observed this particular tree from the ground and were unable to see anything wrong with it, it appears from the evidence above set forth that a condition existed which had been observable to others for a period of nearly two years, and which may well have been taken by the jury as one which should have been seen and remedied by the city officials. We think the evidence referred to is sufficient to support the verdict and judgment, and that it may not be said as a matter of law that the evidence is not sufficient to establish such notice to the city as is requisite under the statute.

We concur: MARKS, J.; JENNINGS, J.

125 Cal.App. 778

MERCANTILE ACCEPTANCE CORPORATION OF CALIFORNIA (a Corporation), Plaintiff and Respondent, v. Oscar L. WILLETT, Individually, and Oscar L. Willett, as Trustee for Atascadero Development Syndicate, and Atascadero Development Syndicate, Defendants and Appellants.

Civ. 8555.

District Court of Appeal, First District, Division 2, California.

Sept. 14, 1932.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Reversed.

James W. Bucklin and Oscar L. Willett, both of Atascadero, for appellants.

Carlyle Miller, of San Francisco, for respondent.

SPENCE, J.

This is an action upon a promissory note. Defendants appeared and made motions for a change of place of trial to San Luis Obispo county. Said defendants appeal from the order denying said motions.

Appellants contend that the trial court erred in denying said motions for change of place of trial and in our opinion this contention must be sustained. We have carefully reviewed the record and believe that appellants were entitled to an order granting the motions upon the showing made. No counter affidavits were offered and we are unable to ascertain the theory upon which the motions were denied. Counsel for respondent has filed no brief and failed to appear when the cause was on the calendar for hearing. We can only assume that counsel for respondent is in accord with our conclusion that there is no ground upon which the order of the trial court may be sustained.

The order is reversed with directions to the trial court to grant the motions for change of place of trial to San Luis Obispo county.

We concur: NOURSE, P. J.; STURTEVANT, J.

125 Cal.App. 679

BAILEY v. WAGNER-THORESON CO. et al.

Civ. 7407.

District Court of Appeal, Second District, Division 1, California.

Sept. 8, 1932.

1. Corporations ⇐216.

Stockholders of foreign corporation lawfully transacting business within state, although having preferred stock of fixed par value and common stock of nominal or nonpar value, *held* subject to same liabilities as domestic corporations' stockholders.

2. Appeal and error ⇐907(3).

Judgment roll being only record before appellate court, all presumptions are in favor of judgment below.

3. Appeal and error ⇐907(3).

Judgment roll being only record before appellate court, presumption is that evidence introduced supports findings.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by R. D. Bailey against the Wagner-Thoreson Company, E. S. Wagner, M. A. Thoreson, and others. Judgment for plaintiff, and defendants named appeal.

Affirmed.

Lewis & Lehman, of Los Angeles, for appellants.

O'Connor & Findlay, of Colton, and Derthick, Cusack & Ganahl, of Los Angeles, for respondent.

TAPPAAN, Justice pro tem.

This is an appeal by defendants, Wagner-Thoreson Company, E. S. Wagner, and M.

A. Thoreson, from a judgment entered against them. The facts, over which there appears to be no controversy, are briefly as follows: The Wagner-Thoreson Syndicate Corporation, a Delaware corporation duly qualified under the laws of the state of California to and transacting business in this state, had an authorized capital stock consisting of 15,000 preferred shares of the par value of $100 each, and 22,500 shares of common stock of nominal or nonpar value. Plaintiff secured a judgment against the Wagner-Thoreson Syndicate Corporation for $21,366.34. Appellant Wagner-Thoreson Company was the owner of 1,000 shares of the preferred and 14,825 shares of the stock without nominal value of the Wagner-Thoreson Syndicate Corporation, issued to it under a permit granted by the corporation commissioner of the state of California. The Wagner-Thoreson Company had subscribed 1,005 shares of its common stock and appellant Wagner owned of this stock 476 shares and appellant Thoreson 526 shares.

Judgment was entered in favor of plaintiff and against defendant Wagner-Thoreson Company for the sum of $21,047.25, against defendant M. A. Thoreson for the sum of $10,956.58, and against defendant Wagner for the sum of $9,915.08. Interest was also allowed on the several sums from the date of trial. Appellants state their only point upon this appeal as follows: "Appellants contend that the stockholders of the Wagner-Thoreson Syndicate Corporation are not liable for its corporate debts because the authorized capital stock is divided into different classes of different value, and no provision is made in the law for imposing stockholders' liability in such cases."

[1] Appellants' contention as presented in their brief is predicated upon the cases of Film Producers, Inc., v. Jordan, 171 Cal. 664, 154 P. 605, and Del Monte L. & P. Co. v. Jordan, 196 Cal. 488, 238 P. 710. Both of these cases involved a question arising under a writ of mandate to compel the secretary of state to file articles of incorporation. In both instances, the question presented involved domestic corporations as contradistinguished from foreign corporations. In this they are distinguished from the instant case which is one of a foreign corporation.

The case of Commonwealth Acc. Corp. v. Jordan, 198 Cal. 618, 622, 246 P. 796, 798, contains the following: "It is a conceded fact herein that the petitioner, a corporation organized in and under the laws of the state of Delaware, had in all respects in its said organization complied with the laws of Delaware, and hence that under the laws of that state corporations such as this could be legally organized with a capital stock structure having certain shares of stock of a fixed par value and certain other shares of stock of a nominal or no par value. It may also be conceded that such a corporation, if attempted to be organized in this state with a like stock structure, would not be entitled to receive from the secretary of state a certificate of incorporation under the rule laid down by this court in Film Producers' Co. v. Jordan, 171 Cal. 664, 154 P. 605, and Del Monte L. & P. Co. v. Jordan, 196 Cal. 488, 238 P. 710. The first question herein presented is as to whether the rule declared in the above-cited cases as applicable to California corporations is also to be given application to foreign corporations duly organized under the laws of the state of their creation."

In the same case at page 627 of 198 Cal., 246 P. 796, 800, in answering the question thus propounded, the court says: "When we examine the Constitution and statutes of the state of California in the light of the liberal application which, according to the consensus of the foregoing authorities, should be given to the doctrine of comity in its application to the admission of foreign corporations to transact their lawful business in states other than those of their creation, and when we do so with particular reference to the exhaustive consideration of the similar situation presented in the case of State ex rel. Standard, etc., Co. v. Sullivan, supra [282 Mo. 261, 221 S. W. 728], we are constrained to hold that as to our statutory law upon the subject there is to be found therein no express inhibition against the admission of foreign corporations entering this state and engaging in business therein, even though it might be that as to their framework, * * * such corporations would not have been entitled to organize as domestic corporations." Upon the question of the liability of stockholders in such foreign corporation so qualifying under the laws of this state, the court at page 630 of the opinion just cited in 198 Cal., 246 P. 796, 801, makes this statement which is controlling in the instant case: "The authorities to which the respondent has cited us with relation to the liabilities of stockholders of foreign corporations hold that the stockholders of such corporations, regardless of the laws of the state wherein they were organized or of the exemptions or other conditions affecting such stockholders and their liabilities under said laws or under the terms of the charter of such foreign corporations, are subjected to the same liabilities as are the stockholders of domestic corporations when such foreign corporations see fit to enter California for the purpose of transacting business therein. It was so held in the case of Provident Gold Min. Co. v. Haynes, 173 Cal. 44, 159 P. 155, and in the earlier decisions of this court cited therein."

[2, 3] The judgment roll is the only record before this court upon this appeal, and un-

der these circumstances all presumptions are in favor of the judgment as entered by the trial court, and that the evidence introduced at the trial supports the findings as made by the trial court and upon which the judgment was made therein. Under the cases herein cited, there is no question that there is provision made in our law for the imposing of stockholders' liability in the instant case. This answers the only question properly presented here.

The judgment appealed from is hereby affirmed.

We concur: CONREY, P. J.; YORK, J.

125 Cal.App. 743

SALVATION ARMY v. THE DAILY TELEGRAM OF LONG BEACH.

Civ. 7464.

District Court of Appeal, Second District, Division 1, California.

Sept. 13, 1932.

1. Landlord and tenant ⇐49(1), 195(1).

Where lease is repudiated and premises abandoned, landlord may sue tenant as each installment of rent, or whole thereof, becomes due, or take possession of premises and recover damages.

2. Landlord and tenant ⇐49(3).

Damages recoverable for tenant's repudiation of lease is difference between what landlord might be able to rent premises for and agreed rent.

3. Landlord and tenant ⇐49(2).

To establish landlord elected to take possession of abandoned premises and recover damages, tenant must prove repudiation or abandonment and landlord's acceptance thereof.

4. Landlord and tenant ⇐49(1).

Landlord's acceptance of tenant's repudiation of lease need not be express, but may be implied.

5. Landlord and tenant ⇐231(8).

Finding that landlord suing for rent had not elected to take possession of premises abandoned by tenant and recover damages *held* justified.

Appeal from Superior Court, Los Angeles County; Thomas H. Selvage, Judge.

Action by the Salvation Army, a religious and charitable corporation, against The Daily Telegram of Long Beach, a corporation. Judgment for plaintiff, and defendant appeals.

Affirmed.

W. A. Alderson, of Los Angeles, for appellant.

Newby & Newby, of Los Angeles (Dee Holder, of Los Angeles, of counsel), for respondent.

TAPPAAN, Justice pro tem.

The plaintiff had judgment in the court below and the defendant appeals therefrom. The action was one for the recovery of the monthly installments of rent reserved to be paid to plaintiff under the terms of a ten-year lease it had with defendant. By a supplemental complaint, filed by stipulation of the parties to the action, plaintiff added to its demand installments of rent and taxes which had accrued since the amended complaint was filed herein. At the time of trial defendant's counsel stated that its defense would be rested solely on the allegations of a certain amendment to its pleading, which amendment read as follows: "For a further and affirmative defense to this action defendant alleges, that after the defendant had quit the possession of said leased property as alleged aforesaid, the plaintiff notified the defendant that it would take possession of said property, would re-lease the same, and would hold the defendant liable for any difference between the rents received from such re-leasing of the premises and the amount stipulated to be paid by the defendant under the terms and provisions of said lease."

The facts, as disclosed by the record here, are as follows: Appellant had, for some years, been a tenant of respondent, under the terms of a ten-year lease. On May 1, 1927, appellant paid to respondent the charges then due under the lease and attempted to surrender up the premises to respondent. As to just what was said and done at this time, the testimony of the witnesses is in conflict. Appellant's witnesses testified to the effect that respondent's representative stated "the only thing he could do and the best thing that he could do, would be to accept the premises back—the occupancy of the premises, that they should take possession, and that they should rent the premises, and then hold The Telegram Company responsible for any difference. * * *" Respondent's witnesses flatly contradict this testimony, and, further, deny that respondent ever took possession of the premises in question or collected any rent therefrom. Under date of June 1, 1927, the "Property Secretary" of respondent wrote appellant as follows:

"We desire to inform you herewith that we cannot accept such notice as absolving

you from your liability under the lease entered into between us. We shall hold you responsible for any losses, financial or otherwise, that may accrue to us up to the date of expiration of the forementioned lease.

"In accordance with the requirements of the law, we shall endeavor to lease these premises to the best advantage possible and wish to notify you herewith that any difference between our receipts from such lease and the sum of money due to us under our lease with you will be considered as due to us in satisfaction of the terms of the contract entered into between us."

It does not appear from the record here that the "Property Secretary" who signed the above letter was an officer of respondent corporation or that his authority extended to more than a collection of rents and certain clerical details concerning respondent's properties. There is testimony to the effect that for a part of time for which respondent claims rent, the premises in question were occupied, and that the rent paid by the occupant was received by appellant.

[1,2] Appellant's first contention is that "Respondent pursued the wrong remedy." Appellant states his position in this regard as follows: "The respondent cannot maintain this action, the nature and purpose of which are to recover the full amount of the monthly installments of rent required to be paid by the lease. * * * it being contended by appellant that because of the letter, Exhibit A (the letter heretofore referred to in this opinion) the remedy of the respondent was restricted to an action to recover the difference between the rents received by the respondent from reletting of the premises, if any, and the rents stipulated for in the lease." Appellant quotes the following from Bradbury v. Higginson, 162 Cal. 602, 604, 123 P. 797, 798, which in the abstract is a correct statement of the law as involved in the instant case: "Where a lease is repudiated and the premises abandoned, the landlord may pursue one of two courses: He may rest upon his contract and sue his tenant as each installment of rent, or the whole thereof, becomes due; or he *may take possession of the premises* and recover damages, which damages will be the difference between what he may be able to rent the premises for and the price agreed to be paid under the lease." (Italics ours.)

[3-5] Under the rule as in the above-quoted case stated, and from the authorities cited by appellant in its brief, it appears that appellant to sustain its alleged defense must first prove a repudiation or abandonment of the lease by the lessee, and, second, an acceptance of such repudiation or abandonment by the lessor, either actual or constructive. This acceptance need not necessarily be expressed, but may also be implied from the acts and conduct of the parties in their dealings with the leased premises. The repudiation or abandonment of the lease by appellant is an admitted fact, and the only question present here is as to the terms and conditions surrounding repudiation of the lease by appellant. Appellant does not contend that there was an unqualified surrender of the lease by it and an unqualified acceptance thereof by respondent. Appellant's position is that the letter received by it from respondent's "Property Secretary," and hereinbefore referred to, amounted to an election on the part of respondent to sue only in damages for the breach of the lease, and prohibited the maintenance of this action for the rent saved to it under the terms of the lease. There is no evidence that respondent at any time took physical possession of the leased premises. As to what occurred at the time appellant paid to respondent the rent and taxes then due, presents a direct conflict of testimony. The trial court elected to believe respondent's witnesses, rather than those who testified for appellant, upon the question of the surrender of the lease. Respondent never exercised any dominion over the leased premises during the term for which rent is claimed. Appellant collected rent therefrom while this action was awaiting trial. There is no evidence of an "unqualified taking possession" nor "releting of the premises" referred to in the cases cited by appellant. In the instant case appellant's contention must rest upon the letter referred to alone. As has been hereinbefore pointed out, the other testimony presented at the trial was of a conflicting nature, and the trial court's findings thereon failed to sustain appellant's contention. This letter, if the authority of the signer was sufficient to bind respondent, refers in so far as is here material to acts to be done at some future time. "We shall endeavor to lease these premises to the best advantage. * * *" There is no evidence that at any time respondent did attempt to lease the premises or that it did lease the premises. There is evidence that the premises were occupied, and that appellant received the rent therefrom. There is no evidence that respondent ever exercised any dominion whatsoever over the premises in question. We cannot agree with appellant that the letter amounted to such an election of remedy that respondent was debarred from the maintenance of this action. The other questions presented upon this appeal, by reason of the conclusion that we have reached herein, are immaterial.

The judgment appealed from is hereby affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

125 Cal.App. 337

PEOPLE v. BRATTON et al.

Cr. 236.

District Court of Appeal, Fourth District, California.

Aug. 11, 1932.

1. Embezzlement ⇐44(1).

Evidence that complaining witness deposited money with defendants as security for faithful performance of duties of employment, and that defendants admitted spending such money, sustained conviction for grand theft (Pen. Code, § 484, as amended by St. 1927, p. 1046).

2. Embezzlement ⇐48(1).

Instruction defining grand theft *held* not erroneous in failing to charge that appropriation must be felonious (Pen. Code, § 484, as amended by St. 1927, p. 1046).

3. Criminal law ⇐772(2).

Instruction defining crime in language of statute is sufficient.

4. Embezzlement ⇐22.

That $201 of another's money, misappropriated by defendants, was obtained by them on different dates, did not reduce offense from grand theft to petty theft (Pen. Code, § 484, as amended by St. 1927, p. 1046).

The facts disclosed that $1 of the $201 misappropriated by defendants was obtained on February 11, and $200 on February 13, and defendants therefore contended that, if guilty of any offense, it was petty theft and not grand theft. However, the evidence showed that, though such money was received by defendants in two installments, defendants had in their possession more than $200 belonging to complaining witness when they misappropriated the funds, and the offense was therefore grand theft.

5. Embezzlement ⇐22.

"Theft by means of embezzlement" is misappropriation of money, regardless of time acquired, degree of offense being determined by amount of money or property misappropriated (Pen. Code, § 484, as amended by St. 1927, p. 1046).

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

L. Bratton and another were convicted of grand theft, and named defendant appeals.

Affirmed.

Edward L. Davin, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

MARKS, J.

Appellant and J. L. Spencer were jointly charged with the crime of grand theft by an information filed by the district attorney of San Diego county. Both defendants were found guilty by the jury. This appeal is taken by L. Bratton from the judgment and from an order denying his motion for new trial.

Appellant urges four grounds upon which he maintains the judgment and order appealed from must be reversed: First, that the evidence was not sufficient to support the judgment and verdict against him; second, errors in instructions given by the court to the jury; third, that, if he be deemed guilty of any crime, it was that of petty theft only, and not grand theft; fourth, that there was a valid contract of employment between defendants and the complaining witness which might have been the subject of a civil action but not of a criminal complaint. The fourth specification is included within the first, and need not be separately considered.

Appellant and Spencer opened an office in the Bank of America Building in San Diego for the sale of a product of the National Automatic Dishwasher Company, Limited. They inserted an advertisement in a San Diego daily paper as follows: "Will train steady worker; $36 week; good future; $200 cash deposit required, returnable. 823 Bank of America Bldg." This was answered by Joe Ferrari on February 11, 1932. After a conversation with appellant and Spencer in which they represented to him that they desired to employ him as a service man to deliver, make collections for, and service portable dishwashing machines at a salary of $30 a week, with $6 additional for the use of his automobile in this business, Ferrari signed a written application for the employment. He was told that he would be required to deposit $200 in the nature of a bond for the faithful performance of his duties. Not having this sum with him, he gave Spencer $2, and was told to return in two days, during which time the defendants would investigate his character and decide whether or not he would be employed. He returned on February 13, accompanied by S. E. Stensrud, a friend. The two of them talked over the proposed employment with both defendants, Ferrari signed a contract of employment with the "Spencer Sales Company," and gave Spencer, in appellant's presence, the sum of $200. The "Spencer Sales Company" apparently was a fictitious name under which Spencer, and perhaps Bratton also, operated. Ferrari then asked Spencer for a return of his $2. Spencer replied that he did not have the change and asked appellant if he had any. Appellant gave Spencer $1, which he, in turn, gave to Ferrari. The $201 which Ferrari had deposited was retained by Spencer for himself and appellant. On Febru-

ary 15th Ferrari reported at the office in the Bank of America Building, and was sent out by Spencer and Bratton with another party to look for sales rooms. He did not see either of the defendants again. No portion of the $201 was ever returned to him.

The matter of the advertisement in the San Diego paper came to the attention of the manager of the Better Business Bureau of San Diego, Stanley M. Gue, deputy state labor commissioner for San Diego, and the district attorney for that county. On February 15 Mr. Gue and an investigator from the district attorney's office called upon the defendants at their office in San Diego. The two defendants made many conflicting, and what subsequently proved to be untrue, statements to these witnesses concerning their activities in San Diego. They denied having signed any contract of employment or having taken any deposits from any prospective employees. Mr. Gue testified as to portions of this conversation as follows: "Mr. Stafstrom, of the district attorney's office, asked both Mr. Bratton and Mr. Spencer some questions. I do not recall the exact wording. One, I believe, was asked them how long they had been here. And they said they had come from Los Angeles a few days before. And I asked them both where they were living. And they said, 'At the Knickerbocker Hotel'; they had previously lived at the Ford Hotel. I asked them if they lived together; and they told me 'Yes'. And I asked them if they were representing the National Dishwasher Company; and both of them told me 'Yes', that they were, they had the exclusive territory of San Diego county for the National Dishwasher Company. Then I asked Mr. Spencer why the application for employment had a heading 'National Dishwasher Company', and the contract of employment, as I recall it, had 'Spencer Sales Company' in it. And he said—well, he said, 'We are acting for the National Dishwasher Company of Los Angeles'. And I asked Mr. Bratton the same thing; and he told me that was correct. I called his attention to the wording on the door of their office, 'National Dishwasher Company—J. L. Spencer', and I asked Mr. Bratton what his connection with it was. And he said Mr. Spencer was the manager and he was the assistant manager." The defendants were then taken to the office of the district attorney of San Diego county, where they were further questioned by a deputy district attorney, and, after going over much of the ground covered in a former conversation detailed in Mr. Gue's testimony, the following occurred: "Mr. Baugh also asked both of them if it was true that they had received $200 from Mr. Ferrari, and they both said, 'Yes.' I asked them both what they had done with the money. And they told me they had used it to pay hotel bills and that they had taken a trip to Los Angeles over the week end. And I asked them if they could pay the money back. I asked them if they could pay the money back, if they wanted to pay it back to Joe. And Mr. Spencer says, 'Well, I haven't got any money.' And he turned to Mr. Bratton and he said, 'Can you raise it?' And Mr. Bratton said, 'No, I can't raise it.'"

Since the amendment of section 484 of the Penal Code (St. 1927, p. 1046) the crimes of larceny, embezzlement, and false pretenses have been included within the crime of theft. In the case of People v. Myers, 206 Cal. 480, 275 P. 219, it was held that this amendment was designed to simplify procedure and to relieve courts from technical questions arising from contentions that the evidence shows the commission of one of these crimes other than that alleged in the information. It has been specifically held that, where an information charged the defendant with the crime of theft by feloniously taking money or property belonging to the complaining witness, theft by means of what is generally known as embezzlement was included within the information, and proof of such was admissible under the allegations of the information, and would sustain a conviction under its terms. People v. Fewkes (Cal. Sup.) 4 P.(2d) 538; People v. Murakami (Cal. App.) 9 P.(2d) 583.

[1] In the instant case there is competent and material evidence in the record that the complaining witness deposited with both defendants money which they were to hold as security for the faithful performance by Ferrari of the duties of his employment. Both defendants admitted they had spent this money in paying hotel bills and on a trip to Los Angeles, and that they did not have the money in their possession prior to their arrest. This evidence is amply sufficient to support the verdict and judgment, even though in their testimony at the trial they denied both the making of the statements and the truth of their admissions in the office of the district attorney. The fact that this money was deposited with them in connection with a written contract of employment cannot excuse their misappropriation of it.

[2, 3] Appellant next complains because the trial court instructed the jury in effect that the crime of grand theft consisted in the fraudulent appropriation of money or property of another which has been intrusted to the defendants and did not instruct them that such appropriation must be felonious. Section 484 of the Penal Code first defines theft as the felonious stealing, taking, carrying, leading, or driving away personal property of another, which is the crime of larceny as it existed prior to the amendment of 1927. It next defines theft as the fraudulent appropriation of property which has been intrusted to defendants by another, which is theft by means of embezzlement. The evidence in the case showed theft by this latter means, and the trial court instructed the jury in accordance

with the Code definition of this particular kind of grand theft. An instruction defining a crime in the language of the statute has been held sufficient. People v. Martin, 44 Cal. App. 45, 185 P. 1003. The instructions to the jury were full, fair and complete and we find no error in them.

[4, 5] Appellant next urges that, if the evidence showed him guilty of any offense, it was petty theft and not grand theft. He maintains that, because the $1 of the $201 of Ferrari's money taken by the defendants was obtained on February 11, 1932, and the $200 on February 13, 1932, that he could not be guilty of stealing more than the $200 which he obtained on the second date, as he urges the transactions were separate ones.

It is true that the defendants received the $201 in two installments. It is also a conclusion justified by the evidence that, when they paid the hotel bills and went on the trip to Los Angeles, they had in their possession the total sum and admitted spending it. The crime of larceny by means of embezzlement does not depend upon the time of the acquisition of the money embezzled. It presupposes a lawful acquisition of the money by them. Theft by means of embezzlement is the misappropriation of the money by the defendants. The intent to steal by means of embezzlement may come into existence after the acquisition of the money by defendants and prior to, or coincident with, its misappropriation by them. The degree of the crime, whether it was grand or petty theft, is determined by the amount of money or property misappropriated. It makes no difference whether the money was acquired by them in amounts of less or more than $200. In the instant case the defendants had in their possession more than $200 belonging to the complaining witness at the time of their misappropriation of his funds and appropriated it all to their own uses. This makes the offense grand theft. This rule was recognized in the case of People v. Mills B. Sing, 42 Cal. App. 385, 183 P. 865, 869, where it was said: "Because part of the potatoes were taken and hauled away from the ranch of the Japanese on September 1st, and part on September 2d, and the balance on September 3d, appellant claims that there were three separate and distinct offenses, and that the court should have granted his motion to compel the prosecution to elect one of the three offenses as that upon which it would rely for a conviction. The transaction in which the potatoes were taken was a continuous one. Appellant and his confederate, St. Clair, when they first went to the ranch of the Japanese and negotiated for the potatoes, evidently designed to obtain possession of the 252 sacks by fraud and deceit; i. e., by fraudulently pretending that the sale was a bona fide cash sale, and by leading the Japanese to believe that the potatoes notwithstanding their delivery, would be immediately paid for, and would not be resold until cash payment should be made as represented by them. It is evident that, from the beginning, defendant and St. Clair intended to appropriate the potatoes to their own use after having obtained the possession fraudulently. Although the deliveries to defendant and St. Clair and the hauling away were distinct acts, still they were continuous. The whole transaction was one continuous proceeding, instigated by one impulse and one purpose. Appellant and his confederate having embarked upon a scheme to appropriate the potatoes to their own use, after they should have induced the Japanese to deliver possession under the impression that they would immediately receive cash payment, and having pursued this scheme until it was effectuated, it is immaterial that it required a number of days to consummate it. All the potatoes having been taken in pursuance of one purpose, they were, legally speaking, taken at the same time. The law is that, if the different asportations from the same owner are prompted by one design, one purpose, one impulse, they are a single act, without regard to time. Carl v. State, 125 Ala. 89, 28 So. 505; Flynn v. State, 47 Tex. Cr. R. 26, 83 S. W. 206; Ex parte Jones, 46 Mont. 122, 126 P. 929; Wilson v. State, 70 Tex. Cr. R. 631, 158 S. W. 516; State v. Gibson, 37 Utah, 330, 108 P. 349; State v. Mandich, 24 Nev. 336, 54 P. 516; 25 Cyc. 61."

The judgment and order appealed from are affirmed.

We concur: BARNARD, P. J.; V. N. THOMPSON, Justice pro tem.

ROY TONG v. SUN REALTY CO. et al. *

Civ. 8076.

District Court of Appeal, Second District, Division 2, California.

Aug. 26, 1932.

Rehearing Granted Sept. 21, 1932.

Appeal and error ⇐766.

Presentation of appeal not conforming to rule, in that preliminary introductory matters required were omitted from appellant's brief, required dismissal of appeal (Rules of Supreme Court and District Courts of Appeal, rule 8).

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 17 P.2d 759.

Action by Roy Tong against the Sun Realty Company and others. From an adverse judgment, named defendant appeals. On motion to dismiss appeal.

Judgment affirmed, and appeal dismissed.

George L. Greer, of Los Angeles, for appellant.

Lasher B. Gallagher, of Los Angeles, for respondent.

IRA F. THOMPSON, J.

A motion to dismiss the appeal in this case upon the ground that the transcript had not been prepared and filed within time was denied. (Cal. App.) 7 P.(2d) 1101. Its presentation upon the merits does not conform to rule VIII of the Supreme Court and District Courts of Appeal, in that the preliminary introductory matters required have been omitted from the appellant's brief. Hence, the appeal cannot be entertained. The rule in question has so frequently been the subject of discussion that we deem it unnecessary to cite the numerous cases so holding.

The judgment is affirmed and the appeal is dismissed.

We concur: WORKS, P. J.; STEPHENS, Justice pro tem.

125 Cal.App. 493

QUALITY BUILDING & SECURITIES CO. et al. v. BLEDSOE et al.

Civ. 1010.

District Court of Appeal, Fourth District, California.

Aug. 25, 1932.

Rehearing Denied Sept. 16, 1932.

Hearing Denied by Supreme Court Oct. 24, 1932.

1. Contracts ⇐333(8).

Where cause of action is founded on alleged mutual mistake, complaint must contain appropriate allegations thereof.

2. Evidence ⇐419(13), 432.

Purchasers could prove true consideration or lack or failure of consideration for written contract for purchase of realty by parol evidence.

3. Evidence ⇐400(2).

Parol evidence *held* inadmissible to establish obligations assumed under written contract for purchase of realty were other than as expressed therein.

4. Contracts ⇐187(1).

Contract on which third party may sue must show that it was for his benefit (Civ. Code, § 1559).

5. Vendor and purchaser ⇐123.

Requirement that third person suing on contract must allege that it was made for his benefit *held* sufficiently met in purchasers' action to rescind because vendors had breached contract to dedicate lot to city.

The requirement was sufficiently met by allegations throughout the complaint that the conveyance and dedication of a lot were a part of the consideration to the purchasers for payment of sums specified when taken together with stipulation of the vendors that the complaint pleaded a failure of consideration and a breach of contract by the vendors.

6. Vendor and purchaser ⇐50.

Purchasers' and vendors' escrow instructions and contract between vendors and escrow agent dealing with same subject-matter *held* construable together as constituting agreement collateral to contract of sale of realty.

7. Contracts ⇐245(2).

Rule written agreement supersedes prior or contemporaneous negotiations is inapplicable to collateral agreement on which instrument is silent, and which does not purport to affect terms of instrument.

8. Vendor and purchaser ⇐79.

Agreement collateral to contract of sale of realty *held* to establish that vendors' agreement to dedicate lot to city was for purchasers' benefit (Civ. Code, §§ 1559, 1641, 1642; Code Civ. Proc. § 1858).

The collateral agreement consisting of purchasers' instructions to the escrow agent, the vendors' instructions to the escrow agent, and a contract between the escrow agent and the vendors, had reference to vendors' dedication of the lot to the city, and disclosed that the escrow agent accepted in behalf of vendors the purchase price of land under condition imposed by purchasers' instructions requiring issuance of contract for conveyance of lots purchased and the securing of an agreement with the vendors authorizing the escrow agent to have lot conveyed and dedicated to the city for park purposes.

9. Contracts ⇐170(1).

Conduct of parties under contract *held* proof of their understanding thereof, and furnishes reliable means of interpretation (Civ. Code, § 3535).

10. Vendor and purchaser ⇐79.

Vendors' agreement made for purchasers' benefit to "authorize" trust company to have another lot conveyed and dedicated to city for park purposes comprehended city's acceptance.

The word "authorize" has different meanings, dependent on the connection

and circumstances of its use. Ordinarily, it means to clothe with authority, warrant, or legal power; to give a right to act; to empower, but it also has a mandatory effect or meaning, implying a direction to act.

[Ed. Note.—For other definitions of "Authority; Authorize," see Words and Phrases.]

11. Vendor and purchaser ⇐79.

Words "convey" and "dedicate" as used in vendors' agreement to convey and dedicate lot to city for park purposes *held* synonymous.

[Ed. Note.—For other definitions of "Convey" and "Dedication," see Words and Phrases.]

12. Dedication ⇐31.

Dedication by conveyance is not complete without acceptance.

13. Vendor and purchaser ⇐79.

That city would not accept lot *held* not to release vendors from obligations to purchasers to dedicate lot to city for park purposes.

14. Vendor and purchaser ⇐15.

Vendors' failure to perform obligation made for purchasers' benefit to dedicate lot to city for park purposes constituted breach of contract and partial failure of consideration.

Appeal from Superior Court, San Diego County; T. I. Fitzpatrick, Judge.

Action by the Quality Building & Securities Company and another against H. E. (R.) Bledsoe and others. From an adverse judgment, plaintiffs appeal.

Reversed.

O. E. Mark, of San Diego, for appellants.

Titus & Macomber, of San Diego, for respondents.

HARDEN, Justice pro tem.

By the first count of their complaint plaintiffs seek to rescind a contract of purchase of real property, for failure of consideration, and to recover from defendants the sum of $14,000, the purchase price; and by the second count they seek damages in the sum of $14,000, for breach of contract, if the rescission demanded in the first count cannot be had. The case was tried before the court and a jury. On motion, the court directed a verdict in favor of the defendants upon both counts, pursuant to which judgment was entered for defendants. No findings of fact or conclusions of law were made. Plaintiffs appeal from the judgment.

The case turns on whether, in a transaction wherein defendants made a contract to convey real property to plaintiffs, defendants were obligated to convey and dedicate to the city of San Diego a designated lot, for park purposes, and bring about an acceptance of such conveyance and dedication.

On September 18, 1926, the Union Trust Company of San Diego held title, as trustee, to certain real property in San Diego, the beneficial ownership of which was vested in equal shares in H. R. Bledsoe and E. N. Young, defendants, as shown by declaration of trust No. S–7315 issued by said company.

On that date a "receipt for deposit on account of purchase of real estate" was prepared by said company, as the representative of the parties hereto, on the usual form of escrow instructions used by title companies, wherein payment of $1,000 by R. H. Cox "as agent for principals" was acknowledged, to apply upon the entire price of $14,000 for the purchase of lots 11 to 16, inclusive, of Hawthorne Terrace, San Diego (a portion of the property held by said trust company). The receipt contained many provisions which are not mentioned by us. Therein it was stated: "Lot 'A' to be used for park purposes restricted against buildings." Said receipt was not signed, but was approved by the signature of R. H. Cox. The names of the "principals," or purchasers, do not appear therein. Said receipt appears to be more in the nature of preliminary escrow instructions than a receipt for money.

On September 20, 1926, plaintiffs gave to said trust company written instructions, under the heading of said trust No. S–7315, substantially as follows: "We hand you herewith our check in the sum of $1,000.00, and will pay you the further sum of $6,000.00 when you can advise us as follows: 1st: That the title to * * * (lots 11 to 16, inc., Hawthorne Terrace), shows vested in your company * * * 2nd: (With reference to easements) * * * 3rd: When there has been filed with you a surety bond guaranteeing the completion of certain improvements (as to grading, sidewalks and curbs, and installation of sewer, gas, water and electricity). 4th: The issuing to me of a contract for the purchase of the above-described lots * * * which contracts will acknowledge the receipt of an aggregate of $7,000.00, and the balance of $7,000.00 due on or before January 10, 1927, * * * 5th: Secure from H. E. (R.) Bledsoe and E. N. Young, the beneficiaries under your trust, an agreement that on or before January 1, 1929, they will authorize you to have lot 'A' of Hawthorne Terrace conveyed to the city of San Diego to be used for park purposes only, with the restriction that there shall be no buildings built thereon." The sum of $1,000, mentioned in said instructions, is evidently the same $1,000

mentioned in the receipt of September 18, 1926.

On the 20th day of September, 1926, a written contract was entered into between said trust company, as seller, and the plaintiff company, as buyer, for the purchase of said lots 11 to 16, inclusive, Hawthorne terrace, for $14,000 (payable upon substantially the same terms as are set forth in the receipt and instructions already mentioned). In the making of said contract, the plaintiff company acted in its own behalf and in behalf of plaintiff Rutherford. In said contract no mention is made of the conveyance or dedication of lot A; nor is any reference made to said receipt or to said instructions.

On September 22, 1926, the trust company, as trustee under said declaration of trust No. S–7315, and defendants entered into a written contract wherein it is recited that the purpose of the trust is the subdivision * * * and general improvement of the property covered thereby, and wherein defendants agree as follows: "* * * In consideration of the sum of $10.00 to them this day in hand paid, and in further consideration of the benefits derived and to be derived from the dedication as hereinafter named, and other good and valuable consideration, receipt whereof is hereby acknowledged, the parties of the second part (defendants) hereby jointly and severally promise, agree, guarantee, and warrant that they will on or before January 1st, 1929, authorize said first party as trustee aforesaid (trust company) to have lot 'A' of Hawthorne Terrace, contained in the property covered by said declaration of trust, conveyed and dedicated to the city of San Diego for park purposes only, provided however that said dedication shall contain the restriction that no buildings shall ever be built thereon."

The final payment of $7,000 upon the purchase price of said property was made by plaintiffs to said trust company on January 21, 1927; and deed to said lots was made to plaintiffs.

On December 18, 1928, defendants executed a writing addressed to the trust company, wherein reference was made to said trust No. S–7315, and particularly to said contract between defendants and said trust company of September 22, 1926, and wherein defendants stated: "Pursuant to said contract, you are hereby authorized and instructed to prepare and execute a deed conveying said lot 'A' of Hawthorne Terrace to the city of San Diego for park purposes with the restriction in said deed that no building shall ever be built upon said lot. * * * You are hereby further authorized and requested to deliver said deed to the city clerk of the city of San Diego as soon as the same has been executed."

On December 19, 1928, said trust company, as grantor, made and executed to said city, as grantee, a quitclaim deed to said lot A "for park purposes," which deed contained a condition against building thereon and for reversion to grantor for violation of condition. Said deed was delivered on December 21, 1928, and was transmitted to the mayor and common council of the city by the manager of operations thereof on December 28, 1928, with a letter wherein he stated: "Would recommend against the acceptance of this piece of land at this time. I also question the conditions embodied in the deed." As is shown by an entry in the minutes of the city clerk, the city adopted the recommendation of the manager of operations on December 31, 1928. The city has not accepted a conveyance or dedication of said property.

Notice of rescission of contract and demand for return of purchase price was served by plaintiffs upon defendants on June 21, 1929, in which notice plaintiffs tendered a reconveyance of lots 11 to 16, inclusive, and offered to execute all instruments necessary to make the reconveyance effective. It recited that efforts had been made without success by plaintiffs to bring about an acceptance of lot A by the city for park purposes.

[1] One of the principal contentions of appellants is that the complaint stated a cause of action based upon a mutual mistake of the parties. That mistake is said to have been the erroneous assumption of the parties that the city would accept a conveyance and dedication of lot A for park purposes. An effort is made to bring the case within the rules applied in such cases as Hannah v. Steinman, 159 Cal. 142, 112 P. 1094, and Cutting Co. v. Peterson, 164 Cal. 44, 127 P. 163. In view of the decision reached on the appeal, we need not consider the point at length here. It will suffice to say that we do not agree with appellants. The complaint is not based upon a mutual mistake. See section 1577 et seq., Civ. Code, and Harding v. Robinson, 175 Cal. 534, 166 P. 808, upon the subject of the mistake which equity will relieve. Where a cause of action is founded upon an alleged mutual mistake, it is necessary that the complaint contain appropriate allegations thereof. 6 Cal. Jur. 79; Bradbury v. Higginson, 167 Cal. 553, 140 P. 254; Harding v. Robinson, supra. No such allegations are found in the complaint. We are required to determine the questions raised on the appeal without regard to the question of mutual mistake. That issue is not in the case.

The theory of the pleader, as expressed in the first count of the complaint, was that there had been a failure of consideration by reason of the refusal of the city to accept said lot A; and, as expressed in the second count, was that there had been a breach of contract, resulting in damages to plaintiffs, for the same reason. No question of laches is raised in defense. It was stipulated by de-

fendants during the trial that "it may be considered that the complaint in the action has plead a failure of consideration and a breach of contract by the defendants." Further reference to the allegations of said complaint will be made hereafter.

[2, 3] Plaintiffs offered evidence to establish conversations between the agents of the parties and the representative of the trust company at the time of the execution of the contract of September 20, 1929, between plaintiff company and the trust company, as to the contents of said instrument. Objection thereto was sustained by the court. The ruling was proper. While it was open to plaintiffs to prove the true consideration for said contract, or lack or failure of consideration, by parol evidence, plaintiffs were not entitled to endeavor to establish by such evidence that the obligations assumed thereunder were other than as expressed therein. Winchester v. Winchester, 175 Cal. 391, 165 P. 965; Arnold v. Arnold, 137 Cal. 291, 70 P. 23; First Federal Trust Company v. Stockfleth, 98 Cal. App. 21, 276 P. 371. Evidence offered by the defendants and received by the court upon the same subject was likewise incompetent. We agree with appellants that said evidence should not have been received. We may not consider it. Harding v. Robinson, supra.

Plaintiffs offered and the court admitted proof of damages to plaintiffs by reason of the failure of defendants to convey and dedicate lot A for park purposes. Such evidence tended to establish that the value of the lots conveyed was only 50 per cent. of the value they would have possessed if lot A had been dedicated and developed as a park.

Section 1641, Civil Code, provides: "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." And section 1858, Code of Civil Procedure, provides in part: "* * * Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

Section 1642, Civil Code, reads: "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." Said rule has been applied in the cases of Cameron v. Burnham, 146 Cal. 580, 80 P. 929; Gilliam v. Brown, 126 Cal. 160, 58 P. 466; Elbert v. Los Angeles Gas Co., 97 Cal. 244, 32 P. 9; McCroskey v. Ladd, 96 Cal. 455, 31 P. 558; Patterson v. Donner, 48 Cal. 369; Gerdes v. Moody, 41 Cal. 335; Holland-Meisell Co. v. Kelly, 37 Cal. App. 610, 174 P. 698; Morrow v. Wells, 30 Cal. App. 306, 158 P. 226.

[4, 5] Section 1559, Civil Code, provides: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." It is not necessary for such third person to allege that the contract has not been rescinded. Stanton v. Santa Ana Sugar Co., 84 Cal. App. 206, 257 P. 907. It is undoubtedly the rule that the contract upon which such third person may sue must show that it was made for his benefit. Chung Kee v. Davidson, 73 Cal. 522, 15 P. 100; Sherwood & Sherwood v. Gill & Lutz, 36 Cal. App. 707, 712, 173 P. 171. But it need not expressly name such third person. Woodhead Lbr. Co. v. Niemann Inv. Co., 99 Cal. App. 456, 278 P. 913. While the complaint does not allege in words that the contract of September 22, 1926, or the subsequent instructions of December 28, 1928, were expressly made for plaintiffs' benefit, it does allege that the contract of September 22, 1926, between defendants and the trust company was pursuant to plaintiffs' instructions of September 20, 1926; and it is alleged throughout the complaint that the conveyance and dedication of lot A were a part of the consideration to plaintiffs for the payment of said sum of $14,000. We think said allegations, when taken together with the stipulation of the defendants that the complaint "plead a failure of consideration and a breach of contract by defendants," are sufficient to meet the requirement that, where a third person sues upon such a contract, he must allege it was made for his benefit.

[6-8] Applying said rules of interpretation, we hold that plaintiffs' instructions of September 20, 1926, the contract between the trust company and defendants of September 22, 1926, and the defendants' instructions to the trust company of December 18, 1928, should be construed together as constituting an agreement between the plaintiffs and defendants collateral to the contract of sale of the lots dated September 20, 1926. "The rule that an agreement in writing supersedes all prior or contemporaneous oral negotiations or stipulations concerning its matter has no application to a collateral agreement upon which the instrument is silent, and which does not purport to affect the terms of the instrument." Savings Bank of So. Cal. v. Asbury, 117 Cal. 96, 103, 48 P. 1081, 1083. If said documents are considered together as constituting the contract between the parties with reference to lot A, no difficulty is encountered in meeting the requirement imposed by section 1559, Civil Code that the contract sued on by a third person must show that it was made for his benefit. While the agreement of September 22, 1926, does not show on its face that it was made for plaintiffs' benefit, the collateral agreement, when taken as a whole, does establish that fact. It is to be noted particularly that said agreement of September 22, 1926, indicates that further instructions were to be given by defendants to the trust company before January 1, 1929. The trust company accepted, in behalf of

defendants, the initial payment by check of $1,000, and subsequent payments aggregating $13,000, under the conditions imposed by plaintiffs' instructions of September 20, 1926. The principal conditions thus imposed required the issuing of a contract for the conveyance of lots 11 to 16, inclusive, and the securing of an agreement with defendants authorizing said trust company to have lot A conveyed and dedicated to the city for park purposes. It is obvious, therefore, that the consideration of $14,000 covered the conveyance and dedication of lot A as well as the transfer of lots 11 to 16, inclusive. There is not the slightest indication in the documents or in the evidence of any intention on the part of either party hereto to abandon the project of having lot A conveyed and dedicated for park purposes.

Defendants contend that their only agreement was to *authorize* the trust company to have said lot A conveyed and dedicated to the city for park purposes. The word *authorize* has different meanings, dependent upon the connection and circumstances of its use. Ordinarily, it means to clothe with authority, warrant, or legal power; to give a right to act; to empower. It also has a mandatory effect or meaning, implying a direction to act. Whether or not there was a contractual obligation on the defendants to convey and dedicate lot A for park purposes is to be ascertained not by reference to that word alone. The language of the agreement of September 22, 1926, is that the defendants "promise, agree, guarantee and warrant that they will * * * authorize (the trust company) to have lot 'A' conveyed and dedicated to the city * * * for park purposes." It should be borne in mind at all times that the trust company acted only as agent, without any other interest. In their instructions of December 18, 1928, defendants not only *authorized* but *instructed* said trust company to prepare and execute the deed, and authorized and requested its delivery. Said instructions of December 28, 1928, and said agreement of September 22, 1926, were pursuant to plaintiffs' instructions of September 20, 1926. As respects the conveyance and dedication of lot A for park purposes, plaintiffs' instructions of September 20, 1926, constituted the proposal therefor; and defendants' contract with the trust company of September 22, 1926, whereby they agreed to authorize said company to make such conveyance and dedication, and defendants' instructions of December 18, 1928, to said company to execute and deliver a conveyance of said lot for said purposes, constituted the acceptance of said proposal. To agree with respondents' contention would require us to believe that the parties contracted to leave it to the discretion of the trust company to convey and dedicate said lot A or not, as it saw fit.

[9] The acts and conduct of the parties under the collateral agreement are proof of their understanding thereof, and furnish reliable means of interpretation. 6 Cal. Jur. 304; citing Ghirardelli & Co. v. Students' Express & Transfer Co., 175 Cal. 427, 166 P. 16; Woodard v. Glenwood Lbr. Co., 171 Cal. 513, 153 P. 951; Grant v. Bannister, 160 Cal. 774, 118 P. 253, and many other cases. "Contemporaneous exposition is in general the best." Section 3535, Civ. Code.

[10-13] Interpreting said collateral contract in the light of the acts and conduct of the parties thereunder, we hold that it was more than an agreement to offer said lot A for park purposes; it was an agreement to convey and dedicate said lot to the city for that purpose. As used, we think the words *convey* and *dedicate* were synonymous. A dedication by conveyance is not complete without acceptance. 9 Cal. Jur. 52; County of Inyo v. Given, 183 Cal. 415, 191 P. 688; City of Anaheim v. Langenberger, 134 Cal. 608, 66 P. 855; Niles v. Los Angeles, 125 Cal. 572, 58 P. 190. The contract of defendants to convey and dedicate said lot A to the city for park purposes comprehended an acceptance of it for such purpose by the city. The fact that the city would not accept said lot for said purpose did not release the defendants from the obligations of their contract. They had contracted to *convey* and *dedicate*, and had thereby bound themselves to bring about an acceptance.

[14] Such being the contract of defendants, it follows that the defendants were guilty of a breach thereof by reason of their failure to procure an acceptance of lot A by the city for park purposes; and it also follows that by reason thereof there was a partial failure of consideration to plaintiffs.

Under the circumstances, the plaintiffs were entitled to have their case submitted to the jury upon the issue of damages under the second count of the complaint. And, upon the issues presented by the first count, findings of fact and conclusions of law were required. 24 Cal. Jur. 933; Schooler v. Williamson, 192 Cal. 472, 221 P. 195; Holland v. Kelly, 177 Cal. 43, 169 P. 1000; Vallejo, etc., R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 P. 238; Mitchel v. Gray, 8 Cal. App. 423, 97 P. 160 (rescission of sale of mine).

The judgment is reversed.

We concur: MARKS, Acting P. J.; JENNINGS, J.

125 Cal.App. 747

BIRKLAND v. RATTERREE LAND CO.

Civ. 8379.

District Court of Appeal, Second District, Division 1, California.

Sept. 13, 1932.

Rehearing Denied Oct. 6, 1932.

Appeal and error ⇐757(2).

Brief of appellant, which contained no statement of contents or substance of pleadings, *held* not sufficient to authorize review by appellate court (Rules of Supreme Court and District Courts of Appeal, rule 8).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Eleanor Joyce Birkland against the Ratterree Land Company. Judgment for plaintiff, and defendant appeals.

Appeal dismissed.

Harley E. Riggins and Schweitzer & Hutton, all of Los Angeles, for appellant.

Edwin J. Miller, of Los Angeles, for respondent.

CONREY, P. J.

The defendant appealed from a judgment whereby the plaintiff recovered damages for alleged fraud committed by the defendant in the course of certain real estate transactions with the plaintiff. The record on appeal having been filed, appellant on May 14, 1932, filed its opening brief. Now comes the respondent and moves the court to affirm the judgment upon the ground that appellant has failed to comply with the rules governing appeals, and particularly has not complied with the requirement of rule VIII that "The pleadings need not be printed in such briefs, but the nature of the action and the substance of the pleadings must be stated in general terms."

An inspection of the seventeen-page brief filed by appellant reveals that appellant has failed to comply with the rule. It is stated in the brief that the case naturally falls into two classes which are referred to as the first cause of action and the second cause of action. While we have spoken of the action as one to recover damages for fraud, this is true only as a general statement. Possibly it may be subject to a different description. There is not in the brief any statement of the pleadings whereby the issues presented to the trial court by those pleadings can be defined or understood. Undoubtedly, the plaintiff was in some form attempting to recover money paid out under conditions such that the payment was said to have been induced by fraud and misrepresentation. It also appears that appellant is contending that for stated reasons the plaintiff was not entitled to recover any compensation or damages in this action. But in the absence of any statement of the contents of the pleadings, or of the substance thereof, the brief does not present any record by which the merit of appellant's contentions can be tested.

The appeal is dismissed.

We concur: HOUSER, J.; YORK, J.

126 Cal.App. 6

McALISTER v. LIGHTBURN et al.

Civ. 8310.

District Court of Appeal, First District, Division 1, California.

Sept. 15, 1932.

Rehearing Denied Oct. 15, 1932.

Hearing Denied by Supreme Court Nov. 14, 1932.

1. Bills and notes ⇐518(1).

Finding that note was given for consideration and not simply as security against placing of liens on property against which payee held trust deed *held* supported.

2. Bills and notes ⇐516.

Finding that agreement requiring payee to convey lot to makers of note had been superseded by new contract on which payee had not defaulted *held* supported.

3. Evidence ⇐179(1).

Permitting contents of written contract to be established by parol *held* proper where contract was unavailable (Code Civ. Proc. § 1855).

Appeal from Superior Court, Los Angeles County; Wilbur F. Downs, Judge.

Action by Harold McAlister against Mark Lightburn and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Frank L. Simons, of Los Angeles, for appellants.

William R. Elam, of Los Angeles, for respondent.

LAMBERSON, Justice pro tem.

Action upon a promissory note for the principal sum of $7,500, dated September 14, 1927, payable ninety days after date, executed by the defendants and appellants to plaintiff, who is the respondent herein.

The appellants first filed separate answers, each alleging: First, that he had received no consideration for the execution of the note; and, second, that the note was given as security against liens that might be filed against a certain apartment house and prem-

ises known as "Elite Arms," situated at 258 South Hudson street, city of Pasadena, and that it was verbally understood and agreed between the makers and payee that upon the expiration of thirty-five days after the completion of said premises, the plaintiff would return the note to the makers, provided no liens had, in the meantime, been filed or paid by plaintiff. Each answer set up a further defense that the plaintiff had failed to comply with the provisions of an agreement whereby, in consideration of the assignment of a note for the sum of $35,000, secured by a deed of trust upon the property upon which the Elite Arms was to be constructed, the plaintiff had agreed to pay the sum of $27,500, and that the plaintiff had failed to make the final payment of $7,500, and had failed to perform other provisions of such agreement. Attached to each answer, and designated "Exhibit A," was a written agreement, dated September 14, 1927, which provided, so far as is material here, as follows: "It is hereby mutually agreed between the undersigned, in order to facilitate the clearing up of the final claims against that certain apartment house known as the 'Elite' that Harold McAlister shall this day advance the sum of $7,500.00 to be deposited with the Ætna Bonding Company to be used by them to pay the accounts contracted in the erection of the buildings. That as evidence of the said advance the said M. Lightburn and Harry Thompson will sign a note for the same amount in favor of said McAlister, due in 90 days. After the time for filing liens shall expire the parties hereto will settle all matters between them."

The case came on for trial upon the issues made by the complaint and answers on June 21, 1928, but after testimony had been taken, and the case had been submitted for decision, the court, on June 28, 1928, granted to the defendants leave to file an amended answer and counterclaim. On July 26, 1928, the case again went to trial upon the issues advanced by the amended pleadings. It was again submitted, but later, upon application of the plaintiff, the case was reopened for the purpose of presenting and receiving further evidence, and a further hearing was had on March 25, 1929. On September 18, 1929, the court filed its findings of fact, and entered judgment in favor of plaintiff for the principal sum named in the promissory note, with interest as prayed.

The facts, as presented to the trial court at the various hearings, were as follows: For a short time prior to March 4, 1927, one Fred W. Lunbeck was the record owner and had an equitable interest in certain property in the city of Pasadena situated at No. 258 South Hudson street. Being desirous of improving the property by the construction of an apartment house, and in order to secure to himself the value of the equity which he had therein, Lunbeck succeeded in negotiating a first deed of trust in favor of the Bond Investment Company to secure the payment of a promissory note for $90,000, and arranged to execute a second deed of trust for the purpose of securing a promissory note for the principal sum of $35,000 to appellants, who were ostensibly the contractors for the construction of the apartment house.

Plaintiff was approached by the persons mentioned, or by others who were acting in their behalf, who were endeavoring to arrange for the financing of the transaction, and the second note and deed of trust were offered for sale to plaintiff who, on March 4th entered into a written agreement with Lunbeck, under which agreement plaintiff agreed to buy the promissory note for $35,000 with the deed of trust securing the same, and to pay therefor the sum of $20,000 in installments of $5,000 each, to Ætna Casualty & Surety Company, to be used according to a schedule of payments as they became due to the contractor. As further consideration, the plaintiff agreed to convey by deed, a certain lot on Las Palmas street in the city of Los Angeles, which will be hereafter referred to as the Las Palmas lot, and upon the security of which lot plaintiff was to loan Lunbeck the sum of $7,500, to be secured by a first deed of trust, such loan to be made if necessary to complete the building; the lot to be conveyed to Lunbeck within thirty-five days after notice of completion of the apartment house. Whether or not the note for $35,000 and the deed of trust securing the same were in existence at the date of the execution of the promissory note is subject to some doubt, but the matter is not important. In consideration of the sum of $20,000 in cash, and the lot described, Lunbeck sold the $35,000 note to plaintiff. Several days later, there appearing to have been some dissatisfaction on the part of plaintiff as to Lunbeck's responsibility, a meeting was held at which there were present besides Lunbeck and the parties to this action, several other persons who were either interested in, or were advisors in, the affair, and on March 8th or 9th, as a result of the conference, it was agreed that appellants who were the payees to be named in the promissory note of $35,000, agreed to sell said note and the deed of trust securing the same to plaintiff for the sum of $23,000, $3,000 of said sum being credited as interest on the note; and as further consideration for such sale, plaintiff agreed to convey to appellants, lot 11 of St. Albans Lake Place tract, and twenty acres of land near Chino, in place of the Las Palmas lot described in the Lunbeck agreement. On March 8 or 9, 1927, the deed of trust and note were placed in escrow, and about March 10th, the deed of trust was recorded and delivered to plaintiff. On March 9th, the appellant Lightburn signed escrow instructions which he delivered to the escrow agent with a

deed from Lunbeck conveying an undivided two-thirds interest in the Hudson street property upon which the apartment house was to be constructed, to Lightburn's wife, Laura May Lightburn, and an undivided one-third interest to one Blanche Miller, wife of Herman Miller, who appears to have been at one time or another, a partner with appellants in the ownership of the apartment-house property, said conveyance from Lunbeck to be subject to the two deeds of trust mentioned. Lunbeck also signed the escrow instructions, and deposited his deed therewith.

Thereafter, plaintiff made payment of the installments, according to the agreement, up to a total of $20,000. During the month of May following, he asked appellants for directions in regard to executing a deed to the St. Albans property, and was finally instructed by the appellants to execute the deed to Laura May Lightburn. This he did, and later she appears to have conveyed the lot to said Blanche Miller. The lot was thereafter used by the Millers, apparently for the purpose of obtaining the execution of a bond for the benefit of themselves. Mrs. Lightburn testified that she executed the deed to Mrs. Miller upon the request of her husband.

In the month of September following, negotiations were begun among the parties for an advance or loan from plaintiff of the sum of $7,500, in order to pay a balance on account of claims against the apartment house. Various papers were executed, including several promissory notes; but after their delivery to McAlister, he became dissatisfied with the actions of the appellants in connection with the execution of a deed of trust upon property other than that upon which they had agreed during their negotiations, and he returned the promissory notes to the appellants. Finally, on September 14, 1927, he agreed to accept an unsecured promissory note from appellants for the sum of $7,500, which is the note in dispute in this action, and paid them therefor the sum of $7,500 by cashier's check.

There appears to have been some difficulty among the parties prior to September 14th, and during the negotiations concerning the $7,500 note, due to the fact that the appellants claimed McAlister was obligated, under the contract of March 4th between himself and Lunbeck, to advance to them $7,500 as part of the original purchase price. The agreement which was executed on September 14th has already been quoted herein.

By their amended answer and counterclaim, appellants allege want of consideration, and the execution of the note simply as security against the placing of liens upon the apartment house, together with the promise of the respondent to return the note in the event that liens were not filed, and then by way of counterclaim, appellants allege the execution of the written agreement with Lunbeck, which is made a part of the counterclaim, setting up the contention that Lunbeck, in executing the agreement, was acting for and as the agent of appellants, and that respondent was fully advised of such agency; that respondent agreed to transfer the Las Palmas lot to Lunbeck, and to thereafter loan to Lunbeck the sum of $7,500 thereon; that at all times, appellants were the contractors described in said agreement to erect said apartment house; that respondent has never delivered a deed to the Las Palmas lot to Lunbeck or defendants; that for the purpose of paying final claims against the building, defendants requested plaintiff to loan to them the sum of $7,500 upon the lot, which plaintiff should transfer to them, but he refused to transfer the lot, or make the loan secured by the first deed of trust referred to in the Lunbeck agreement; that plaintiff compelled them to execute the promissory note which is the subject of the action, and loaned them $7,500 on such note; that the Las Palmas lot was of the reasonable market value of $12,000, and by reason of plaintiff's breach of the agreement the defendants have been damaged in that sum.

The court, in substance, found that the defendants received a consideration of $7,500 in cash for the execution of the note; that it was not given as security against liens, or to be returned to appellants in the event that no liens were filed against the building; that it is not true that plaintiff agreed to advance the sum of $27,500; that on March 8, 1927, a written agreement was entered into between plaintiff and the defendants, whereby defendants sold the $35,000 note to plaintiff, who was to pay therefor the sum of $23,000 cash, and convey to defendants, lot No. 11 of St. Albans Lake Place tract, together with twenty acres of land near Chino; that Lunbeck executed the $35,000 note to defendants in order that they could indorse it to plaintiff without recourse; that plaintiff conveyed said lot to Laura May Lightburn, with the knowledge and consent of the defendants; that defendants declined to accept a conveyance of the Chino land, and by agreement with them plaintiff gave them in lieu thereof, a credit of $2,500 on the $35,000 note, and defendants accepted such credit; that plaintiff made his payments of the sum of $20,000 in pursuance of the agreement of March 8th with defendant, and not in pursuance of the terms of the agreement with Lunbeck; that it is untrue that defendants executed the promissory note now before the court for the purpose of guaranteeing plaintiff against the payment of liens that might be filed against the Elite Arms, but executed it in accordance with the written agreement of September 14, 1927, and received therefor a consideration of $7,500 in cash; that it is not true that the $7,500 note was procured by fraud or false representations; that it is not true that Lunbeck, in executing the agreement of March 4,

1927, was acting for or on behalf of, or as agent for, defendants, and that he had no other interest in said transaction; that it is true that plaintiff never delivered a conveyance of the Las Palmas lot to defendants, but it is not true that plaintiff did not deliver any other lot to defendants.

[1] The court awarded judgment to plaintiff for the principal sum, in addition to attorney's fees and interest as prayed for, and found that defendants were not entitled to recover anything on their counterclaim. We have carefully read the entire record, and are of the opinion that the evidence fully supports the findings and conclusions of the court. No matter whether we consider that Lunbeck was acting on behalf of the appellants in entering into the contract of March 4, 1927, or independently for himself, as the court found, we have ample support for the conclusion that on March 8th the appellants and respondent, independently of Lunbeck, closed a different agreement upon which all of them thereafter acted. In neither of these agreements was the payment of the additional sum of $7,500 to be a part of the purchase price, but, on the other hand, it was to be loaned upon the security of a lot of land to be conveyed to Lunbeck, or to appellants, according to whichever person or persons were parties to the contract, and upon such lot the person to whom the loan was to be made was to execute a deed of trust to the respondent.

The evidence also satisfactorily supports the conclusion that the parties mutually agreed to the substitution of what was considered by them a more valuable lot in St. Albans Lake Place tract, for the Las Palmas lot described in the Lunbeck agreement, and that by their own acts in having the lot conveyed to Mrs. Lightburn, appellants rendered it impossible, and placed it beyond their power to execute a deed of trust upon the St. Albans lot to respondent. That lot has never been reconveyed, but was retained by the appellants, or by persons to whom they transferred the property, who have had the advantage at all times during the pendency of the proceedings of the ownership thereof. The evidence is clear that in executing the agreement of September 14, 1927, which was pleaded in each of their original answers, the appellants contemplated that respondent would pay to them the sum of $7,500 in cash, which would be used by them in paying outstanding claims, and that the giving of the note was not merely a gesture or for the purpose of guaranteeing to respondent that he would not be compelled to pay any liens upon the Hudson street property.

While there may be a conflict of evidence as to various issues, and the facts may be enshrouded in some doubt, which is often the case where litigants have frequently substituted and changed agreements and deals, and particularly in an instance where they have endeavored to draw a number of legal instruments without expert advice, the facts are so well established, as found by the court, that the appellate court has no authority to say that the judgment is not supported by the findings, or that the findings are not supported by the evidence.

The appellants, as witnesses, contradicted themselves and each other upon material matters, both in the course of the trial and in depositions, and in other actions in which the appellants were witnesses, and to such a degree that the court had good reason to refuse to give credence to their testimony. In addition to that situation, two of their witnesses so discredited themselves upon their examination during the trial, that the court, upon motion of attorneys for the appellants, struck their testimony from the record, all of which justified the trial court in its observation that the appellants had presented so many various and conflicting defenses in the action that the court was inclined to regard with suspicion their good faith in the premises.

It may be remarked that in no place does it appear that Lunbeck ever assigned his interest in the contract of March 4, 1927, to appellants, or to any other person, which fact tends to support the conclusion that the appellants, as well as the respondent, treated Lunbeck's contract as being of no further force or effect after they had concluded their agreement of March 8th, which latter agreement seems to have controlled their actions thereafter. Even if the court had accepted the agreement of March 4th at its face value, and had assumed that Lunbeck was acting as the agent or "dummy" of the appellants, such conclusion would not preclude the further inference from the facts as they appeared at the trial, that the agreement of March 4th was replaced by another agreement, either written or verbal, entered into between respondent and appellants, and by which the conduct of the parties was thereafter governed, and further that the execution of the note for $7,500 on September 14, 1927, was the result of a transaction which had no actual or legal connection with the original purchase of the $35,000 note and deed of trust from the appellants.

[2] The evidence fully sustains the conclusion of the trial court that the defendants were not entitled to relief on their counterclaim. There was no evidence supporting the contention that Lunbeck was acting as the agent of the defendants. Even if he were, there is ample evidence in the record to justify the determination of the court that a new contract had been created by the parties, and that appellants had made it impossible by their action in causing the St. Albans lot to be transferred to Mrs. Lightburn, and in permitting her to transfer the lot in turn to Mrs. Miller, for the appellants to reconvey the

St. Albans lot by deed of trust to respondent, or for him to make a loan thereon.

[3] It was not error for the trial court to permit parol testimony to be introduced as to the contents of the contract of March 8th. A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise. Civ. Code, § 1698. Proof was made that a written contract had been made, and that two copies had been executed; that demand had been made upon the appellants to produce the copy claimed to have been in their possession, and that the copy held by respondent had been surreptitiously taken from his files. The admission of the testimony as to the contents of the contract was proper under the provisions of section 1855 of the Code of Civil Procedure, and respondent's testimony as to the contents of the written instrument was amply corroborated.

The point has been made that the findings are in part inconsistent, and that the court failed to make findings upon all the issues. The findings are unnecessarily prolix and involved; but upon an examination of the entire record, we are of the opinion that the court found upon all material issues, and that its findings are fully supported by the evidence. We consider it unnecessary, in view of the conclusions which we have expressed, to discuss the issues of agency advanced in the briefs of the respective parties.

It is ordered that the judgment be affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

125 Cal.App. 740

ROSE v. TILDEN LUMBER & MILL CO.

Civ. 8427.

District Court of Appeal, First District, Division 2, California.

Sept. 13, 1932.

1. Trover and conversion ⇨4.

Conversion of note and deed took place immediately on defendant's assumption of ownership following payment of obligation to secure which they were deposited with defendant.

2. Trover and conversion ⇨22.

Defendant's fraudulent act in purchasing converted note and deed at execution sale did not lessen liability for conversion.

3. Trover and conversion ⇨69.

Sums defendant unlawfully collected and unpaid balance of note *held* properly included in judgment for conversion of note and deed.

4. Evidence ⇨474(19).

Where witness' competency to testify to market value of converted note and deed as compared with face value was not shown, testimony *held* properly excluded.

Appeal from Superior Court, Contra Costa County; H. V. Alvarado, Judge.

Action by Vada A. Rose against the Tilden Lumber & Mill Company. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Ralph H. Wight, of Martinez, for appellant.

Alva S. Sherlock, of Concord (George S. Barkley, of Martinez, of counsel), for respondent.

NOURSE, P. J.

Plaintiff sued for an accounting and for damages for the conversion of a note and deed of trust. The cause was tried by the court without a jury and went to judgment for the plaintiff upon the second cause of action. The defendant has appealed upon typewritten transcripts.

Briefly the facts are that plaintiff had placed in defendant's hands the note and trust deed as collateral security for the payment of an independent obligation of a third party to the defendant. This transaction was covered by a collateral agreement under the terms of which defendant was authorized to credit payments made under the note to the independent obligation and was required to return the note and trust deed to plaintiff when that obligation was satisfied. Payments were duly credited under this agreement until July 8, 1930, when the indebtedness of the third party was fully paid. Defendant failed to return the note and deed to plaintiff but commenced an action against this plaintiff upon a separate obligation of plaintiff to defendant. An attempt was made to attach the note and deed but no valid levy was effected. Thereafter defendant obtained judgment against plaintiff, execution was issued, and the trust deed and note were sold to the defendant under sheriff's sale for the sum of $5. The value of the note and deed, including the sums paid pending the suit and also appropriated by the defendant, was $721.39. For this sum plaintiff had judgment.

[1, 2] Appellant states that the principal question involved was whether there was a conversion, and, if so, when did it occur. There was a conversion which took place immediately upon appellant's assumption of ownership following the payment of the original obligation to secure which the note and

deed were deposited with appellant. 21 R. C. L. p. 675; 49 Cor. Jur. p. 971. The appellant held the deed and note as trustee for respondent, and its purchase of this property at the execution sale at a price less than 1 per cent. of its real value was a plain fraud upon the respondent. But this act of fraud did not create in the appellant any new right in the property and did not lessen appellant's liability for its prior act of conversion.

[3] The judgment was not excessive in amount as it included the sums unlawfully collected by appellant with the unpaid balance due under the note.

[4] Appellant complains that it was not permitted to prove the market value of the note and deed as compared with their face value. The testimony tendered was that of one who was not shown to have been competent to testify on the subject.

The appeal is wholly without merit.

Judgment affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

126 Cal.App. 32

THIBAUT v. KEY et al.*

THOMASSON v. SAME.

Civ. 4650, 4651.

District Court of Appeal, Third District, California.

Sept. 15, 1932.

As Amended on Denial of Rehearing Oct. 15, 1932.

Hearing Denied by Supreme Court Nov. 14, 1932.

Schools and school districts ⇨133.

Teacher employed for school year of 1930–31, and who received no notice of dismissal prior to June 10, 1931, *held* employed for following school year, notwithstanding prior to June 10 another teacher ostensibly had been employed (School Code, §§ 5.401, 5.680, 5.681).

Teacher employed for school year of 1930–31 was legally employed teacher for the year 1931–32, since the trustees of school district could not remove teacher by simply employing another without taking steps required by School Code, §§ 5,401, 5,680, 5,681, to remove teacher then employed.

Appeals from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Separate actions by Lizzie B. Thibaut against W. H. Key and others, as trustee of Antelope School District, Shasta County, California, and others; and by Helen M. Thomasson against W. H. Key and others, as trustees of Antelope School District, Shasta County, California. The cases were consolidated for the purpose of trial and appeal. From adverse judgments, defendants appeal.

Affirmed.

Allert F. Ross, Jesse W. Carter, and Glenn D. Newton, all of Redding, for appellants.

Chenoweth & Leininger, of Redding, for respondents.

JAMISON, Justice pro tem.

On September 10, 1931, the plaintiff Lizzie B. Thibaut, a taxpayer of Antelope school district, Shasta county, began her action to have declared void a certain contract of employment of Mrs. Laura E. Moore, entered into between her and the trustees of said district on May 20, 1931, and to enjoin defendants from issuing, approving, or paying warrants as compensation for her services as teacher of said district. On the same date, plaintiff Helen M. Thomasson began her action for a writ of mandate to compel the trustees of said school district to reinstate her in the position of teacher of the school of said district for the school year of 1931–32. These cases were consolidated for the purpose of trial, and in each case judgment was, on October 17, 1931, rendered in favor of the plaintiff. These cases were also consolidated for the purposes of this appeal, and one brought up on the judgment roll in the Thibaut case alone.

On May 24, 1930, respondent Thomasson was employed by said trustees to teach the school of said district for the nine months' term beginning August 24, 1930, consisting of 170 school days, at a salary of $1,215 for the term. On May 20, 1931, the trustees of said school district entered into a contract with Mrs. Moore by which they employed her to teach the school of said district for the ensuing school term at a salary of $1,215 for the term, said school term beginning August 21, 1931. Section 18 of article 11 of the Constitution prohibits a school district from incurring in any year a liability in excess of the income and revenue provided for such year; therefore only one teacher could be legally employed by the trustees of said district to teach the school for the year 1931–32. The total income or revenue provided for said district for the school year of 1931–32 was the sum of $1,679, and the amount budgeted for teacher's salary was $1,215, and no election was held in said school district permitting it to incur an indebtedness in excess of the said sum of $1,679. No notice, written or otherwise, was given Miss Thomasson of her dismissal as such teacher prior to June 10, 1931.

It is apparent that the trustees of said school district were without authority to employ, or continue in employment, two teachers of the school of said district, for the

*Rehearing denied 15 P.(2d) 189.

school year of 1931–32. The question then to be determined is: Which one of these teachers was legally employed to teach said school for the said year of 1931–32?

Section 5.401 of the School Code provides that: "Persons in positions requiring certification qualifications may be elected on or after May second for the next ensuing school year, and each person so elected shall be deemed reelected from year to year except as hereinafter specified."

Section 5.681 of said Code is as follows: "On or before the tenth day of June in any year the governing board may give notice in writing to a probationary employee that his services will not be required for the ensuing year."

Section 5.680 of said Code provides that: "boards of school trustees, and city, and city and county boards of education shall have power and it shall be their duty to dismiss probationary employees during the school year for cause only, as in the case of permanent employees."

The court found that respondent Thomasson was employed by said trustees on August 24, 1930, to teach the school of said district for the school year of 1930–31, and that in pursuance of that employment, she performed her duties as such teacher and taught said school as prescribed by the contract of employment, and that she received no notice of dismissal as such teacher prior to June 10, 1931, or any notice at all, and that by reason of such failure, respondent Thomasson continued to be the legally employed teacher of the school of said district during the school year of 1931–32.

Appellants contend that the contract of employment of respondent Thomasson ended about the 1st of June, 1931, and that the failure to give her notice of dismissal prior to June 10th of that year could only have the effect, by operation of law, of entering into a new contract with her to teach said school as of the date of June 10, 1931, and that inasmuch as the trustees had, prior to that time, namely, May 20, 1931, already employed Mrs. Moore as the teacher of the school of said district for the year 1931–32, Mrs. Moore, by reason thereof, was the legally employed teacher for that year.

In the case of Blalock v. Ridgway, 92 Cal. App. 132, 267 P. 713, 714, the court quoting from Owens v. Board of Education, 68 Cal. App. 403, 229 P. 881, said: "This contract terminated with the school year 1921–1922, but was deemed continued in force unless, before the 10th of June the board should give the appellant notice in writing that her services would not be required for the following school year." Also, the court said: "It seems to us apparent from the authority and from the language of the act, that the legislative intent is manifest to give assurance to the teaching profession of some degree of certainty in their employment—something akin to civil service in other administrative branches of government. With this intent before us, having in mind that the statute provides that each teacher employed for one year shall be deemed reemployed, except discharged for cause after hearing, or in the case of a probationary teacher, by serving her with a notice in writing on or before June 10th, we conclude that the intent and meaning of the law is as though it read: 'Permanent teachers cannot be discharged except for good cause after hearing, and probationary teachers cannot be discharged except for good cause after hearing, or by serving them with written notice on or before June 10th, that their services will not be required for the ensuing year.'"

It would therefore seem to be clear that the employment of a probationary teacher for the school year of 1930–31 would thereafter be a continuing employment unless removed for cause after a hearing, or unless notice of dismissal was given on or before June 10th of the next succeeding year.

Respondent Thomasson having been employed as the teacher of said school for the year 1930–31, she would continue to be such teacher for that school term, and thereafter would continue to be such teacher unless removed for cause, or until she received notice on or before June 10th of 1931. Only one teacher could be employed by the trustees of said school district, the school law limiting them to that number. The employment of either respondent Thomasson or Mrs. Moore was therefore invalid. The trustees were without authority to employ another teacher until they had removed the one then employed as such. They could not remove such teacher by simply employing another, without taking the steps required by law to remove the teacher then employed.

We are therefore of the opinion that the trustees of said school district were without authority to employ Mrs. Moore to teach the school of said district for the year 1931–32, for the reason that respondent Thomasson was, for said year, the legally employed teacher of said district.

Appellants contend that the obligation to respondent Thomasson for the school term of 1931–32 was at most a contingent liability prior to June 11, 1931, and therefore was not a debt within the meaning of article 11, § 18, of the Constitution.

In view of the conclusions which we have reached, we deem it needless to discuss this contention.

The judgments are affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

125 Cal.App. 723

PEOPLE v. OSTERHELT.

Cr. 2219.

District Court of Appeal, Second District, Division 1, California.

Sept. 12, 1932.

1. Criminal law ⇐377, 1168(4).

Striking of testimony that defendant's reputation for honesty was good *held* prejudicial error, where defendant's testimony, if believed, would have prevented conviction.

2. Criminal law ⇐982.

Refusal to permit defendant to file application for probation after trial and conviction because of his failure to admit guilt *held* erroneous.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Ernest Osterhelt was convicted of burglary in the second degree, and he appeals from an order denying his motion for a new trial.

Order and judgment reversed.

Crop & Crop, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

CONREY, P. J.

Upon an information charging defendant with commission of the crime of burglary, the defendant was tried before a jury, which found him guilty of burglary in the second degree. Appellant made oral application for permission to file a written application for probation, which application was by the court denied, and defendant was sentenced to the state prison. He appeals from an order denying his motion for a new trial.

[1] The defendant rests his appeal upon two alleged errors of the trial court. These are that the court committed prejudicial error in striking out the testimony of one John Bower, a character witness produced by appellant; and that the court abused its discretion and committed prejudicial error in refusing to appellant permission to file an application for probation. The testimony of the witness Bower, after he had duly qualified to answer on the subject, was that defendant's reputation for honesty was good. Nevertheless, this testimony was stricken from the record for the reason that the witness on cross-examination admitted that he had never heard the defendant's reputation discussed. It is conceded by respondent that the action of the court in granting the motion to strike this testimony was erroneous. People v. Stennett, 51 Cal. App. 370, 385, 197 P. 372; People v. Hoffman, 199 Cal. 155, 248 P. 504. This was a prejudicial error. The defendant's testimony, if believed by the jury, would have prevented a conviction. It may be that, with the addition of positive evidence of defendant's good reputation for honesty, the jury would have found that there was a reasonable doubt of his guilt. We do not agree with respondent's contention that appellant acquiesced in the court's ruling, in any such way that he waived his right of exception thereto.

[2] At the time when defendant's motion for a new trial was denied the defendant asked for permission to file an application for probation, but such permission was refused. The only reason given for such refusal was stated by the court in these words: "If he had honestly admitted his guilt, I would have permitted him to file his application for probation, but not after we have gone through the trial and the jury has found him guilty." Here again it is conceded by respondent that the court was in error; and this concession is clearly justified. People v. Miller, 112 Cal. App. 535, 297 P. 40. But this error is of no importance. The judgment must be reversed for the reason first given, so that there may be a new trial.

The order denying a new trial is reversed, and the judgment is reversed.

We concur: HOUSER, J.; YORK, J.

125 Cal.App. 776

STATE COMPENSATION INSURANCE FUND, Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION of the State of California and Griffith Roberts, Guardian ad Litem and Trustee of Frank Roberts and Walter Roberts, Minors, Respondents.

Civ. 8633.

District Court of Appeal, First District, Division 2, California.

Sept. 14, 1932.

Daniel W. Burbank, Henry G. Sanford, and C. F. Laumeister, all of San Francisco, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

STURTEVANT, J.

On March 28, 1931, Griffith Roberts and Mary Roberts were man and wife residing in Oakland. They had two minor sons, Frank and Walter, both of whom were living with their parents. The parents were living together and both were employed by Mountain View Cemetery Association. The wife received $75 per month and the husband re-

ceived $125 per month. When the pay was received, the husband delivered his pay check to the wife and out of the common earnings she paid the expenses of the household. On the date last mentioned Mary Roberts sustained an industrial injury from which she died on May 30, 1931. An application was made by the surviving husband to have the claim of each of said minors fixed. The respondent commission thereafter filed its findings and award and, among other things, found: "3. The employee left surviving her, wholly dependent, Frank Roberts, a minor child, who is entitled to a death benefit of $2,479.48. * * * 4. The employee left surviving her Walter Roberts, a minor, who was partially dependent upon her for support." The petitioner contends that under the facts the third finding was not sustained by the evidence. The respondent commission contends that it was and that said finding was made in direct compliance with section 14 (a) (2) of the Workmen's Compensation Act (as amended by St. 1919, p. 917, § 5). The petitioner replies that the statute is ambiguous and it cites and relies on Fox v. Industrial Acc. Comm., 194 Cal. 173, 228 P. 38. Merely because the minors involved in that litigation were domiciled in Japan, the respondent commission seeks to distinguish that case from the instant case. We think the distinction is immaterial and that the case cited by the petitioner is controlling and should be followed by this court. On the authority of that case the award should be and it is hereby annulled, and the proceeding is remanded for further action by the commission in accordance with this decision.

We concur: NOURSE, P. J.; SPENCE, J.

126 Cal.App. 67

PEOPLE v. BICKNER.

Cr. 147.

District Court of Appeal, Fourth District, California.

Sept. 17, 1932.

Rehearing Denied Sept. 28, 1932.

1. Larceny ⇐55.

Evidence *held* sufficient to sustain conviction of larceny of shotgun.

Evidence disclosed that, three days after defendant visited prosecutor's home, prosecutor missed his shotgun which was there during defendant's visit; that the gun was found in a pawnshop in defendant's home town; that the handwriting in which the bill of sale was found was identified by a handwriting expert as defendant's; and that, before defendant left prosecutor's home, he went to the closet where the gun was kept.

2. Criminal law ⇐1141(1).

Court of appeal cannot presume error in order to reverse trial court's judgment.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Peter Bickner was convicted of petty theft and with having suffered a prior conviction of a felony and he appeals.

Affirmed.

J. M. Lopes, of Visalia, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

MARKS, J.

By an amended information filed by the district attorney of Tulare county, the defendant was accused of the crime of petty theft, and with having suffered two prior convictions of felonies. He pleaded not guilty to the charge of petty theft, and guilty to one prior conviction, but apparently not guilty to the second. It was stipulated that the second prior should not be considered during the trial. The appellant was found guilty as charged, and has appealed from the judgment pronounced upon him and from the order denying his motion for a new trial.

The appellant urges, as grounds for a reversal of the judgment, that the evidence does not support the verdict and judgment; that the trial court erred in its instructions to the jury; that it erred in ruling on objections to questions propounded to witnesses by counsel; and that it erred in denying appellant's motion for arrest of judgment.

[1] It appears from the record that appellant was a guest at the home of J. E. Smith, the complaining witness, in Visalia on April 23 and 24, 1932; that Smith was the owner of a twelve-gauge Winchester repeating shotgun which was in his home during the time of appellant's visit, and was missed by Smith about three days after appellant returned to his home in the city of Fresno. The shotgun was found in a pawnshop in the city of Fresno. Appellant was identified as the person who pawned the shotgun. He signed "John Smith, 204 Fresno St.," to a bill of sale of the shotgun. A handwriting expert testified that the words "John Smith, 204 Fresno St.," were in the handwriting of appellant. Another witness testified that appellant came to the closet where the gun was kept in the Smith home just prior to his leaving. Under the authority of People v. Luchetti, 119 Cal. 501, 51 P. 707, evidence of this character has been held amply sufficient to sustain the verdict and judgment.

We have carefully reviewed the instructions given by the trial court. They are fair, full, and complete and we find no error in them.

The rulings of the trial court upon objections made to questions asked witnesses by counsel, of which appellant complains, were proper and need not be considered at length here.

We cannot determine the grounds of appellant's contention that the trial court erred in denying his motion for arrest of judgment. He fails to set forth any such grounds or supporting argument in his brief, merely incorporating a quotation from the case of In re Rosencrantz, 211 Cal. 749, 297 P. 15. An examination of the record discloses that the only reference to this motion is contained in the clerk's transcript as follows: "Counsel for defendant moved the court for an order for arrest of judgment in said cause, and said motion was by the court denied."

[2] It is self-evident that from this record no error is made to appear from the denial of the motion. We cannot presume error in order to reverse a judgment of the trial court.

The judgment and order appealed from are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

126 Cal.App. 65

TITUS v. STREHL et al.

Civ. 8590.

District Court of Appeal, First District, Division 1, California.

Sept. 17, 1932.

1. Fraudulent conveyances ⇐295(1).

Evidence in suit to declare conveyance void as to creditor sustained finding conveyance was voluntarily made without consideration in contemplation of insolvency and to defraud creditors (Civ. Code, § 3442).

2. Appeal and error ⇐994(3), 1012(1).

Weight to be given testimony is for trial court; it being exclusive judge of witnesses' credibility (Code Civ. Proc. § 1847).

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by C. R. Titus against F. W. Strehl and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Frank V. Kington, of San Francisco, for appellants.

Ira J. Darling, of San Francisco, for respondent.

PER CURIAM.

On January 8, 1926, defendant Strehl was the owner of a parcel of real property in Alameda county. He was indebted to plaintiff in the sum of $775. On that date Strehl conveyed the property to defendant Eleanor Le Conte, who on April 23, 1926, conveyed the same to the Stockholders' Auxiliary Corporation by a deed of trust to secure the payment of the sum of $1,250. Previous to the first transfer plaintiff brought suit on his claim, and on June 23, 1927, procured a judgment against defendant Strehl therefor. An execution issued, by virtue of which the interest of Strehl in the property was levied upon and sold at sheriff's sale; the plaintiff being the purchaser. Thereafter a sheriff's deed to the property was executed to plaintiff, following which the present action was brought to have the transfer from Strehl to Le Conte adjudged void as to plaintiff, it being alleged that the same was voluntary and without consideration; that it was made in contemplation of insolvency and resulted in the insolvency of the grantor; also that the transfer was made with intent to delay and defraud creditors; and that the grantee took with notice of the facts alleged in the complaint. It was also alleged that defendants Frank Le Conte, Leren Powers, and Mrs. Leren Powers claimed an interest in the property, which interest was subordinate to plaintiff's claim.

The trial court found in accordance with the complaint, but that the trust deed mentioned was executed to and accepted by the above-named corporation for a valuable consideration and without notice of the facts alleged. Judgment was entered adjudging the transfer from Strehl to be void, and plaintiff to be the owner of the property subject to said deed of trust.

Defendant Strehl died previous to the trial, and the other defendants, with the exception of the corporation, have appealed from the judgment. As grounds therefor it is claimed that the evidence was insufficient to support the findings.

The evidence shows that for some time previous to the transfer by Strehl he had been cared for by plaintiff and his wife at their home, and that they had expended sums on his behalf. Disputes arose, following which Strehl left without paying and went to reside with defendants Powers, the parents of defendant Eleanor Le Conte. According to the latter, she paid nothing for the conveyance, but she and others testified that her parents had rendered services and had agreed to care for Strehl during his lifetime, and that by agreement the conveyance was made to

her, she undertaking to care for him in case he outlived her mother.

[1, 2] Under section 3442 of the Civil Code any transfer or incumbrance of property made voluntarily or without a valuable consideration by a party insolvent or in contemplation of insolvency is fraudulent and void as to existing creditors (Lefrooth v. Prentice, 202 Cal. 215, 259 P. 947), and without reviewing here the testimony of other witnesses it will suffice to say that the circumstances disclosed by the evidence sufficiently support the court's findings as above stated. The question of the weight to be given this testimony was for the trial court; it being the exclusive judge of the credibility of the witnesses. Code Civ. Proc., § 1847.

It is further urged that a communication, objected to on the ground that it was privileged, was improperly admitted in evidence. However this may be, the communication was of such a character that its admission, if erroneous, resulted in no miscarriage of justice.

The findings are fairly sustained, and no valid reason for reversing the judgment appears.

The judgment is affirmed.

126 Cal.App. 43

COFFEY v. WAY, Mayor, et al.

WARD v. SAME.

Civ. 3882, 3883.

District Court of Appeal, Third District, California.

Sept. 15, 1932.

1. Municipal corporations ⇐185(4, 6).

Under charter authorizing city council to remove from office appointees without preferring charges and to remove appointees with charges against them, council could remove police officers without notice or hearing (St. 1895, pp. 364, 386, 387, § 43, subd. 15, and §§ 109, 113; Const. art. 20, § 16).

St. 1895, p. 364, § 43, subd. 15, provides, in effect, that the council should have power to pass ordinances to try and remove from office appointees against whom charges have been preferred, and to remove without the preferring of charges any appointee at any time when, in the judgment of the council, the public service will be promoted, improved, or benefited thereby.

2. Municipal corporations ⇐159(4).

Person taking city office with knowledge removal could occur without notice or hearing cannot complain because removal was so effected.

3. Holidays ⇐6.

Ordinance ousting police officers passed at 3 o'clock Saturday afternoon in special meeting *held* executive act, and hence not invalid as ordinance adopted on legal holiday (St. 1895, p. 361, § 25, and pp. 364, 386, 387, § 43, subd. 15, and §§ 109, 113; Pol. Code, § 10).

4. Municipal corporations ⇐154.

City authorized to remove appointees need not adopt ordinance providing for procedure in removal of such officers.

Appeals from Superior Court, Humboldt County; Harry W. Falk, Judge.

Separate proceedings by Edgar Coffey and by Albert E. Ward for writs of mandate to be directed to A. W. Way, Mayor of the City of Eureka, and others. From judgments for defendants, plaintiffs appeal.

Affirmed.

Henry L. Ford and Puter & Quinn, all of Eureka, for appellants.

James W. Henderson, of Eureka, for respondents.

JAMISON, Justice pro tem., delivered the opinion of the court.

These proceedings for writs of mandate were brought by plaintiffs to compel defendants, in their official capacity, as the mayor and city council of the city of Eureka, to abstain from refusing to permit plaintiffs to perform their duties as policemen of the said city of Eureka, and to abstain from refusing to permit them the use, enjoyment, and emoluments of said offices. Upon the hearing of the said matters, judgments were rendered for defendants, and from these judgments plaintiffs have appealed. The plaintiff Harry E. Abers having dismissed his appeal, the cases of plaintiffs Coffey and Ward were consolidated for the purposes of this appeal.

Appellants were duly appointed and acting policemen of the said city of Eureka, and on Saturday, February 2, 1929, at about the hour of 3 o'clock p. m. of that day, a special meeting of the said city council was held, and an ordinance was passed removing appellants from said offices as policemen of said city, upon the ground that such removal was for the improvement of the public service. This removal was made without notice to appellants and without a hearing.

Appellants contend that they should have been given the opportunity of being heard before the city council passed the order ousting them.

[1] The city of Eureka is governed under a freeholder's charter adopted by the peo-

ple and approved by the Legislature in 1895, St. 1895, p. 355. Section 113 of the charter provides that: "The policemen shall be appointed by the mayor, by and with the consent of the council, and shall hold office during good behavior, unless removed for cause or for the improvement of the public service, as in this charter provided." Section 43, subdivision 15, of the charter, provides that the council shall have power to pass ordinances "to try and remove from office appointees against whom charges have been preferred; and to remove without the preferring of charges any appointee at any time when, in the judgment of the council, the public service will be promoted, improved or benefited thereby."

Section 109 of the charter provides that the chief of police may prefer charges against a member of the police force, and, if found guilty, he shall be dismissed from the force.

Appellants cite the case of Boyd v. Pendegast, 57 Cal. App. 504, 207 P. 713, in support of their contention that they were entitled to a hearing, but the provisions for the removal of the officer contained in the charter then under consideration are not similar to those in the instant case. The charter considered by the court in that case provided that the removal of the officer should not be made except for cause, and further provided that the cause for such suspension should be stated in writing and filed with the board, and also provided that, upon application of the officer so removed, the board would investigate the grounds for removal. They also cite Bannerman v. Boyle, 160 Cal. 197, 116 P. 732, 735, but neither in that case are the provisions of the charter similar to those contained in the charter in the instant case. In the case of Bannerman v. Boyle, supra, the charter provided that the officer should be appointed for a specified term, and that he could be removed by the mayor for cause. In that case the court said: "The great weight of authority is to the effect that where an officer is appointed for a fixed term and it is provided that he may be removed during the term 'for cause,' without other qualifying words, such removal cannot be made except after notice and hearing." And in this same case the court quoted with approval the following language found in Mechem on Officers, p. 454: "Where the appointment or election is made for a definite term or during good behavior, and the removal is to be for cause, it is now clearly established by the great weight of authority that the power of removal cannot, except by clear statutory authority, be exercised without notice and hearing."

Section 16 of article 20 of the Constitution provides as follows: "In the case of any officer or employee of any municipality governed under a legally adopted charter, the provisions of such charter with reference to the tenure of office or the dismissal from office of any such officer or employee, shall control."

We find in the charter of the city of Eureka clear statutory authority for the removal of appellants from their appointive offices, without notice and without a hearing, as set forth in subdivision 15, section 43 of said charter.

[2] The officer takes the office with the knowledge that he may be removed therefrom without notice or hearing, whenever, in the judgment of the council, his removal will promote the public service, and, if he is removed in strict accordance with the law, it is no objection to the validity of the removal to say that it was done without notice or investigation, where the law does not require it. Matter of Carter, 141 Cal. 316, 74 P. 997.

[3] The next contention of appellants is that the city council had no authority to adopt the ordinance on a legal holiday. Section 25 of the said charter provides that, if at any time a regular meeting falls on a holiday, such regular meeting shall be held on the following day, and provides that special meeting shall be called by the mayor, etc., but does not provide that such special meetings shall not be held on a holiday.

Section 10 of the Political Code provides that: "Every Saturday from 12 o'clock noon until 12 o'clock midnight is a holiday as regards the transaction of business in the public offices of this state, and also in political divisions thereof where laws, ordinances or charters provide that public offices shall be closed on holidays."

There is no provision in the charter of the city of Eureka that the public offices of said city shall be closed on holidays. Nor can it be successfully contended that the act of the city council in passing the ordinance removing appellants from their offices was a judicial act. Having made up their minds that the removal of appellants from office was necessary for the improvement of the public service, they held a special meeting and passed the ordinance resulting in said removal. The passing of this ordinance under these conditions was purely executive; nor was it in any manner a judicial act.

In this state a municipality possesses powers both legislative and executive. Such executive powers are frequently committed to the city council, and they are sometimes exercised by declarations in the form of an ordinance or resolution. Hopping v. Council of City of Richmond, 170 Cal. 605–610, 150 P. 977; Hyde v. Wilde, 51 Cal. App. 82, 196 P. 118.

In the case of In re Heckman, 90 Cal. App. 700–708, 266 P. 585, the court cited with approval the case of Mueller v. Egg Harbor City, 55 N. J. Law, 245, 26 A. 89, wherein it was held that an act which made Saturday

afternoon a legal holiday did not apply to proceedings taken before a common council. The act there considered provided that certain days should be considered holidays as far as transacting business in public offices of the state was involved.

[4] Appellants have cited no authority sustaining their position that the act of the city council in merely passing the ordinance on Saturday afternoon was illegal. Appellants further contend that the city council never adopted an ordinance providing for the procedure to be followed in the removal of its officers. So far as concerns the removal of an appointed officer, where the officer is not appointed for a fixed term, we see no merit in this contention. The passage of an ordinance to do that which the city council was already authorized to perform would be an idle act. Thomas et al. v. City of Petaluma, 33 Cal. App. 547, 165 P. 1021; City of Petaluma v. Hughes, 37 Cal. App. 473, 174 P. 336.

The judgments are affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

125 Cal.App. 675

Ex parte KEPFORD.

Cr. 1215.

District Court of Appeal, Third District, California.

Sept. 7, 1932.

1. Criminal law ⇐1211.

Minimum penalty for driving automobile without owner's consent where defendant had previously been convicted of felony *held* 7 years (Pen. Code, §§ 18, 667, and § 1168, as amended by St. 1927, p. 1491).

2. Habeas corpus ⇐30(3).

Prisoner cannot complain because prison board reduced penalty from previous 10-year term to 7-year term authorized by law, even if original term was unauthorized (Pen. Code, §§ 18, 667, and § 1168, as amended by St. 1927, p. 1491).

Petition by Edward Kepford against the Warden of Folsom State Prison for writ of habeas corpus.

Writ denied.

Edward Kepford, in pro per.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for respondent.

PER CURIAM.

This is a petition for a writ of habeas corpus. The petitioner contends he is illegally restrained of his liberty for the reason that he has served the maximum time of imprisonment prescribed by law as a penalty for the offense of which he was convicted.

June 6, 1929, the petitioner was convicted by a jury in San Joaquin county, of the felony of "driving an automobile without the consent of the owner," for the purpose of temporarily depriving the owner of the possession thereof. At the same time he pleaded guilty to two former convictions of other felonies. He was sentenced to imprisonment in Folsom state prison for the indeterminate period prescribed by law. The prison board subsequently fixed his penalty at ten years' imprisonment. That order was rescinded by the prison board May 14, 1932, and his term of imprisonment was fixed at seven years.

[1] The petitioner contends that the maximum penalty for the offense of which he was convicted, together with the prior conviction of a felony, was but five years; that the term of imprisonment which was fixed by the prison board was excessive and void and that the credits which he has earned for good behavior entitle him to a discharge at this time.

Section 146 of the California Vehicle Act (St. 1923, p. 564), the violation of which led to the conviction of the petitioner, reads in part: "Any person who shall drive a vehicle not his own, without the consent of the owner thereof and in the absence of the owner, and with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle, whether with or without intent to steal the same, shall be deemed guilty of a felony."

The penalty for this felony is prescribed by section 18 of the Penal Code, as it then existed, as follows: "Except in cases where a different punishment is prescribed by this code, every offense declared to be a felony is punishable by imprisonment in the state prison, not exceeding five years."

The maximum penalty for the offense of feloniously driving a vehicle without the presence or consent of the owner is therefore fixed at five years of imprisonment in the state prison. This penalty is, however, increased in the present case on account of the prior conviction of a previous felony, which was also suffered by the petitioner. The term of imprisonment in this case was properly fixed by the prison board, pursuant to the mandate of section 1168 of the Penal Code as it existed in 1928 at the time of the commission of the offense and the conviction of the defendant therefor. That section of the Code then provided that one who was convicted of a crime "shall be sentenced to be confined in the state prison, but the court in imposing such sentence shall not fix the term or duration of the period of imprisonment. * * * The governing authority of the reformatory or prison

in which such person may be confined, or any board or commission that may be hereafter given authority so to do, shall determine * * * what length of time * * * such person shall be confined, * * * but the following shall be the minimum term of sentence and imprisonment in certain cases, notwithstanding any other provision of this code or any provision of law specifying a lesser sentence. * * * For a person previously convicted of a felony, but not armed with a deadly weapon at the time of his commission of the offense or a concealed deadly weapon at the time of his arrest, seven years." This statute then provides that this term of imprisonment may be fixed by the prison board at any time after one year from the commencement of the service of sentence, and that the prisoner may be allowed credit for good behavior. In the present case the prisoner was allowed and is entitled to credit of one year and five months to be deducted from his term of sentence, for good behavior.

The petitioner contends that the order of the prison board fixing his term of imprisonment at seven years is unauthorized by law and void. He asserts that the maximum penalty which is authorized by law in the present case is five years' imprisonment, and that the term fixed by the prison board in excess of that period is void. If this contention be true, then the petitioner has earned credits to be deducted from his time of imprisonment, which will entitle him to his discharge. In support of this assertion, the petitioner relies on section 667 of the Penal Code, relating to prior convictions, which reads in part:

"Every person who, having been convicted of any offense punishable by imprisonment in the state prison, and having served a term therefor in any penal institution, commits any crime after such conviction, is punishable therefor as follows:

"1. If the offense of which such person is subsequently convicted is such that, upon a first conviction, an offender would be punishable by imprisonment in the state prison, such person is punishable by imprisonment in the state prison for the maximum period for which he might have been sentenced, if such offense had been his first offense."

The petitioner claims that the language of the last-quoted section of the Code is controlling, and that since five years of imprisonment is prescribed by section 18 of the Penal Code as the maximum penalty for feloniously driving an automobile without the consent or presence of the owner thereof, that period of time may not be extended because of his previous conviction of another felony. The last-quoted section of the Code was enacted in 1909. It is specifically modified and controlled by the language of section 1168 of the Penal Code, which was enacted in 1917 (St. 1917, p. 665) and amended in 1927 (St. 1927, p. 1491), declaring that the penalty for a felony committed by "a person previously convicted of a felony, but not armed with a deadly weapon * * * [is] seven years," "notwithstanding any other provision of this code or any provision of law specifying a lesser sentence." It is conceded the petitioner was not possessed of a deadly weapon. The last-quoted provision definitely and specifically fixes the minimum penalty under the circumstances of the present case at seven years. The minimum penalty for a felony accompanied by evidence of a prior conviction of another felony, when the possession of a deadly weapon is not involved, is seven years. The defendant was charged and convicted of a felony under the provisions of section 146 of the California Vehicle Act. It may not be said he was convicted of a mere misdemeanor under section 499b of the Penal Code. People v. Norman, 62 Cal. App. 219, 216 P. 402. He was not charged with taking an automobile under the provisions of the last-mentioned section.

[2] The petitioner may not complain because the prison board reduced his penalty from a previous term of ten years to the present fixed term of seven years. Assuming that there is no legal authority for the prison board to have originally fixed the term of imprisonment at ten years, that order was, nevertheless, valid to the extent of the minimum term of seven years, which is specifically fixed by law. The petitioner was not harmed by the correction of the original order of the prison board.

The writ is denied.

125 Cal.App. 683

McFATE v. BANK OF AMERICA OF CALIFORNIA.

Civ. 7417.

District Court of Appeal, Second District, Division 1, California.

Sept. 8, 1932.

Rehearing Denied Oct. 4, 1932.

Hearing Denied by Supreme Court Nov. 7, 1932.

1. Principal and agent ⇐69(1).

Before accepting employment as agent for plaintiff, defendant was under obligation to disclose to plaintiff any adverse interest it may have had (Civ. Code, § 2343).

2. Fraud ⇐17.

Party to contract is entitled to know party with whom he contracts.

3. Fraud ⇐41.

Complaint against escrow holder of mortgage which was also record mortgagee for constructive fraud for its acts while exchange of mortgaged house for plaintiff's ranch was

made, stated cause of action (Civ. Code, §§ 1573, 2343).

Complaint alleged that mortgagor owned an apartment house and plaintiff a ranch; that mortgagor made false representations as to value of his property to plaintiff, and stated that it was encumbered with a $100,000 mortgage held by defendant mortgagee; that, in reliance on the representations, plaintiff entered into an agreement of exchange of properties under terms of which provision was made for creation of an escrow by the parties with mortgagee to consummate the exchange; that the reasonable mortgage value of the property was $68,000; that mortgagor informed mortgagee of the exchange contract and mortgagee agreed to receive a note and mortgage for $100,000 and credit to mortgagor's account the moneys received therefrom; that such a mortgage was made and placed of record; that plaintiff was thereby induced to believe that apartment house possessed a bona fide loan value of $100,000, and to consummate such exchange when otherwise he would not have done so.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Joseph N. McFate, Jr., against the Bank of America of California, a banking corporation, as successor of the Merchants' National Trust & Savings Bank, a national banking association. From a judgment dismissing the action, plaintiff appeals.

Reversed.

W. I. Gilbert and Troy Pace, both of Los Angeles, for appellant.

E Freston & Files, of Los Angeles (Ralph E. Lewis, of Los Angeles, of counsel), for respondent.

TAPPAAN, Justice pro tem.

This appeal is from a judgment of dismissal entered after an order sustaining defendant's demurrer to plaintiff's complaint. The demurrer was sustained by the trial court with leave to the plaintiff to amend, but plaintiff elected to stand on his complaint, whereupon, by stipulation setting forth such election and reserving to plaintiff the right to appeal, the order was entered dismissing the action. The sole question presented upon this appeal is whether the original complaint states a cause of action. Defendant's demurrer was general. The complaint alleges the corporate existence of defendant bank and its predecessor banks, of whose various rights and liabilities defendant bank is alleged to have become the successor. Where, hereafter in this opinion reference is made to defendant bank, it is deemed to include as well the banking institutions which preceded defendant in this transaction, and to whose rights and liabilities it has succeeded. Then follow allegations that one Zuckerman owned a certain apartment house; that plaintiff owned a ranch; that one Gordon acted as Zuckerman's agent and broker to negotiate a sale or exchange of his apartment house to plaintiff. It should be noted that neither Zuckerman nor Gordon are parties to this action. The complaint then alleges that Zuckerman made representations as to the value of his property to plaintiff, and stated that it was encumbered with a mortgage in the amount of $100,000, held by defendant bank, and that said bank renewed the loan from year to year and in the future would so renew the loan. The next allegation is to the effect that plaintiff, in reliance upon the said representations of Zuckerman, entered into a written agreement of exchange of his (plaintiff's) ranch for Zuckerman's apartment house, subject to a mortgage of $100,000, held by defendant bank. Under the terms of this agreement, it is alleged that a provision was made for the creation of an escrow by the parties with defendant bank to consummate the exchange. There is then an allegation that the representation as made by Zuckerman that there was a mortgage in the sum of $100,000 on the apartment house held by defendant bank was false and untrue; that the reasonable mortgage value of said property was $68,000; that defendant bank made an appraisal of said property at $132,000, and offered to loan Zuckerman $75,000 on the same; that Zuckerman informed defendant bank that he was about to exchange the property with plaintiff for his ranch, subject to the mortgage of $100,000 held by defendant bank, and defendant bank agreed to receive a note and mortgage for that amount and credit to Zuckerman's account the moneys received therefrom; and that such a mortgage was duly made and placed of record. The next allegation is as follows: "That thereby and as a result of such plan and of such actions upon the part of the Merchants National Trust and Savings Bank (a predecessor in interest of defendant bank) the plaintiff was induced and caused to believe that the Knickerbocker Apartments were of the value that had been represented to plaintiff by the said H. Lew Zuckerman and S. E. Gordon, and that it possessed a bona fide loan value of $100,000, and said plaintiff was thereby induced to consummate such exchange, when otherwise and had he been advised of the true facts he would not have done so." Then follows an allegation that plaintiff had been damaged in the sum of $114,000, and a prayer for judgment as against defendant bank for that sum. Defendant's demurrer, as hereinbefore stated, was that the complaint did not state facts sufficient to constitute a cause of action. Appellant in his argument, as presented here, tacitly admits that the alleged cause of action

set up in his complaint falls short in some of its material essentials of stating a cause of action for actual fraud, as defined in our law (Civil Code, § 1572), but advances the theory that it does state a cause of action for constructive fraud. Constructive fraud is defined by section 1573 of the Civil Code as follows: "Constructive fraud consists: 1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him. * * *"

It is appellant's contention that defendant bank, by becoming the escrow holder thereafter, stood in a fiduciary relationship to plaintiff, and owed to him a duty to disclose all facts that would materially tend to cause him to consummate the exchange upon the basis proposed by Zuckerman. Both appellant and respondent in their briefs devote considerable space to discussion of the question of the status of escrow holders and their obligations to their principals. It would seem, from an examination of the facts, as alleged in the complaint, that there is a far broader principle involved than that which would arise solely from defendant's acts as escrow holder. Plaintiff's cause of action, as stated in his complaint, is that defendant bank became the record mortgagee in a mortgage upon property for which plaintiff was about to exchange certain property then owned by him, and that this mortgage so accepted and recorded by defendant bank was in fact taken for the benefit and credit of the owner of the property seeking the exchange with plaintiff. Defendant is not alleged to have made any statement or representation in regard to this mortgage to plaintiff, other than that it acted in the capacity of escrow holder while the exchange was made. There is an allegation that defendant had notice that it was necessary that there be a mortgage of the amount stated and held by it to induce plaintiff to complete the exchange. The existence of this mortgage, its parties, and terms, clearly appear as one of the material inducements which secured plaintiff's consent to the completion of the existing exchange agreement. The cause of action thus alleged fails to aver facts which amount to actual fraud, nor are there facts stated which would directly show a violation of the express terms of the trust relationship alleged to have existed. In the last analysis the question here presented would seem to be this: Does the term "breach of duty" as found in the definition of constructive fraud in section 1573 of our Civil Code include within its scope cases where one has aided in the creation of or has created an untrue condition or statement of material fact, with knowledge that the condition or statement would be made use of in inducing a known person to continue or complete a contractual obligation, and which in fact did have that result and in fact did cause detriment to the person so induced to act? It will be noted that, if the facts alleged in the complaint in the instant case are construed as sufficient to allege a "breach of duty," the other essential elements necessary to constitute constructive fraud, as defined in the Code section just referred to, are adequately alleged in the complaint. Counsel in their briefs have not cited any authorities having a direct bearing upon this question, nor has an examination of our reported cases disclosed any such authority.

It may fairly be argued that "breach of duty" as made use of in the section of the Code quoted, when considered with the context of the paragraph, means but the correlative for injury suffered by one and caused by the participation or co-operation in the wrong by another. The cases of Blair v. Guarantee Title Co., 103 Cal. App. 260, 270, 284 P. 719, and Mox, Incorporated, v. Woods, 202 Cal. 675, 677, 262 P. 302, would seem to sustain this conclusion.

[1-3] The defendant in accepting the mortgage is alleged to have acted in the capacity of agent for the mortgagor, and would be liable to plaintiff for its wrongful acts. Civ. Code, § 2343. Before accepting employment as agent for plaintiff, defendant was under an obligation to disclose to plaintiff any adverse interest it may have had. This it failed to do before accepting the escrow. This was clearly a "breach of duty" within the intention of the section. There is no merit in the argument advanced that the plaintiff suffered no detriment. A party to a contract is entitled, under the circumstances of the instant case, to know the party with whom he contracts. The act of the defendant debarred him from this information. Under somewhat similar circumstances to those present here, complaints have been upheld in the following cases: Continental Insurance Co. v. Mercadante, 222 App. Div. 181, 225 N. Y. S. 488; Doyle v. Chatham & Phenix Nat. Bank, 253 N. Y. 369, 171 N. E. 574, 71 A. L. R. 1405; Ultramares Corporation v. Touche, 255 N. Y. 170, 174 N. E. 441, 74 A. L. R. 1139.

Nothing in this opinion contained is to be construed as approving or disapproving the measure of damages as alleged in the complaint. "We are not concerned with the question of the ability of the plaintiff to prove the allegations of the complaint, and this would be true even though we could foresee insuperable difficulties in making such proof. We are merely to pass upon the sufficiency of the complaint as a pleading." Mox, Incorporated, v. Woods, supra, at page 676 of 202 Cal., 262 P. 302.

For the reason herein stated, the judgment entered herein is reversed.

We concur: CONREY, P. J.; YORK, J.

125 Cal.App. 290

HOLMES v. HUGHES et al.

Civ. 8426.

District Court of Appeal, First District, Division 1, California.

Aug. 6, 1932.

Rehearing Denied Sept. 3, 1932. Hearing Denied by Supreme Court Oct. 3, 1932.

1. Appeal and error ⇐931(1).

On appeal from order made on affidavits, affidavit of prevailing party must be taken as true.

2. Insurance ⇐514½.
Subrogation ⇐7(5).

Provision of automobile liability policy that insured would help prosecute appeals did not require insured to furnish bond to stay execution on judgment against insured pending insurer's appeal or subject him to claim for subrogation by surety on insolvent insurer's appeal bond (Code Civ. Proc. §§ 942, 1059).

3. Subrogation ⇐7(1).

For surety to be subrogated, he must show he became surety at express or implied request of principal, otherwise he is a mere volunteer (Civ. Code, § 2831; Code Civ. Proc. § 1059).

4. Subrogation ⇐7(5).

Surety on appeal bond obtained by insurer to stay execution pending insurer's appeal from judgment against insured *held* mere "volunteer" as to insured, not entitled to recover against insured on subrogation theory (Civ. Code, § 2831; Code Civ. Proc. § 1059).

Such surety was, as to insured, a mere "volunteer" not entitled to recover against insured on the subrogation theory, notwithstanding that insured was named as principal in the bond, which was without his knowledge or consent; the real principal being the insurer, regardless of the form of the transaction.

[Ed. Note.—For other definitions of "Volunteer," see Words and Phrases.]

5. Subrogation ⇐7(1).

Equity recognizes surety's right of subrogation to original creditor's right against judgment debtor on payment of judgment (Civ. Code, § 2831; Code Civ. Proc. § 1059).

6. Statutes ⇐183.

Letter of statute will not be followed where result would be absurd and unjust (Code Civ. Proc. § 1059).

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Ann D. Holmes against Edward F. Hughes and the Indemnity Insurance Company of North America. From the judgment for plaintiff, the Indemnity Insurance Company appeals.

Affirmed.

Bronson, Bronson & Slaven, of San Francisco, for appellant.

P. L. Benjamin, of San Francisco, for respondent.

PER CURIAM.

On February 27, 1930, judgment was entered in the above action in favor of plaintiff and against the defendant for $2,500 and costs. The action was one for personal injuries caused by the negligent operation of an automobile by the defendant. The latter was insured against loss or damage due to such negligence by a policy of liability insurance issued by the Home Accident Insurance Company of Arkansas. Therein the insurer agreed "to defend in the name and on behalf of the assured any suit brought to enforce a claim for damages, * * *" and the policy also contained the following provision: "The assured, whenever requested by the company, shall aid in securing information and evidence and the attendance of witnesses and in prosecuting appeals, but the assured shall not voluntarily assume any liability either before or after an accident, nor shall he, without the written consent of the company previously given, incur any expense or settle any claim except at his own cost, nor interfere in any negotiations for settlement or in any legal proceeding conducted by the company on account of any claim. * * *" Further, that in the event of a judgment being recovered against the assured, an action might be brought on the policy by the injured person against the insurer.

The evidence shows that the insurer employed attorneys and carried on the defense without interference by defendant. Upon the entry of the judgment, an appeal was taken therefrom by the insurer, acting through its attorneys, and a bond was filed for the purpose of staying execution pending the appeal. This bond was procured by the insurer from the Indemnity Insurance Company of North America, which at the insurer's request became sole surety thereon. Thereafter the insurer became insolvent, and the appeal was dismissed, whereupon a remittitur issued and was filed in the Superior Court. The judgment passed by assignment to J. C. Hughes, who, on June 17, 1931, filed in the Superior Court a written application for entry of judgment against the Indemnity Company as surety upon the bond. The application was granted, resulting in a judgment under section 942 of the Code of Civil Procedure against said company for $2,639.04, with costs and interest, which it paid.

[1] Following such payment, the Indemnity Company, pursuant to section 1059 of the Code of Civil Procedure, requested the clerk of the Superior Court to issue execution against the defendant for the amount paid. The writ issued and was levied upon property standing in defendant's name. Thereupon he moved the court for an order directing entry of satisfaction of judgment as against himself and recalling the execution. This motion was upon the ground that the Indemnity Company did not by executing the said bond on appeal become surety for him but for the insurer, and that therefore it had not become subrogated to any right to enforce the judgment against him. Affidavits in support of the motion, and counter affidavits by the Indemnity Company, were filed. Those in favor of the defendant, who was the prevailing party, must be taken as true. Doak v. Bruson, 152 Cal. 17, 91 P. 1001. From these it sufficiently appears that the defendant was satisfied with the judgment and desired its payment, but that without his knowledge or consent an appeal was taken therefrom by the insurer, and upon its application alone the bond in question was procured and filed; further, that the insurer agreed to hold the Indemnity Company harmless against any liability for loss thereunder, and that the latter company until the insurer became insolvent considered it and not the defendant to be its principal. It also appears that all the facts of the transaction were known to the Indemnity Company when its bond was executed, and that a discount from the regular premium was allowed the insurer.

The motion was granted, and the Indemnity Company appealed from the orders entered in that connection.

[2] While the policy contained the provision that the assured, if requested by the company, should aid in the prosecution of appeals, by no reasonable construction did this provision require defendant to furnish a bond to stay the execution of a judgment pending an appeal, or to place himself in a position where he would be subject to a claim of the character made in this proceeding; and it has been held to be the duty of an insurer, in case it elects to appeal, to furnish the bond. Pacific Coast Casualty Co. v. General Bonding & Casualty Co. (C. C. A.) 240 F. 36. It has also been held that an insurance company, in exercising its right to defend an action brought against the assured, is not the latter's agent, but rather in the position of an independent contractor. Attleboro Mfg. Co. v. Frankfort, etc., Ins. Co. (C. C. A.) 240 F. 573; Bell v. Greenwood, 229 App. Div. 550, 242 N. Y. S. 149.

The Indemnity Company contends, however, that, having paid the judgment, it became substituted to the rights of the judgment creditor under said section 1059, which provides that any surety on an undertaking on appeal executed to stay proceedings on a money judgment, who pays the same after its affirmation, is substituted to the rights of the judgment creditor, and may enforce the judgment in all respects as if he had recovered it.

[3-6] A surety is one who at the request of another, and for the purpose of securing him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor (Civ. Code, § 2831); and it is the general rule that, in order to recover, he must show that he became such at the express or implied request of the principal; otherwise he will be deemed a mere volunteer, and cannot thus make himself a creditor of him whose debt he pays. Spencer, Suretyship, § 118; 50 Cor. Jur. Principal and Surety, § 404, p. 249; Mitchell v. Chambers, 43 Mich. 150, 5 N. W. 57, 38 Am. Rep. 167; White's Ex'r v. White, 30 Vt. 338; Ricketson v. Giles, 91 Ill. 154; McPherson v. Meek, 30 Mo. 345; McCabe v. Montgomery, 131 Ark. 523, 199 S. W. 548; Anderson v. Hendrickson, 1 Neb. (Unof.) 610, 95 N. W. 844. Here there was no request by defendant, and as between him and the companies he received no benefit from the filing of the bond, nor was it the intention of the Indemnity Company that he should; the sole beneficiary as understood by both companies being the insurer. Under such circumstances, as held in McCabe v. Montgomery, supra, so far as the companies were concerned, the bond was not for defendant's benefit, and as to him the Indemnity Company was a volunteer. While subrogation is founded upon principles of justice, and may be decreed so as to secure such without regard to form, a person claiming the benefit of the doctrine must establish a superior equity, which appellant has failed to do, and it will not be permitted to work an injustice. 23 Cal. Jur. Subrogation, 917; Bell v. Greenwood, supra. The facts of the case last cited closely resemble those in the case at bar; and it was there held that a surety on an appeal bond obtained by an insurer was not entitled after payment of the judgment to recover against the principal defendant on the theory of subrogation, citing City Trust, etc., Surety Co. v. Haaslocher, 101 App. Div. 415, 91 N. Y. S. 1022, which declares that after judgment the insurer is as between it and the judgment debtor to be regarded as the principal debtor, and that an appeal bond which it had caused to be filed should be deemed to have been executed on its behalf as principal. Literally, the Code section covers all cases where such a bond is filed irrespective of any question of privity between the parties, and regardless of whether the judgment debtor knew of the fact. However, the right of a surety to be subrogated to the rights of the original creditor as against the judgment debtor upon payment of the judgment has long been recognized and enforced in equity

(37 Cyc. Subrogation, 419; 25 R. C. L. Subrogation, § 69, p. 1387; 16 L. R. A. page 118, note); and, as has been said with regard to section 709 of the same Code (Forsythe v. Los Angeles Railway Co., 149 Cal. 569, 87 P. 24; Williams v. Riehl, 127 Cal. 365, 59 P. 762, 78 Am. St. Rep. 60), section 1059 gives to a surety the summary remedy of using the judgment itself to enforce his rights against the judgment debtor. It is but a method of procedure based upon the doctrine of subrogation and governed by the same equitable principles. The letter of the statute will not be followed where the result of such an interpretation will be absurd and unjust; it being the rule that the spirit and reason of the law should prevail. 23 Cal. Jur. Stats. § 113, p. 735. Here, although the defendant was named as principal in the bond, this was without his knowledge or consent, and the insurer was, regardless of the form of the transaction, the real principal and the Indemnity Company its surety. It is our conclusion in view of the facts that as to defendant the Indemnity Company was not a surety within the meaning of the Code section.

The orders appealed from are affirmed.

125 Cal.App. 748

BAILEY v. SUPERIOR COURT IN AND FOR HUMBOLDT COUNTY et al.

Civ. 4693.

District Court of Appeal, Third District, California.

Sept. 13, 1932.

Eminent domain ⊂=258.

Motion to dismiss condemnation proceedings filed after perfecting appeal from judgment *held* properly dismissed by trial court, since court had lost jurisdiction (Code Civ. Proc. §§ 949, 1251, 1255a).

Petition by Frank M. Bailey for a writ of certiorari to review the order of the Superior Court of the State of California in and for the County of Humboldt, Hon. T. H. Selvage, Judge, dismissing petitioner's motion to dismiss an action for condemnation of a right of way.

Order affirmed.

Harry A. Encell, of San Francisco, and Ernest S. Mitchell, of Eureka, for petitioner.

Hugh K. McKevitt, of San Francisco, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is a petition for a writ of certiorari to review the order of the Superior Court of Humboldt County dismissing petitioner's motion to dismiss an action for condemnation of a right of way for failure to pay the amount of money assessed, within thirty days after the rendering of final judgment, pursuant to section 1251 of the Code of Civil Procedure, after an appeal from the judgment had been perfected.

The petitioner is the owner of certain real property in Humboldt county. The state of California, acting through its department of public works, brought an action in the Superior Court of that county to condemn a fraction of one acre of that land for highway purposes. January 25, 1932, judgment of condemnation was rendered and entered in that action assessing the value of the land to be taken at the sum of $12,200. On February 9, 1932, within thirty days after the entry of judgment, the plaintiff perfected an appeal from the judgment of condemnation. No money was paid upon this judgment by the plaintiff pursuant to section 1251 of the Code of Civil Procedure, or at all. On February 25th this petitioner, who was the defendant in the condemnation proceeding, moved the trial court for a judgment of dismissal of the action in eminent domain on the ground that the failure of the plaintiff to pay the sum of money which was assessed within thirty days from the entry of judgment pursuant to section 1251, supra, constituted an abandonment of the condemnation proceedings and a waiver of all rights affected by the decree. On application of the plaintiff the motion to dismiss the condemnation suit was dismissed by the trial court on the ground that the perfected appeal stayed proceedings in that action, and that the court was without jurisdiction to dismiss the proceeding in eminent domain. This petition for a writ of review was then instituted.

The petitioner contends that the decree which was rendered in the eminent domain proceedings on January 25th was a "final judgment" of condemnation, and that failure to pay the judgment within thirty days from the entry thereof constituted an abandonment of the proceedings, in spite of the pending appeal from that judgment.

With respect to judgments in condemnation proceedings, section 1251 of the Code of Civil Procedure reads, in part: "The plaintiff must, within thirty days after final judgment, pay the sum of money assessed." That portion of section 1255a, of the same Code, upon which the petitioner relies reads as follows: "* * * Failure to comply with section 1251 of this code shall constitute an implied abandonment of the proceeding."

The petitioner's motion to dismiss the condemnation proceedings was presented to the wrong court. After an appeal from the judgment had been perfected to the District Court of Appeal the trial court was without jurisdiction to entertain the motion to dismiss the action. Section 949, Code Civ. Proc.; 2 Cal. Jur. 415, § 178; Colusa, etc., R. R. Co. v. Superior Court, 31 Cal. App. 746, 161 P. 1011; Mt. Shasta Power Corp. v. Dennis, 66 Cal. App. 186, 225 P. 877. In 2 California Jurisprudence 415, § 178, it is said: "The service and filing of a proper notice of appeal from final judgment in an action transfers the action from the superior court to the appellate court, and divests the superior court of further jurisdiction in the cause except as to matters not affected by the judgment or order appealed from. The trial court has no longer any power or control over the action, and cannot proceed further as to matters embraced in the judgment until the appeal is heard and determined and its jurisdiction is restored."

The well-settled rule above mentioned has been applied to condemnation proceedings. Colusa, etc., R. R. Co. v. Superior Court, supra. In the Mt. Shasta Power Corporation Case, above cited, a similar motion to dismiss the proceedings in a condemnation action was properly addressed to the appellate court and not to the trial court. If the result of a failure to pay the money assessed by the trial court in the present action amounted to an implied abandonment of the proceedings, that abandonment did not occur until thirty days had elapsed after the judgment was rendered and entered. In the meantime the cause was transferred to the appellate court by the perfecting of an appeal, and the trial court thereby lost jurisdiction to entertain a motion to dismiss the proceedings on account of an implied abandonment or otherwise. The order of the trial court dismissing the petitioner's motion to dismiss the condemnation proceedings was therefore properly made. That order amounted to a denial of his petition to dismiss the condemnation proceedings.

In view of the fact that the trial court was without jurisdiction to dismiss the condemnation proceedings, it is unnecessary for this court to determine the question as to whether a failure on the part of the state to pay the amount of money which was assessed by the judgment in this case constituted an implied abandonment of the cause.

The order denying petitioner's motion to dismiss the condemnation proceedings is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

In re O'CONNOR'S ESTATE.*

Civ. 8637.

District Court of Appeal, First District, Division 1, California.

Sept. 6, 1932.

Rehearing Denied Oct. 6, 1932. Hearing Granted by Supreme Court Nov. 3, 1932.

1. Assignments ⇐8.

Under Indiana law, wife's inchoate interest in husband's lands is not present estate, and so long as title remains in husband her inchoate right alone cannot be conveyed (Burns' Ann. St. Ind. 1926, §§ 3337, 3349).

2. Descent and distribution ⇐69.

Under Indiana law, husband may dispose of his personalty without wife's consent, except in expectancy of death to defeat her statutory distributive right (Burns' Ann. St. Ind. 1926, § 3343).

3. Descent and distribution ⇐5.

Wife having only expectancy in decedent's personal estate under law of matrimonial domicile, and decedent having established his domicile in California, wife *held* not entitled to portion of decedent's personalty which she could have claimed under law of matrimonial domicile (Burns' Ann. St. Ind. 1926, § 3343; Civ. Code Cal. § 129).

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Petition by Caroline H. O'Connor for a decree of partial distribution of the estate of Joseph S. O'Connor, deceased, opposed by Charles B. O'Connor, executor. From the order sustaining the demurrer to the petition, the petitioner appeals.

Affirmed.

Shelton, Gray & McWilliams and Charles A. Gray, all of San Francisco, Olin L. Everts, of Fresno, and U. S. Lesh and James E. Lesh, both of Indianapolis, Ind., for appellant.

Perry Evans, of San Francisco, for respondent.

PER CURIAM.

An appeal from an order and decree sustaining the demurrer of respondent executor to appellant's petition for a decree of partial distribution and denying said petition.

Appellant is the widow of decedent, who at the time of his death was a resident of California. They were married on March 28, 1925, at which time, according to the petition, both had their legal residence and domicile in Indiana. Within a few days after the marriage they separated, and decedent came to California, where he estab-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 23 P.2d 1031.

lished his residence. Thereafter he commenced in Los Angeles county an action for a divorce from appellant, but died testate befor the action terminated. Proceedings for the administration of his estate are pending in the superior court of the city and county of San Francisco. The petition alleged:

"That prior to her marriage with decedent the decedent represented to the petitioner that he owned stocks, bonds and other securities of an amount in value in excess of $200,000, which stocks, bonds and securities were issued by corporations having their domicile in said state of Indiana; that said decedent did in fact own said securities at and prior to the time of said marriage, and he made said representations to the petitioner as inducements for her engagement to marry him, and they were intended to and in fact did operate as a part of the consideration for the consummation of said marriage on part of the petitioner.

"That at, prior to and continuously since the time of said marriage it was and is the law of said state of Indiana that if a man dies testate leaving a widow, one-third of his personal estate shall descend to said widow subject to its proportion of the debts of said decedent, and that any such widow shall have the right to reject and renounce the provisions made for her under the terms of the will and elect to take under the laws of said state; that it was and is further provided by the laws of said state that any surviving wife desiring to renounce the provisions made for her in any such will shall file her election in writing, duly signed and acknowledged before some officer authorized to take acknowledgments of deeds. and cause such election to be filed within one year after such will has been admitted to probate in said state.

"That similar statutory provisions were made in favor of a husband with reference to property and property rights owned by a wife, with like right of election in favor of a surviving husband to take under the law instead of any provisions made for him by will; that under the decisions of the courts of said state having final jurisdiction over the subject matter thereof, said statutory provisions have been construed as modifying the common law property rights as between husband and wife, and holding it to be the law of said state that by virtue of the marital contract and the rights accruing therefrom the law casts upon each a contingent interest in the other's property which in the event of death becomes fixed in the survivor and which can be abridged or taken away only to the extent stipulated in a marriage settlement; that your petitioner herein has duly executed and filed or caused to be filed her renunciation of the decedent's will and the provision therein made for her and her election to take under the laws of their matrimonial domicile, being said state of Indiana, which renunciation and election was filed within the time and in the manner required by law.

"That after the separation between your petitioner and the decedent as hereinbefore stated, the decedent disposed of the stocks, bonds and securities so owned by him at the time of their marriage and converted the proceeds thereof into the property, stocks and bonds described in the inventory filed by the executor herein, and that the property and property rights represented by said inventory are in legal effect the same as those owned by the decedent at the time of their marriage; that the petitioner is entitled to a distributive share of the funds remaining for distribution after the payment of the decedent's debts, in an amount equal to one-third thereof."

Appellant contends that she is entitled to the portion of decedent's personal estate which she could have claimed under the laws of Indiana notwithstanding his attempted disposal thereof by his will.

By the Code of 1852 dower was abolished in Indiana. May v. Fletcher, 40 Ind. 575. But with regard to the wife's interest in her deceased husband's real estate it is provided by statute that "if a husband die testate or intestate, leaving a widow, one-third of his real estate shall descend to her in fee-simple, free from all demands of creditors * * *" (Burns' Annotated Indiana Statutes 1926, § 3337 [3014]); and that "a surviving wife is entitled * * * to one-third of all the real estate of which her husband may have been seized in fee-simple at any time during the marriage, and in the conveyance of which she may not have joined, in due form of law, and also of all lands in which her husband had an equitable interest at the time of his death: Provided, That if the husband shall have left a will, the wife may elect to take under the will instead of this or the foregoing provisions" (Burns' Annotated Indiana Statutes 1926, § 3349 [3029]).

[1] It has been held with respect to said section 3337 (3014) that the wife acquires her title thereunder by descent as an heir of her husband; but that under section 3349 (3029) her title is by purchase by virtue of her marital rights and not as an heir, and that in both cases her title vests at the same time and by virtue of the happening of the same event, namely, the death of her husband (May v. Fletcher, supra; Bowers v. Lillis, 187 Ind. 1, 115 N. E. 930), so that, while her inchoate interest in the lands of her husband is an estate in the land itself and not a mere incumbrance (Clements v. Davis, 155 Ind. 624, 57 N. E. 905), it is not a present estate, and so long as the title remains in the husband her inchoate right alone cannot be conveyed (Davenport v. Gwilliams, 133 Ind. 142, 31

N. E. 790, 22 L. R. A. 244; Unger v. Mellinger, 37 Ind. App. 639, 77 N. E. 814, 117 Am. St. Rep. 348). The community system does not prevail in Indiana, and appellant admits that prior to 1891 there was no statute of that state giving to a surviving widow an interest in her deceased husband's personal estate akin to the common-law right of dower and not subject to be defeated by will. See Pond v. Sweetser, 85 Ind. 144; Loy v. Loy, 128 Ind. 150, 27 N. E. 351. She claims, however, that the Act of March 9, 1891, Acts 1891, p. 404, c. 185 (Burns' Annotated Indiana Statutes 1926, § 3343 [3025]), gives such right.

This act provided as follows: "If a man die testate leaving a widow, one third of his personal estate shall descend to said widow, subject, however, to its proportion of the debts of said decedent: Provided, however, That nothing in this act shall be construed to reduce the interest which the law now gives a widow in the estate of a deceased husband: And provided, further, That such widow may elect to take under the will of said decedent instead of this or any other law of descent of this state, which election shall be made within ninety days after said will has been admitted to probate in this state, and in the same manner as widows are now required by law to elect." This section was referred to in Crawfordsville Trust Co. v. Ramsey, 55 Ind. App. 40, 100 N. E. 1049, 102 N. E. 282, an action involving the validity of a gift. The gift was conditioned on the event of the donor's death, with a reservation of the use of the property during his life and was testamentary in character. It was also made with the intention of defeating his wife's right to share in his personal estate at his death, and was held to be void. The court, with respect to the husband's power of control over his personal property in that state, held that there could be no question but that as a general rule he had the absolute control of his personal property during his life and could give and otherwise dispose of it without his wife's consent free from any claim of hers, but that where the transfer was a mere device by which he sought to deprive his wife of her distributive share under the statute the same rule should apply as in cases of conveyances of real property for the purpose of defeating the wife's right to dower. In its opinion the court cites cases from other jurisdictions which refer to the right of a wife to share in her deceased husband's personal estate as a dower right. An examination of these cases shows that with one exception, namely, where by statute "dower" was given in the personal estate of the husband, the court used the term to describe the widow's statutory right to a distributive share of her deceased husband's personal estate. That the term is sometimes so used is shown in Howard v. Strode, 242 Mo. 210, 146 S. W. 792, Ann. Cas. 1913C, 1057.

Appellant cites other Indiana cases which she contends support her claim. In Carroll v. Swift, 10 Ind. App. 170, 37 N. E. 1061, 1062, the court said that "prior to the Act of March 9, 1891 * * * a surviving wife took no absolute interest in the personal estate of her husband, except as to the statutory allowance of $500. He might dispose of the surplus, after the payment of debts, by will." This case involved the right of a widow to the distribution of part of her husband's personal property, and the question of her interest therein was not necessary to the decision, or decided.

In Murphey v. Brown, 159 Ind. 106, 62 N. E. 275, a widow claimed the whole of her husband's estate under the provisions of a statute; but the question of her interest in his personal property other than her right to a distributive share thereof upon his death was not involved.

In Unger v. Mellinger, supra, the validity of a postnuptial contract was considered, and the court in its opinion speaks of the "contingent" and "inchoate" right of each spouse in the property of the other, but the character of such right in personal property was not considered. None of these cases appear to us to have decided the question presented in the case at bar.

[2] As stated, a husband may under the Indiana laws dispose of his personal property during his lifetime without his wife's consent and free from any claim by her, provided it be not done in expectation of death and for the purpose of defeating her distributive right under the statute (Crawfordsville Trust Co. v. Ramsey, supra), and no statute or decision from that state has been called to our attention which provides or holds that the wife enjoys any ordinary rights of ownership in her husband's personal property during his lifetime, or has a more complete interest therein than that of an expectancy as heir if she survives him.

Appellant concedes that the property in question if governed by the California law would be the separate property of decedent and subject to his testamentary disposition; also that as a general rule the descent of personal property is governed by the laws of the state where decedent was domiciled at the time of his death; but she insists that the contract of marriage in relation to property rights should be governed, as other contracts, by the laws of the jurisdiction where it was to be carried out—in this instance by the laws of Indiana.

This doctrine has been recognized and applied in instances where rights in the property of one spouse were held to have vested at the time of the marriage. The rule is

stated in Wharton on Conflict of Laws, § 193a, as follows: "While * * * it is undoubtedly true that the intestacy laws of the last domicile of the deceased govern the distribution of the personal estate of either husband or wife in case of intestacy, a distinction is to be observed between the mere inchoate rights of either spouse to share in the distribution of the other's estate at his death and a vested right which attaches at the time of marriage though its enjoyment may be postponed until the death of the other spouse." The author says further that the latter right is not divested by a change of domicile, but that a mere statute of distribution of the original matrimonial domicile, or any domicile other than the last, by which either spouse is to share in the other's personal estate upon the latter's death creates no vested right, and therefore offers no obstacle to the application of the statute of distribution of the last domicile.

Appellant in this connection cites a number of decisions. Kraemer v. Kraemer, 52 Cal. 302, holds that where there is no express contract the law of the matrimonial domicile will govern as to personal property everywhere. See, also, Estate of Drishaus, 199 Cal. 369, 249 P. 515. Bonati v. Welsch, 24 N. Y. 157, was an action by a widow to recover from her husband's estate the amount received by him from the sale of certain real property situated in France. The spouses were married and living in that country when plaintiff inherited the property from her mother. She was later abandoned by her husband, who died domiciled in New York. It appeared that by the French law the property which came to her by succession belonged to her, but that her husband had the management of it, with the right to retain the avails of the sale during the existence of the community, which terminated upon his death, whereupon she would have a valid claim against his estate. It was held that as a creditor of her husband under the laws of France her rights continued and attached to the property of her husband situated in New York.

Harral v. Harral, 39 N. J. Eq. 279, 51 Am. Rep. 17, was a similar case. The parties married and established their domicile in France without any contract as to property. By the laws of that country, where there was no contract and the marriage was followed by a conjugal domicile the property of married persons became subject to the community law. Under this law the husband, who had the management of the community property, might dispose of his share by will, but not the share of his wife to which she became entitled upon his death. After the marriage the husband became insane and was brought to the United States, where he died. It was held by reason of the above facts that his personal property became subject to the law mentioned, and that his widow was entitled to a half thereof notwithstanding that by his will he had bequeathed the whole to others.

It was held in Doss v. Campbell, 19 Ala. 590, 54 Am. Dec. 198, that where the wife acquired separate property under the laws of California and removed with it to Alabama, where she could not have acquired a separate interest in the property under the same facts, that the removal did not destroy her property interest.

So in Holmes v. Holmes, 4 Barb. (N. Y.) 295, a wife who had obtained a decree a mensa et thoro inherited a legacy from her father. Under the law then in force her husband was entitled to the legacy, which he received. A subsequent act would have made the wife the owner, but it was held that the later statute did not apply, as "the marriage of the parties and the vesting of the money were prior to the passage of the act."

In Noonan v. Kemp, 34 Md. 73, 6 Am. Rep. 307, a citizen of Maryland left a legacy to his daughter, who resided in Kentucky. The latter died before the distribution of her father's estate, leaving a husband surviving. Under the Kentucky law the husband succeeded to the entire personal estate of his deceased wife. It was held that the legacy, like any other personal property owned by the daughter, was deemed to be situated in Kentucky and governed by its laws.

Other cases declaring similar principles decided in Indiana and other jurisdictions are cited by appellant, but none involved the question presented here.

In addition she cites cases dealing with the question whether or not the provision made by law for the wife is in the nature of an inheritance and subject to a succession tax, which cases hold that such a provision is not an inheritance but belongs to her independent of any right of inheritance or succession. These cases are contrary to the California rule that upon the death of the husband the wife took one-half of the community property as heir. Estate of Moffitt, 153 Cal. 359, 95 P. 653, 1025, 20 L. R. A. (N. S.) 207; Estate of Dargie, 176 Cal. 720, 169 P. 360.

[3] The mere fact that under the Indiana laws (section 3343 [3025]) the power of the husband to dispose of his personal property by will was subject to the right of his wife at her election to claim a third thereof gave her no more than an expectancy in this portion of his estate. As was held in Spreckels v. Spreckels, 116 Cal. 339, 48 P. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170, such a limitation of the husband's right would give the wife no interest in his property during his lifetime. We are satisfied that appellant had no present fixed right or interest in decedent's personal estate, or more than a mere expect-

ancy, which depended upon survivorship to become a vested right. This being true, and he having established his domicile in California, as he might do (Civ. Code, § 129), the property was subject to the law of this state, which governs its disposition and distribution whether he died testate or intestate.

The order appealed from is affirmed.

125 Cal.App. 691

DODGE v. SNOW.

Civ. 7397.

District Court of Appeal, Second District, Division 1, California.

Sept. 8, 1932.

Rehearing Denied Oct. 7, 1932.

Hearing Denied by Supreme Court Nov. 7, 1932.

1. Appeal and error ⇐1071(6).

In suit against blank indorser, court's failure to make findings regarding circumstances of indorsement *held* immaterial, where note was duly transferred by indorser to plaintiff subsequent to indorsement.

Court's failure to make findings regarding the circumstances of the indorsement were, in such case, immaterial, since plaintiff was entitled to rely on the face of the note as it was transferred to him, and could not be charged with circumstances occurring at some prior time not brought to his notice; the indorser being equally bound by the notices of the date of its transfer, and being charged with notice of its legal effect.

2. Appeal and error ⇐1071(6).

In suit against indorser on note containing waiver of presentment and of notice of dishonor, court's failure to make findings regarding presentment and notice *held* immaterial, where court found indorser regularly transferred note to plaintiff (Civ. Code, §§ 3190, 3191).

3. Appeal and error ⇐842(1).

In suit against blank indorser who transferred note to plaintiff, whether indorser told plaintiff's agent indorser would not be bound by indorsement *held* question of fact on which trial court's finding is conclusive.

4. Bills and notes ⇐195.

Trust company's delivering note indorsed in blank to another on indorser's request made indorsement effective (Civ. Code, § 3097).

5. Pleading ⇐236(1).

Motion to amend answer is addressed to trial court's discretion.

6. Appeal and error ⇐959(1).

Trial court's judgment on motion to amend answer *held* conclusive, absent abuse of discretion.

7. Pleading ⇐140.

Trial court's denying defendant's motion to file counterclaim alleging facts which occurred four years before trial *held* no error.

Appeal from Superior Court, Los Angeles County; Robert B. Lambert, Judge.

Action by Jonathan S. Dodge against R. K. Snow. From the judgment for plaintiff and order denying a new trial, defendant appeals.

Appeal from order denying new trial dismissed. Judgment affirmed.

William Ellis Lady, of Los Angeles, for appellant.

H. L. Carnahan, Harry Povey, Raymond Tremaine, and Karl Lynn Davis, all of Los Angeles, for respondent.

TAPPAAN, Justice pro tem.

The plaintiff had judgment below, and defendant appeals therefrom. The facts involved in this case are comparatively simple and relate to a transaction whereby defendant acquired from plaintiff certain shares of stock. Plaintiff was the owner of shares of stock of the Cawston Ostrich Farm, and had had negotiations with defendant looking toward the sale or exchange of the same to defendant. On February 28, 1925, plaintiff submitted to defendant a statement of the terms and conditions upon which he would sell his stock interest in the Cawston Ostrich Farm to defendant. This written proposal so made by plaintiff to defendant was duly accepted in writing by said defendant, and in evidence of such acceptance he wrote upon the document "Accepted: R. K. Snow."

Among other items mentioned in this written proposal, which plaintiff proposed to accept from defendant for his stock, was the following: "3. Assignment of note, C. L. Clinch, for $9,000.00 (Drawing seven per cent interest), secured by collateral already submitted, said note to become due in about six months, *and be guaranteed by yourself.*" (Italics ours.) Some days later the note referred to in the agreement just quoted was by defendant's direction tendered to plaintiff by a trust company which held the same under some agreement with defendant. Plaintiff authorized this same trust company to accept the note and hold it for his account, which it thereupon did. The note as thus transferred to plaintiff had upon it the blank indorsement of defendant. Thereafter, default being made in the payment of this note, the collateral given to secure payment of the note was realized upon and the sum thus secured applied upon the note. Defendant had notice of this fact, and co-operated with plaintiff in the conversion of the collateral into money and the application of the fund

thus derived to the reduction of the balance due upon the note. The sum claimed by plaintiff here is for the balance remaining unpaid after deducting from the face of the note and unpaid interest the sum secured from the sale of the collateral.

The complaint filed herein sets forth three causes of action, all based upon the same facts, but differing as to allegations of the effect thereof. The first cause of action thus set up pleads a guaranty and the breach thereof. The second cause of action sets forth a contract to guarantee and the breach thereof. The third cause of action alleges an indorsement of the note by defendant and his failure to pay on default of the makers. The trial court dismissed the second cause of action, but found for the plaintiff on both the first and third causes of action.

[1, 2] The first point relied upon by appellant on this appeal is that the court failed to find on material issues raised by the pleadings. Appellant contends that the court should have included findings covering certain allegations contained in his answer and in the amendment to such answer. The allegations to which appellant thus directs the attention of the court have to do with certain transactions appellant is alleged to have had with the note, here in question, at a time prior to the transfer of this note to respondent. Briefly it is alleged that appellant caused said note to be placed in trust with a trust company to be held by it in trust for appellant and others; that at the time it was so placed in trust appellant indorsed said note in blank, so that it could be transferred to the trust. There is also an allegation that the note was not duly presented to the makers for payment, and that defendant had no notice of nonpayment. There is no allegation that plaintiff at any time had notice of the alleged transaction had in reference to the note and its alleged transfer in trust or the purpose of its indorsement at that time. In view of the fact that the court found that the note was, at a time subsequent to the date of these alleged transactions, duly sold and transferred by defendant to plaintiff, these allegations cited by appellant were immaterial to the issues involved in the controversy, and the court was not required to find as to them. The note so transferred contained upon its face an express waiver of presentment, demand, protest, notice of dishonor, and diligence, and, as the court found in favor of the regularity of the transfer to plaintiff, a finding on question of failure to present and give notice was also immaterial. Civ. Code, §§ 3190 and 3191.

[3] Appellant in his next two specifications attacks the sufficiency of the evidence to support the findings as made by the trial court. Appellant first contends that the evidence shows that, on the date of the transfer of the note to respondent, the note was in trust, and, as a conclusion from said fact, argues that therefore appellant could not on said date have been the owner of the note. The evidence is conclusive that on or about said date the note was transferred to respondent's agent by the trust company at the direct order and request of appellant, and for appellant's account and benefit. There is ample evidence to support the finding that as of that date appellant was the owner of the note, either legal or equitable. There is no merit in the contention that the finding that the note was "delivered duly indorsed" is unsupported. Appellant made no attempt to show that respondent had notice of the alleged transaction which he had had with the trust company in reference to the note. He had indorsed the note for some purpose, and must have had notice of the condition of the note at the time he directed it to be transferred by his agent, the trust company, to respondent. His written agreement was to guarantee the note. Appellant's testimony that he notified an alleged agent of respondent that he would not be bound by his written agreement to guarantee the note, when considered in connection with the admitted fact that thereafter he directed the indorsed note to be delivered to respondent, at best, but presents a question of fact. The court's finding, therefore, is conclusive and not open to question here.

[4] An examination of appellant's other specifications of alleged insufficiency of the evidence to support the findings discloses that they relate, in most instances, to testimony as to appellant's acts and motives in transferring the note in question to the trust company. As has been heretofore pointed out, such matters were immaterial under the circumstances of this case. Respondent was entitled to rely on the face of the note as it was transferred to him, and could not be charged with facts and circumstances which occurred at some prior time unless and until they were brought to his notice, which nowhere appears to have been done. On the other hand, appellant is equally bound by the note as of the date of its transfer, and must be charged as well with notice of its legal effect. He cannot bind respondent nor limit his rights by any secret or uncommunicated act or intention upon his part. It should be noted that there was nothing in or upon the note itself nor the indorsement of appellant thereon which gave notice, actual or constructive, of any limitation of the legal effect of the note or its indorsement. The indorsement was regular in form (Civ. Code, § 3112) and the act of the trust company in the delivering of the note as appellant's agent, made effective the indorsement (Civ. Code, § 3097).

If the transactions had in the instant case are to be considered as evidencing a relationship of guaranty, this may be established, un-

der the circumstances here present, by acts and declarations of the parties as well as by a written instrument. Civ. Code, § 2794, subd. 5. When we consider that the note here involved is of questionable negotiability, containing as it does many collateral undertakings, but though indorsed in blank it contained a waiver of presentment notice and protest and was transferred in accordance with the terms of a written contract to guarantee the note, it cannot be fairly said that there was not sufficient evidence to support the court's finding in this regard. First Nat. Bank v. Falkenhan, 94 Cal. 141, 29 P. 866; Kendall v. Parker, 103 Cal. 319, 324, 37 P. 401, 42 Am. St. Rep. 117; Nuetzel v. Mackie, 80 Cal. App. 768, 772, 253 P. 166. There is evidence to be found in the record sufficient to support the findings questioned by appellant.

Appellant's next point is that the indorsement at the time it was made or written was a restrictive indorsement. Appellant's argument is based upon the facts alleged to have surrounded his transfer of the note to the trust company. As has been heretofore stated, these facts are immaterial, in the absence of notice to respondent. The only material facts on this phase of the case are those arising upon the transfer of the note to plaintiff. We have already pointed out that there was nothing disclosed by those facts which could be construed as giving notice to respondent of any limitation upon his rights under the note and indorsement thereof.

[5-7] Appellant complains that the court committed error in that it refused to permit him to file, at the time of trial, an amendment consisting of an amendment to his answer, then on file, and a counterclaim. The court permitted the filing of the amendment to the answer, but refused to permit the filing of the counterclaim. The motion to amend is one directed to the sound judicial discretion of the trial court, and, unless there appears an abuse of this discretion on the part of the trial court, its judgment will not be disturbed. The record here fails to disclose any such abuse of discretion as will justify a reversal of the judgment here. The facts alleged in the counterclaim occurred some four years before the date of trial. They, if true, would constitute fraud. No adequate excuse is alleged for the failure to present these facts in a proper pleading at a reasonable time before the date of trial. Appellant frankly states: "We concede that a large amount of time passed between the time of the filing of the action and the time we asked leave to file the counterclaim, but it was only the very day or the night before that the case finally came to trial that we concluded that a counterclaim would lie." The action of the trial court in denying appellant's motion to amend by filing a counterclaim was not error under the circumstances existing here.

Appellant's attempted appeal from the order denying his motion for a new trial is dismissed. The judgment appealed from is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

125 Cal.App. 666

THOMAS v. LAVERY et al.

Civ. 4570.

District Court of Appeal, Third District, California.

Sept. 6, 1932.

1. Fraudulent conveyances ⇐241(2).

Generally, creditor must reduce claim to judgment before resorting to equitable action to reach property fraudulently transferred by debtor (Civ. Code, § 3441).

2. Judgment ⇐217.

Generally, until judgment becomes final, it is not admissible in evidence, and cannot be relied on as foundation of rights.

3. Fraudulent conveyances ⇐241(2).

Judgment creditor who has endeavored without avail to collect judgment may attack transfer as fraudulent, although judgment has not become final, and judgment creditor has no specific lien on property transferred independent of judgment.

4. Judgment ⇐903.

Cause of action on judgment does not accrue until judgment becomes final.

5. Appeal and error ⇐1180(1).

Reversal of judgment places parties in trial court as if cause had never been tried, with exception that opinion of court on appeal must be followed where applicable.

6. Appeal and error ⇐1180(2).

Judgment setting aside transfer of debtor's property for fraud was reversed, where creditor's judgment against debtor on debt had been reversed.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by J. D. Thomas against Jessie E. Lavery and others. From an adverse judgment, the named defendant appeals.

Reversed.

E. A. Kline and Gerard J. Cuoco, both of Los Angeles, for appellant.

Charles E. Hobart, of Los Angeles, for respondent.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

JAMISON, Justice pro tem., delivered the opinion of the court.

This action was brought by plaintiff to set aside a conveyance of personal and real property from defendant Jessie E. Lavery to defendant Emma Lucretia Barnett upon the ground that the said conveyance was executed in fraud of creditors. Judgment was rendered in favor of plaintiff setting aside and annulling this conveyance, and from this judgment the said Emma Lucretia Barnett has appealed.

On November 25, 1925, Jessie E. Lavery executed a contract naming W. C. Barnett as trustee and giving to respondent the exclusive right to sell a tract of land known as tract 8304, containing 57 lots, respondent to receive a commission for his services in selling the said lots. Pursuant to the terms of said contract, respondent proceeded with the sale of said lots until about August 1, 1927, at which date he received notice from Jessie E. Lavery canceling the said contract. In the meantime, on March 26, 1926, Jessie E. Lavery had conveyed the said property, by her deed, to her daughter, Emma L. Barnett, and this deed was recorded in the early part of 1927. Thereafter, on January 28, 1928, respondent commenced an action for damages for breach of contract against Jessie E. Lavery, Emma L. Barnett, and W. C. Barnett for the breach of said contract, and judgment was rendered in his favor against Jessie E. Lavery. From this judgment the said Jessie E. Lavery appealed, and it was reversed by the Supreme Court on June 23, 1932. Thomas v. Lavery (Cal. Sup.) 12 P.(2d) 636.

[1] The rule is general that the creditor must first reduce his claim to a judgment before he is entitled to resort to an equitable action to reach property fraudulently transferred by his debtor. 12 Cal. Jur. 1033; Moore v. Schneider, 196 Cal. 380, 238 P. 81, and James v. Schafer, 70 Cal. App. 372, 233 P. 70.

A creditor can avoid the act or obligation of his debtor for fraud only where the fraud obstructs the enforcement by legal procedure of his right to take the property affected by the transfer or obligation. Civ. Code, § 3441.

[2, 3] While it is a general rule that until a judgment becomes final by affirmance on appeal, or the lapse of the time within which an appeal might be taken, such judgment is not admissible in evidence, and cannot be relied upon as the foundation of the rights declared in it (Feeney v. Hinckley, 134 Cal. 467, 66 P. 580, 86 Am. St. Rep. 290), yet a judgment creditor who has endeavored without avail to collect the judgment may attack a transfer as made with intent to defraud creditors, although the judgment has not become final by affirmance on appeal, or by expiration of the time in which to appeal, and although he have no specific lien on the property transferred independent of the judgment. Rossen v. Villanueva, 175 Cal. 632, 166 P. 1004.

But in the well-considered case of Sewell v. Johnson, 165 Cal. 762, 134 P. 704, 707, Ann. Cas. 1915B, 645, in which all of the justices concurred, where it appeared that the judgment for the debt had been reversed, the court held on appeal from the judgment in favor of the judgment creditor setting aside and annulling a transfer of the debtor's property on the ground of fraud that the latter must also be reversed. In the course of the opinion in that case, the court said: "It is to be observed that the sole basis sustaining the right of this respondent in the present appeal to maintain his action against this appellant in the court below was the judgment in Sewell v. Christie, Price et al. [163 Cal. 76, 124 P. 713], which we have reversed. The present action against the defendant arising out of such judgment is in the nature of a creditor's bill. It could only be maintained after a judgment at law against Price, which was in effect its essential basis. As a general creditor, with a mere legal demand not merged into a judgment, plaintiff could maintain no action against appellant. But the judgment which alone constituted the basis of the present action has been reversed; the respondent has lost his position as a judgment creditor as effectually as if it never existed. He has no judgment." Further along in this opinion the court held that it must take judicial notice of the reversal, and to that extent overruled the decision in the case of Sewell v. Mary L. Price et al., 164 Cal. 265, 128 P. 407.

[4] It is a well-settled rule of law that a cause of action upon a judgment does not accrue until the judgment becomes final. Willard v. Dobbins, 191 Cal. 287, 216 P. 1008; Jones v. Summers, 105 Cal. App. 51, 286 P. 1093.

[5] And the reversal of the judgment places the parties in the trial court in the same position as if the cause had never been tried, with the exception that the opinion of the court on appeal must be followed so far as applicable. Central Savings Bank of Oakland v. Lake, 201 Cal. 438, 257 P. 521.

[6] The judgment in the case of Thomas v. Lavery having been reversed and that judgment being the basis of the judgment in the instant case, we are of the opinion that this court cannot do otherwise than also reverse it.

The judgment is therefore reversed.

We concur: PRESTON, P. J.; PLUMMER, J.

126 Cal.App. 787

J. D. THOMAS, Plaintiff and Respondent, v. Jessie E. LAVERY et al., Defendants; Helen Reynolds, Defendant and Appellant.

Civ. 4571.

District Court of Appeal, Third District, California.

Sept. 15, 1932.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

See, also, 6 P.(2d) 531; 12 P.(2d) 636.

Earl D. Killion, of Los Angeles, for appellant.

Charles E. Hobart, of Los Angeles, for respondent.

PER CURIAM.

This appeal involves the same questions that were involved in the case of J. D. Thomas v. Jessie E. Lavery et al., defendants (Cal. App.) 14 P.(2d) 158, wherein Emma L. Barnett was defendant and appellant.

For the reasons set forth in the opinion in that case (filed September 6, 1932), the judgment in this case is reversed.

126 Cal.App. 37

NEW YORK INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 4711.

District Court of Appeal, Third District, California.

Sept. 15, 1932.

Rehearing Denied Oct. 15, 1932.

Hearing Denied by Supreme Court Nov. 14, 1932.

1. Master and servant ⇐417(7).

Where record contains substantial evidence supporting findings of Industrial Commission, award should be sustained.

2. Master and servant ⇐361.

Arrangement whereby one rancher supplied machinery and finances and other superintended work in harvesting of crop on separate premises constituted "joint enterprise," making both liable for compensation, though employee's injury occurred on ranch of person supplying machinery.

[Ed. Note.—For other definitions of "Joint Enterprise," see Words and Phrases.]

3. Master and servant ⇐361.

Where parties engage in joint enterprise wherein they unite in employment of workmen, one of whom is injured in course of such employment, both joint adventurers are liable for compensation.

Proceeding under the Workmen's Compensation Act by Leoncio Alonso for injuries, claimant, opposed by William Crawford, doing business as the Woodland Rice Milling Company, and Santos Brothers, employers, and the New York Indemnity Company and the State Compensation Insurance Fund, insurers. To review an order of the Industrial Accident Commission awarding compensation, the New York Indemnity Company brings certiorari.

Affirmed.

Cleveland R. Wright and Hadsell, Sweet & Ingalls, all of San Francisco, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The petitioner seeks to review an award of damages which was rendered by the Industrial Accident Commission in favor of Lenocio Alonso against the New York Indemnity Company and the State Compensation Insurance Fund, jointly, as separate insurers of co-employers of the claimant who was injured in the course of his employment.

William Crawford owned a tract of rice land in Yolo county. He lacked experience in raising rice. He had been engaged in milling rice under the firm name of Woodland Rice Milling Company. He was desirous of attempting to produce rice on his Yolo county farm. There were three brothers by the name of Santos, residing in Yolo county, who were experienced rice growers. They were organized as a copartnership for the purpose of conducting a rice-growing business. Through the aid of Mr. Crawford, a lease of 151 acres of rice land adjoining his ranch was procured for the Santos brothers. In 1931, Mr. Crawford and the Santos brothers entered into an oral agreement to conduct a joint enterprise of cultivating and harvesting the rice crops which were growing upon their respective adjoining ranches. It was agreed that Crawford would supply the necessary farm machinery, and that Santos brothers should keep the machinery in repair and select and superintend a crew of farm hands to perform the labor of harvesting the rice crops on their respective adjoining ranches. Crawford agreed to finance this joint adventure. The employees were to be paid a reasonable per diem wage, which was to be charged against, and finally paid by, the respective owners for the work which was performed on the property of each of them. John Santos, who was one of the partners, was designated to superintend the operations on both ranches. Regarding this agreement to jointly employ a crew of men and co-op-

erate in harvesting the rice crops on both ranches, William Crawford testified: "I was instrumental in securing (the lease of the 151 acres adjoining my ranch) for the Santos boys * * * in order to have them adjacent (and) to consolidate our work and experience. We entered into an agreement. * * * I owned * * * certain equipment, threshing machines, binders. * * * The Santos boys would have the free use of the same in the harvesting of their rice crop. * * * I had had no experience. * * * I spoke to John Santos * * * and asked that he assemble a crew (for our work) and supervise the same during the harvest. He was also to superintend and see that the equipment * * * (was kept in condition for use). * * * Alonso was one of the crew that John Santos assembled under this arrangement. * * * (I told) him to get a crew that would be sufficient to carry on the work efficiently, to get as efficient a crew as possible to minimize expense." Crawford further testified he "would see that sufficient finances were given (Santos brothers) to carry through their crop and mine to completion."

This agreement was made with the common purpose of using one crew of men on both ranches to expedite the work and economize the expense. The harvesting of the crops of rice on these adjoining ranches was a joint enterprise. The petitioner, New York Indemnity Company, was the separate insurer of Santos brothers. The State Compensation Insurance Fund was the separate insurer of William Crawford.

Pursuant to the foregoing agreement, Santos brothers selected a crew of about six men. This crew included the claimant, Leoncio Alonso. Under the supervision of John Santos, the work of harvesting the rice crop was commenced with this crew on the Santos property. The soil of this ranch proved too wet for satisfactory harvesting. The same crew of men was therefore transferred to the adjoining Crawford property, where they proceeded to harvest his crop of rice, under the supervision of John Santos. The claimant, Leoncio Alonso, was engaged in driving a Fordson tractor to which a rice binder was attached. On the third day of his employment on the Crawford ranch, Alonso was attempting to cross a ridge when the tractor upset, falling upon him and fracturing a leg and causing severe burns about the thigh. He was taken to a hospital by John Santos and paid by the Santos brothers for the services which he performed on the Crawford ranch. His wages while engaged upon these premises were charged to Crawford and subsequently paid by him. A demand for compensation was made in due time, and an award was allowed the claimant against both the New York Indemnity Company and the State Compensation Insurance Fund, on the theory that they were separate insurers of joint employers of the claimant. The commission found that "Leoncio Alonso, while employed as a tractor driver * * * by Santos brothers, as general employer, and William Crawford, as special employer, sustained injury arising out of and in the course of his employment," and that the New York Indemnity Company, as the insurer of Santos brothers, and the State Compensation Insurance Fund, as the insurer of William Crawford, were jointly liable for the payment of this compensation.

The petitioner contends that these findings are not supported by the evidence; that the claimant was injured while working on the Crawford premises for his exclusive benefit and under the supervision of his foreman, John Santos; that the New York Indemnity Company was not an insurer of Crawford; and that the award of damages against the petitioner is therefore erroneous and void.

[1, 2] When the record contains substantial evidence to support the findings of the commission, the award should be sustained. We are of the opinion the findings are amply supported by the evidence in the present case. It satisfactorily appears that Santos brothers and Crawford were engaged in a joint enterprise of harvesting their respective crops of rice growing upon separate adjoining premises, when the claimant was injured, and that they united in employing him for that service. By their oral agreement Crawford supplied the machinery and financed the enterprise. Santos brothers, who were experienced in rice growing selected the crew of workmen, superintended their work through John Santos, one of the partners, and kept the machinery in repair. It is immaterial that the wages of these workmen were charged to and ultimately paid by the respective owners for the time actually employed on their separate ranches. The workmen were employed to harvest both crops for the mutual benefit of both owners. It was therefore a joint enterprise.

[3] Where two or more parties engage in a joint enterprise, in the performance of which they unite in the employment of workmen, one of whom is injured in the course of that employment, both joint adventurers are liable for compensation just as the members of a copartnership are liable under similar circumstances. This liability will attach to both parties to a joint enterprise even though one may be the general employer and the other a mere special employer. It is held that, when two or more parties are mutually benefited by an enterprise, for the conducting of which they hire workmen who are injured in the performance of their duties, even though one of the parties is a general

employer and the other a mere special employer, both may be liable for compensation. Employer's Liability Assur. Corp. v. Ind. Acc. Comm., 179 Cal. 432, 177 P. 273; Diamond Drill Contracting Co. v. Ind. Acc. Comm., 199 Cal. 694, 250 P. 862; Independence Ind. Co. v. Ind. Acc. Comm., 203 Cal. 51, 262 P. 757; Umsted v. Scofield Eng. Const. Co., 203 Cal. 224, 263 P. 799. In attempting to distinguish these causes from the facts of the case at bar, the petitioner asserts that the Santos brothers received no benefit from the agreement to co-operate in the harvesting of the respective rice crops. We think the petitioner is mistaken in that regard. Crawford agreed to furnish the machinery and finance the enterprise. This was a distinct benefit to the Santos brothers. One crew of men was employed for both ranches. By this means they were enabled to expedite the work and economize the expense. When they found the soil of the Santos place too wet, instead of discharging or laying off the men, they were transferred to the Crawford property, and the harvesting proceeded without delay. They were able to perform the work with one foreman. John Santos acted in that capacity without pay. His service as foreman and the experience of the Santos brothers as rice producers were offset by the furnishing of machinery and the financing of the enterprise by Crawford. This furnishes ample evidence of adequate benefit secured by the Santos brothers to support the agreement for this joint enterprise and bind both employers.

There is sufficient evidence to support the respondents' contention that both employers had a right to exercise control over the conduct of these employees. The respondents do not deny the joint liability of Crawford John Santos selected the workmen and superintended their services on both ranches. He took the claimant to the hospital for treatment after the accident occurred. Santos brothers paid his wages for the time during which he was employed on the Crawford ranch, although that sum was charged to, and ultimately paid by, Crawford. During the examination of John Santos, he testified regarding the right of Santos brothers to direct and control the action of the claimant while he was employed on the Crawford ranch, as follows:

"Q. Could Crawford have come in there and stopped Alonso from working at any time he wanted to? A. Why, I do not think so. * * * He would tell me, and it would be up to me. * * *

"Q. During the time that you were working on Crawford's land did Crawford ever actually give any orders to the men that you had furnished? A. No, not that I know of. * * *

"Q. Did you consider that you had the right to fire any of those men at any time? A. Sure."

This furnishes sufficient evidence, in conjunction with the testimony of Mr. Crawford respecting the agreement to co-operate in the joint enterprise of harvesting the separate crops of rice, to support the findings to the effect that Santos brothers were joint employers of the claimant together with Crawford, that they had authority to control the services of the claimant, even to the extent of discharging him, and that they were therefore jointly liable with Crawford for compensation for his injuries, in spite of the fact that the accident occurred on the premises of Crawford.

The award is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

126 Cal.App. 70

In re DAM'S ESTATE.

Civ. 8525.

District Court of Appeal, First District, Division 1, California.

Sept. 19, 1932.

Rehearing Denied Oct. 19, 1932.

Hearing Denied by Supreme Court Nov. 17, 1932.

1. Statutes ⇐225.

Statutes regarding petition and notice of hearing in probate proceedings must be construed together (Probate Code, §§ 1000, 1200).

2. Executors and administrators ⇐314(12).

Evidence at hearing on petition for partial distribution, pertinent to distribution, notice, and jurisdiction where not brought up by bill of exceptions, must be presumed competent and to warrant findings thereon by court within scope and issues of petition (Probate Code, §§ 1000, 1200).

3. Executors and administrators ⇐314(12).

Recital in decree of partial distribution that matter came on "regularly to be heard" must be presumed to be true, in absence of anything to contrary (Probate Code, §§ 1000, 1200).

4. Appeal and error ⇐931(7).

Where nothing in judgment roll is inconsistent with court's findings of due service, it must be presumed on appeal in support of judgment that finding was based upon service made in pursuance of statute.

5. Courts ⇐202(5).

Where clerk's affidavit showed notice was duly posted, no other showing being made, recitals in probate decree that notice was sufficient must be accepted as true and record *held*

to sustain lower court's jurisdiction even on direct attack by appeal (Probate Code, §§ 1000, 1200).

Clerk's affidavit in judgment roll established that 10-day notice was duly posted as required by Probate Code, §§ 1000, 1200, while there was no showing by affidavit that copies of the notice were mailed or that citation was served upon any one, nor was there any showing that such proof was not made.

6. Appeal and error ⇐931(1).

Every intendment and presumption not contradicted by nor inconsistent with record on appeal must be indulged in favor of judgment.

7. Judgment ⇐18(2).

Intelligible statement of existing substantial right, which court has jurisdiction to enforce, is sufficient allegation of all matter necessary to sustain judgment.

8. Executors and administrators ⇐314(12).

Where decree of partial distribution recited good cause appeared for dispensing with bond, appellate court, in absence of bill of exceptions, must assume evidence met statutory requirements that court was satisfied no injury could result to estate and that such constituted good cause recited (Probate Code, § 1001).

9. Courts ⇐33.

Orders and decrees in probate proceedings need not recite existence of facts or performance of acts upon which jurisdiction of court may depend (Probate Code, § 1200).

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Petition by Arthur King Dam and others for a partial distribution in the matter of the estate of Frances Leoni Dam, deceased, opposed by Francis Herbert Dam. From an adverse decree, defendant appeals.

Affirmed.

Francis Herbert Dam, of San Francisco, in pro. per.

Brobeck, Phleger & Harrison, of San Francisco (Kenneth Ferguson, of San Francisco, of counsel), for respondents.

THOMPSON, Justice pro tem.

This is an appeal by Francis Herbert Dam, as an heir at law of the above-named decedent and also as residuary devisee and legatee under the last will of said decedent, from the decree of partial distribution made September 22, 1931, in the matter of said estate. The appeal has been taken on the judgment roll alone (that is, on the clerk's transcript of the record in his office pertinent to said distribution and constituting the judgment roll in such matter), without a bill of exceptions or the transcript in lieu of a bill of exceptions under section 953a of the Code of Civil Procedure. The clerk's transcript contains a copy of the following, viz.: (1) Petition for partial distribution filed September 8, 1931. (2) Order of the clerk indorsed thereon setting the hearing for September 22, 1931, 10 o'clock a. m. (3) Clerk's 10-day notice dated September 8, 1931, posted on the same day pursuant to section 1200 of the Probate Code, to all persons interested in the estate of the deceased. (4) Affidavit of the deputy county clerk made September 10, 1931, annexed to said notice setting forth that on September 8, 1931, he posted a correct and true copy of the notice at the courthouse in the county, etc. (5) Decree of partial distribution made on September 22, 1931, and filed on the same day. (6) Notice of appeal. And to the said transcript the clerk has certified: "That the foregoing, to-wit, the petition for partial distribution, the affidavit of posting notice of hearing thereof and the annexed notice, and the decree of partial distribution, constitute the judgment roll in my office in the appeal taken in and by the foregoing notice of appeal (under decision in Estate of Broome, 169 Cal. 604, 147 P. 270); that no opposition to said petition, no counter petition, no paper or papers in the nature of pleadings, notices, affidavits, or findings of the court, and no order or paper of like character to those mentioned in section 670 of the Code of Civil Procedure of California, relating to said petition or said proceeding for partial distribution, other than the foregoing, has or have been filed in my office; and that the foregoing papers, and the endorsements thereon, are full, true and correct copies of the originals thereof on file in my office."

It appears that the petition for partial distribution was filed September 8, 1931, which was after the Probate Code became effective; and that seven petitioners, one of whom, Cora Dam Ferguson, was a coexecutrix, joined in the petition; and that on the hearing, distribution was made to the seven petitioners as prayed for in the petition.

The decree, in addition to making distribution as prayed, determines and sets forth, among other things, the following facts concerning said petition and the matters heard and considered: "* * * And the same now coming on this day duly and regularly to be heard, from the proofs taken and examination had therein this court finds as follows: That notice of this hearing has been given as required by the order of this court and by law, and that said notice is in all respects due, proper and sufficient; that the above named Frances Leoni Dam died on February 15, 1930, and that she was at the

time of her death a resident of the County of Alameda, State of California, and left estate therein and elsewhere; that thereafter such proceedings were duly taken and had in and by the above entitled court in the above entitled matter that by an order and judgment of said court duly given and made on April 21, 1930 [1931], the will of said Frances Leoni Dam, deceased, was duly admitted to probate, with Etta Pearl Dam and Cora Dam Ferguson as executrices; that thereafter said Etta Pearl Dam and Cora Dam Ferguson duly qualified as such executrices and on said 21st day of April, 1931, letters testamentary upon the will of said deceased were duly issued to them; that thereupon they immediately entered upon the discharge of their duties as such executrices and they ever since have been and now are the duly appointed, qualified and acting executrices of the will of said deceased. * * That more than four months have elapsed since the will of said decedent was admitted to probate and letters testamentary thereon issued to said executrices as aforesaid; that the time for presentation of claims against the estate of said decedent has expired; that there is ample property in the hands of said executrices to pay any and all debts of said deceased, expenses of administration, taxes and to satisfy all other claims against said estate; and that a partial distribution of the assets of said estate as hereinafter set forth can at this time be made to said petitioners without loss to any creditor or creditors of said deceased or of her estate. * * And, good cause appearing therefor, it is further ordered, adjudged and decreed that no bond be required of said persons, or any of them, and that bond is hereby dispensed with. * * *"

[1-6] The appeal taken constitutes a direct attack on the said decree, and requires an answer as to whether or not want of jurisdiction or error or irregularity compelling reversal is shown by the judgment roll herein. Sections 1000 and 1200 of the Probate Code —which became effective August 14, 1931— prescribe what must be done to acquire jurisdiction. These sections obviously must be construed together. If on appeal from a probate decree such as this and under such a situation as is presented herein, the said sections 1000 and 1200 of the Probate Code must be construed as meaning that jurisdiction for the decree can be shown and supported in no way other than by the actual presence in the judgment roll of affidavits showing affirmatively the taking of all the steps that constitute all the notice prescribed by these sections, i. e., the posting of the 10-day notice and the mailing of the copies thereof to the different persons mentioned and the service of citation on the executor, etc., and that under the situation presented by an appeal taken on the judgment roll as here, the reviewing court must entirely ignore and disregard, when inspecting the judgment roll, all presumptions incident to the judgment and all recitals and findings in the judgment and decree concerning the service of the prescribed notice and the acquiring of jurisdiction by the court, then, of course, in this case under such view, manifestly, it could not be held that the law has been complied with or that jurisdiction has been shown; for there appears in the judgment roll but one affidavit, namely, that of the clerk that the 10-day notice of the hearing was duly posted. But we do not think that the meaning of said sections 1000 and 1200 of the Probate Code as applied to the present situation is so restricted. (In the case of Vail v. Jones, 209 Cal. 251, 254, 287 P. 99, wherein the trial court upon evidence not appearing in the judgment roll by affidavit as prescribed by sections 411, 415, and 670 of the Code of Civil Procedure, found that "Annie H. Vail was in fact served with summons attached to a copy of the complaint in said action," the Supreme Court apparently giving effect to such parol evidence and to the presumptions of service arising from the recitals of the judgment in the record attacked and under the view that jurisdiction does not depend upon the proof of service, but upon the fact that service has been made, declined to disturb the finding of the trial court.) Section 1200 of the Probate Code, as to the notices therein mentioned, provides that, "Proof of the giving of notice must be made at the hearing." What shape must that proof take? Must it all be in the form of affidavit so that under section 670 of the Code of Civil Procedure it may be incorporated into the judgment roll? As heretofore mentioned, sections 1200 and 1000 of the Probate Code obviously must be construed together. At the hearing on September 22, 1931, on the petition, the court was required to hear and consider evidence bearing on various matters, i. e., bearing on the terms of the will and on the condition of the estate, etc., pertinent to the distribution asked for, in addition to the primary matters of notice and of jurisdiction. What that evidence was we do not know, for it has not been brought up by bill of exceptions. It must, however, be presumed that the evidence was competent and that it warranted any finding thereon made by the court within the scope and issues of the petition. Williams v. Savings & Loan Society, 133 Cal. 360, 65 P. 822; Lane v. Tanner, 156 Cal. 135, 103 P. 846; Morgan v. Morgan, 190 Cal. 522, 213 P. 993. It does not appear on the face of the decree what notice or proof of service formed the basis of the recital that "the same now coming on this day duly and regularly to be heard, from the proofs taken and examination had therein this court finds as follows: That notice of the hearing has been given as required by the order of this court and by law, and that said

notice is in all respects due, proper and sufficient," but it is declared generally in the recital that the determination was based on "the proofs taken and examination had." The statute required proof that the notice was duly posted at the courthouse. Such proof appears by the clerk's affidavit; but that affidavit goes only to a part of what had to be done; on its face it purports only to be a showing that the 10-day notice was duly posted, and is not contrary to or inconsistent with the finding of the court made from the proofs taken and examination had "that notice of the hearing has been given as required by the order of this court and by law, and that said notice is in all respects due, proper and sufficient." Moreover, the recital that the matter came on "regularly to be heard" must be presumed to be true, in the absence of anything inconsistent or to the contrary in the record. Estate of Espinosa, 179 Cal. 189, 175 P. 896; Estate of Schulmeyer, 171 Cal. 340, 153 P. 233. The finding of the court does no violence to the facts presented by the clerk's affidavit, for it is not contradictory of anything in the affidavit. Canadian, etc., Co. v. Clarita, etc., Co., 140 Cal. 672, 74 P. 301; County Bank v. Jack, 148 Cal. 437, 83 P. 705, 113 Am. St. Rep. 285. Where there is nothing in the judgment roll inconsistent with the findings by the court of due service, it must be presumed on appeal in support of the judgment that the finding was based upon a service made in pursuance of the statute. La Fetra v. Gleason, 101 Cal. 246, 35 P. 765. The affidavit in the judgment roll establishes that the 10-day notice was posted by the clerk as required by sections 1200 and 1000 of the Probate Code. That was a notice to "all persons interested in the estate of said deceased," and constituted what is commonly called a notice in rem. With such a notice admittedly duly given, it would seem that the further requirement that copies should be mailed, etc., and that citation should be served, etc., was "an extra protection provided by the statute." S. F. Protestant Orphan Asylum v. Superior Court, 116 Cal. 443, 453, 48 P. 379, 382. There is no showing by affidavit in the judgment roll that copies of the notice were mailed or that citation was served on any one or that anything else mentioned in sections 1200 and 1000 of the Probate Code was done; there is no affidavit showing that any such other proof was made, neither is there any affidavit showing that it was not made. Consequently as against such silence, it would seem that the recitals of the judgment finding that "said notice is in all respects due, proper and sufficient" must be accepted as true and that it must be held that the record sustains the jurisdiction of the lower court even on this direct attack by appeal, for the judgment and its recitals will be presumed to be correct upon appeal unless the contrary is made to appear. Catanich v. Hayes, 52 Cal. 338. Every intendment and presumption not contradicted by nor inconsistent with the record on appeal must be indulged in in favor of the judgment. Kovacevich v. Fischer Motor Body Co., 94 Cal. App. 405, 271 P. 351; Throop v. Weaver, 180 Cal. 335, 181 P. 55.

Prior to August 14, 1931, the requirement as to notice on petition for partial distribution was as follows: "Notice of the application must be given to the executor or administrator, personally, and to all persons interested in the estate, in the same manner that notice is required to be given of the settlement of the account of an executor or administrator." Section 1659, Code Civ. Proc.

Under the Probate Code, the requirement as to notice is set forth in sections 1000 and 1200; and section 1000 contains the following language: "The clerk shall set the petition for hearing by the court and give notice thereof for the period and in the manner required by section 1200 of this code, and to the executor or administrator by citation."

Section 1710 of the Code of Civil Procedure provided that: "When personal notice is required, and no mode of giving it is prescribed in this title, it must be given by citation." And in Spencer v. Houghton, 68 Cal. 82, 8 P. 679, that section was construed to mean that where actual service is directed to be made on the party personally and not by publication, it must be made by citation. The language of said section 1710 of the Code of Civil Procedure has been reincorporated in section 1206 of the Probate Code. Sections 1206 and 1207 of the Probate Code contain substantially all the provisions of the Code of Civil Procedure that had to do with citations. The law is now and for many years has been that a citation "must be served in the same manner as a summons in a civil action," that is, as provided in section 411 of the Code of Civil Procedure. The sections of the Code of Civil Procedure that dealt with citations contained nothing concerning the proof of service of citation and how made, and the Probate Code contains nothing concerning such proof. In section 415 of the Code of Civil Procedure it is expressly provided how the proof of service of summons shall be made. Can it therefore be said that the proof of service of citation is restricted to the method set forth in section 415 of the Code of Civil Procedure for the service of summons? In the early days of California when in the probate of wills citations were directed to be issued to the heirs of the testator resident in the county, it appears that the probate court proceeded to hear the testimony in proof of the will, at the time appointed or at any time to which the hearing was continued, upon proof being made, *by affidavit or otherwise to the satisfaction of the court*, that notice had been given as

required. Belknap's Probate, p. 39, § 17. Hence it would appear that in such matters parol testimony as to the service of citation and notice was admitted and considered competent under the law and that the rigid rule as in the case of summons that proof could be not otherwise than by affidavit, was not applied. Judge Temple, in dealing with the status of the citation in probate matters in California, says: "But I think the statute shows on its face that no provision in regard to summons applies to citations. Everything in regard to citations is provided for in title 11. Section 1707 states what it must contain; 1708 provides for its issuance; 1709, that it shall be served in the same manner as a summons. This would be unnecessary if the provisions as to the summons applied, and on that supposition no operation can be given this section. * * * As a rule, its functions are very unlike those of a summons. It is simply a notice which may be molded to suit the occasion, and not a process which a party may sue out or not. * * The office of the citation * * was not like that of a summons, to give the court jurisdiction. It was an extra protection provided by the statute. * * *" S. F. Protestant Orphan Asylum v. Superior Court, supra, at page 451 of 116 Cal., 48 P. 379.

It not appearing that any law prohibits the making of proof of mailing notices and of service of citations other than by affidavit, and no such law being called to the attention of the court, it would seem that the situation presented here under the judgment roll is in this particular much the same as that appearing in Estate of Twombley, 120 Cal. 350, 382, 52 P. 815, wherein the court, as against the contention that the judgment roll should show affirmatively that the notice of probate was served either by mail or personally, held that the statute did not require that fact to appear of record; the requirement being simply that the proof "must be made at the hearing." If as restricted to the matter of the mailing of the copies of the notice, etc., and the matter of the service of the citation, a like construction is to be given the words "proof of the giving of notice must be made at the hearing" (section 1200, Probate Code), the judgment roll would seem to sustain the decree in this particular.

[7-9] It is further contended that the petition is insufficient in its statement of facts to authorize either the distribution made or the dispensing with the bond. While the allegations are general we do not think that for that reason they are insufficient. We think that the allegations of the petition were sufficient under the demands of section 1001 of the Probate Code to invoke and warrant the action of the court. An intelligible statement of an existing substantial right, which the court has jurisdiction to enforce, is a sufficient allegation of all matter necessary to sustain a judgment. Estate of Murphy, 145 Cal. 464, 78 P. 960. Section 1001 of the Probate Code states that: "When the time for filing or presenting claims has expired, and all valid claims have been paid or are sufficiently secured by mortgage, and the court is satisfied that no injury can result to the estate, the court may dispense with the bond." Reciting "good cause appearing therefor," the court dispensed with the bond. We must assume in the absence of a bill of exceptions that the evidence measured up to the requirements of the statute and that the court was satisfied that no injury could result to the estate and that such constituted the "good cause" that was made to appear. Orders and decrees in probate proceedings need not recite the existence of facts or the performance of acts upon which the jurisdiction of the court or judge may depend. Section 1200, Probate Code.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

125 Cal.App. 657

PEOPLE v. PETER.

Cr. 2212.

District Court of Appeal, Second District, Division 1, California.

Sept. 6, 1932.

1. Criminal law ⇐1023(5).

Order before judgment denying motion for modification of verdict, though not appealable, *held* reviewable on appeal from judgment and order denying new trial (Pen. Code, § 1237).

2. Criminal law ⇐1173(2).

Refusal to instruct as to danger of mistake of witnesses as to statements made by defendant out of court *held* not prejudicial, although many witnesses to transaction involved spoke Hungarian and but broken English.

3. Criminal law ⇐829(17).

In murder trial, refusal to give requested instructions regarding defendant's testimony *held* not error, where court gave general instruction on witnesses' credibility.

4. Homicide ⇐300(7).

In murder trial, evidence *held* to warrant instruction that, when one under self-created hostile appearance purposely procures assault and kills adversary, self-defense plea is unavailing.

5. Witnesses ⊂⇒372(2).

In murder trial, asking defendant's witness on cross-examination if she and defendant had lived together as husband and wife *held* admissible to show witness' motive (Code Civ. Proc. § 1847).

6. Criminal law ⊂⇒1172(6).

That court may have given instruction inapplicable to evidence *held* insufficient for reversal, absent showing of prejudice.

7. Criminal law ⊂⇒1172(6).

In murder trial, general instruction regarding impeachment by evidence affecting witness' character for truth and integrity, though inapplicable to evidence, *held* not prejudicial, where jury were instructed to consider question whether witness had lived with defendant as his wife solely in ascertaining witness' motive.

8. Homicide ⊂⇒254.

Evidence *held* insufficient to sustain conviction of second degree murder, but required modification to offense of manslaughter (Pen. Code, § 1181, subd. 6).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Charles Peter was convicted of murder of the second degree, and he appeals.

Modified and remanded, with directions.

Frederic H. Vercoe, Public Defender, and G. A. Benedict, Deputy Public Defender, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

TAPPAAN, Justice pro tem.

[1] Appellant was convicted after a trial had before a jury of murder of the second degree, and appeals from the judgment as entered against him on the verdict and from the order denying him a new trial. Appellant also appeals from the order denying his motion for change of verdict from murder of the second degree to manslaughter. As to this attempted appeal from the order denying appellant's motion for modification of the verdict of murder of the second degree to one of manslaughter, it would appear that this is not an appealable order, as it was made before judgment (Pen. Code, § 1237), but the matter may properly be reviewed on the appeal from the judgment and the order denying appellant's motion for a new trial.

The facts and circumstances which culminated in the killing here involved, as disclosed by the record, are somewhat entangled, and the evidence produced at the trial, at times is sharply conflicting. Appellant shot and killed one Alex Usucke on Thanksgiving Day, 1931. The homicide occurred at the home of one Mrs. Eros, where both appellant and deceased lived. The deceased was shot at about 7 o'clock in the evening, after a day spent in a sordid celebration of the holiday. The participants in this so-called "party" were all Hungarian or made use of the Hungarian language. At about 8 o'clock in the morning of the day of the homicide, appellant, deceased, Steve Toth, and Julius Klemper gathered at the home of Mrs. Eros. Klemper had at one time lived at Mrs. Eros' house, but some little time before the events herein narrated had moved away, owing Mrs. Eros some room rent. At some time during the morning, deceased, Toth, and Klemper left the house and later returned with liquor, which was consumed by the persons at the house. Mrs. Eros then left the house and did not return until the late afternoon. At about 11 o'clock dinner was prepared and eaten. After the noonday meal, the four men engaged in a card game. Wine which appellant had made two or three weeks before was served. Toth and then appellant left the game. Appellant lay down upon a couch in the room where the game was being continued by deceased and Klemper. After a time, appellant jumped from the couch, turned out the light, and told Klemper to go home; that he did not pay any room rent there; that he did not belong there; and that he owed the landlady room rent. To this Klemper replied that he owed the landlady, but did not owe appellant anything. Klemper then said to deceased, "Let's go, Alex," whereupon appellant called him an opprobrious name. At this point deceased joined in the controversy and objected to the language used by appellant. Appellant and Klemper engaged in a scuffle, a knife being made use of by one of the combatants, and appellant receiving a cut upon his hand. At this point the evidence is conflicting, but, from the testimony of the witnesses other than Klemper, it appears that deceased, Toth, and Klemper left the house and proceeded some distance to the home of a friend where they had some wine before returning again to Mrs. Eros' house. During this same time appellant called the police, and was by them taken to a police station, where his hand was dressed by a police surgeon, and he then returned with a police officer to the Eros home. Mrs. Eros returned shortly before appellant and the officer arrived.

As to what occurred next, the evidence is in conflict. Klemper testified that the card game, hereinbefore referred to, took place, and that the deceased was shot by appellant as the culmination of the controversy that took place at that time; while appellant and Mrs. Eros testified that, after appellant and the police officer had returned to the Eros home, deceased and Klemper came into the house through the back door, and that, at this time, appellant was sitting in his room on the bed. Mrs. Eros testified that at this time

Klemper took a knife out of a drawer of the kitchen table and that deceased had his own knife, in his hand; that they said, "Your life is out, we go and get you"; that Klemper and deceased were in appellant's room fighting; that she heard Klemper say, while he had appellant by the throat, "I am out to get your life"; that then she heard the shot and saw deceased come out of the room and fall down, and Klemper run from the house. Appellant testified that he heard deceased say, "We do now finish Charlie"; that deceased then came into his room with a knife. Appellant does not deny the shooting, though at a later date he said it was accidental, and at another time he said, "Ya. Couldn't help it. He called me son-of-a-bitch 4 or 5 times." "He followed me and he called me son-of-a-bitch." After the shooting, appellant testified that he went to another house and tried to call the police. The police found appellant waiting in the front yard when they arrived shortly after the shooting, and appellant then gave them a number of unshot cartridges. There is some evidence that after the fatal shot appellant went outside the house and fired his gun a number of times in the air. There is also evidence that at a prior date Klemper and appellant had had words at a drinking bout held at the Eros home. It would seem that the theory of the prosecution was that appellant, while attempting to shoot Klemper, fired the shot that resulted in the death of deceased.

Appellant's specifications of error, some fifteen in number, refer in many instances to rulings made by the trial court in the giving and refusal to give certain instructions to the jury. In view of the decision reached by this court upon this appeal, it becomes unnecessary to review many of these alleged errors; the questions presented being now immaterial.

Appellant assigns as error the refusal of the court to give the following instruction: "As to verbal statements, or as they are sometimes called, extrajudicial statements, that is, statements made by the defendant out of court, you have a right to consider that there is danger of mistake and misapprehension of the witnesses; the misuse of the words; the failure of the party to express his own meaning; the infirmity of memory on the part of the witness attempting to relate all the conversation. It frequently happens also that the witness by unintentionally altering a few of the expressions used gives an effect to the statement completely at variance with what the party actually did say. The weight and effect, however, of this evidence is for you to determine."

[2] Appellant bases, in large part, his contention that he was prejudiced by the court's refusal to so instruct the jury, upon the fact that many of the persons involved in the transaction referred to spoke Hungarian as their mother tongue, and could converse but brokenly in the English language. From an examination of the record, it clearly appears that the witnesses, in testifying as to these statements of which appellant complains, gave their evidence in such a manner that the jury had before it not only the statements, but also the surrounding circumstances. In testifying as to the language used, the witnesses in most cases attempted to give words actually made use of rather than the proper English word. We find in the record, for example, "ya ya" used for "yes." The jury had the transaction placed before them, and it was their duty to consider this evidence with the same care as other competent evidence submitted to them. The subject-matter contained in the questioned instruction might have provided the basis for argument before the jury, but, under the circumstances presented in the instant case, would have withdrawn from the jury their right to consider this particular evidence in the same way as the other evidence produced at the trial. It should be noted that in the case at bar the statements were attributed to persons who had difficulty in "expression," and therefore should be differentiated from those cases in which cautionary instructions are sometimes given, where the statement is that of "a child of tender years." The court properly exercised its discretion in refusing to give the requested instruction.

[3] Appellant contends that another instruction requested by him should have been given. This instruction had to do with the jury's consideration of the testimony of the defendant. The court gave a general instruction pertaining to the credibility of witnesses, and in view of this it was not error on the part of the court to refuse to give the particular instruction so requested. People v. Miller, 112 Cal. App. 535, 538, 297 P. 40.

[4] The court was justified by the evidence introduced at the trial in giving the following instruction, and the statement of law therein contained was not open to criticism under the circumstances of the instant case (People v. Hecker, 109 Cal. 451, 462 et seq., 42 P. 307, 30 L. R. A. 403): "Whenever an assault is brought upon a person by his own procurement, or under an appearance of hostility which he himself creates, with a view of having his adversary act upon it, and he so acts and is killed, the plea of self-defense under such circumstances is unavailing."

Appellant attempted to impeach the witness Klemper by the introduction of his testimony given at the preliminary examination had in the cause. From an examination of the record it clearly appears that the testimony given at the preliminary hearing referred to a time other than that referred to in the answer made by the witness at the trial, and therefore was not impeaching, but immaterial as to the question presented.

[5] Appellant complains of the action of the court in the overruling of an objection interposed by him to a question asked of one of his witnesses upon cross-examination. This witness, Mrs. Eros, had just testified to the fact that appellant had lived in her home for thirteen years. She was then asked if she and appellant had not lived together as husband and wife. Over objection to this question, the witness answered, "No." This evidence was admitted for the sole purpose of showing motive, if any, on the part of the witness, and the jury at the time of the admission of the evidence were so instructed by the court. A witness is presumed to speak the truth, but this presumption may be repelled in a number of ways, among them by showing as to his motive. Code Civ. Proc. § 1847. Motive, being a condition of the human mind, is impossible of direct proof, but must be shown by condition, circumstance, act, or statement of the witness. If the witness had lived with appellant in the relationship of husband and wife, this circumstance would, without doubt, be one which the jury could rightly consider as a factor in arriving at the motive of the witness and the weight to be given to her testimony. There was no error committed by the court in the overruling of appellant's objection.

[6, 7] Appellant complains of a part of a general instruction given by the court on the credibility of witnesses: "A witness may be impeached * * * by evidence affecting his or her character for truth, honesty or integrity." The fact that the court may have given an instruction which had no application to the evidence, standing alone, will not justify the reversal of a judgment. In addition, it must appear that the appellant was in some way prejudiced by the instruction. Appellant contends that, when this instruction is considered in connection with the question asked of the witness Eros, whether she had lived with appellant as his wife, such prejudice is made to appear. With this contention we cannot agree. The jury were instructed by the court clearly and fully that the question and answer were to be considered by them for a limited purpose only—the ascertainment of motive. The question being properly asked and answered, the appellant cannot now complain. Appellant did not suffer prejudice within the rule.

Appellant's remaining specifications of error are directed to certain rulings of the court overruling objection interposed by appellant to certain questions asked witnesses upon cross-examination. From an examination of the record, it appears that appellant failed to make timely objection. People v. Gilman, 43 Cal. App. 451, 453, 185 P. 310. The evidence of itself was not of importance, and was not unfavorable to appellant. In the other instance cited by appellant, the matter was also unimportant, and the cross-examination was as to matters which could fairly be said to be implied from the testimony given in chief.

In People v. Tyren, 179 Cal. 575, at page 579, 178 P. 132, 134, it is said: "It was not error to permit the defendant to be cross-examined on this subject. Where a defendant testifies in his own behalf, he may be cross-examined 'as to all matters about which he was examined in chief.' Pen. Code, § 1323. 'The cross-examination may extend to the whole transaction, of which he gives a part' (People v. Teshara, 141 Cal. 633, 75 P. 338), and may be directed to the eliciting of any matter which may tend to overcome or qualify the effect of the testimony given by him on his direct examination."

The various specifications of error which we have discussed at length herein are, in most instances, of a highly technical character, and we cannot but agree with a statement contained in appellant's reply brief: "We do not claim that each of our Points are exceedingly weighty." In all fairness to appellant, it must be stated that this statement just above quoted was coupled with a statement to the effect that the verdict of murder of the second degree was "incomprehensible" under the evidence contained in the record here.

[8] Appellant contends that the evidence, taken as a whole, is insufficient to support the verdict of murder of the second degree. With this contention we are constrained to agree. We have examined the evidence in this case with minute care. Appellant was properly found guilty on competent evidence of a most serious offense, and the errors, if any, did not prejudicially contribute toward bringing about the finding that appellant killed the deceased. "No miscarriage of justice, therefore, resulted, except that, as a matter of law, the jury improperly fixed the degree of the crime and imposed the penalty therefor. That injustice may now be righted without subjecting the state and the defendant to the delay and expense of a new trial." People v. Kelley, 208 Cal. 387, 393, 281 P. 609, 611; Pen. Code, § 1181, subd. 6.

The facts of the case have already been stated, and further analysis of the evidence seems unnecessary. The record discloses that the homicide closed a long day of drinking and controversy had by appellant, the deceased, and the witnesses. It would appear that such days were not unusual in the home of Mrs. Eros, and that the actors in this tragedy had passed like days at her home at other times. The character, mentality, and surroundings of the persons who took part in the transaction but too clearly appear from the word picture presented in the record. The fact that appellant stood dumbly by, after the killing, waiting for the police officers to arrive, is strongly indicative of his mental condition. The following statement, found in the case of People v. Kelley, supra, at page 393, of 208

Cal., 281 P. 609, 611, applies with equal force to the case at bar: "Nor can we bring ourselves to believe that there was a willful, deliberate, and premeditated killing. * * * No express malice was shown, for there was not manifested a deliberate, or any, intention to unlawfully take the life of a fellow creature, and the circumstances attending the killing in this case, as proved, do not show an abandoned and malignant heart."

The appeal from the order denying appellant's motion for modification of the verdict, as heretofore noted, not being subject to review, is dismissed.

The judgment of the lower court of murder of the second degree is modified. The cause is remanded to the trial court, with directions to enter a judgment against the defendant finding him guilty of manslaughter, and to thereupon pronounce judgment upon him as prescribed by law.

We concur: CONREY, P. J.; YORK, J.

125 Cal.App. 631

WOOD v. ROACH et al.

Civ. 8544.

District Court of Appeal, First District, Division 1, California.

Sept. 1, 1932.

Rehearing Denied Oct. 1, 1932.

1. Courts ⇐198.

Originally, California probate courts were of limited and inferior jurisdiction.

2. Judgment ⇐475.

Orders and decrees of Superior Courts exercising probate jurisdiction are as conclusive against collateral attack as those in any other branch of their jurisdiction (Const. 1879, art. 6, § 5; St. 1858, p. 95).

3. Executors and administrators ⇐148.

Executor or administrator may negotiate sale of decedent's property without first procuring court order, but no title passes until confirmation (Code Civ. Proc. § 1556, and §§ 1536, 1552, 1554, as amended by St. 1919, pp. 1178, 1180, §§ 6, 10, 11).

4. Courts ⇐107.

Language of opinion should be confined to facts then before court.

5. Courts ⇐107.

Language of opinion, if plainly inconsistent with statute, cannot affect subsequent decisions.

6. Executors and administrators ⇐320.

Statutes *held* to manifest intention to establish complete new scheme respecting sales of decedents' property (St. 1919, p. 1177 et seq.).

7. Statutes ⇐167(1).

That statutes manifest intention to establish complete new scheme as regards subject-matter is equivalent to legislative declaration that whatever is embraced in new act shall prevail.

8. Statutes ⇐170.

Where statute is revised and some parts omitted with intention of covering entire subject, omitted parts are deemed annulled, and cannot be revived by construction.

9. Constitutional law ⇐93(1).

Legislature cannot, by amending law after decedent's death, authorize sale of decedent's property for new reasons or purposes, although it may prescribe different procedure.

10. Executors and administrators ⇐333.

Under statutes, neither allegation nor finding of statutory grounds for sale of decedent's property is necessary to jurisdiction (Code Civ. Proc. §§ 1556, 1704, and §§ 1536, 1552, 1554, as amended by St. 1919, pp. 1178, 1180, §§ 6, 10, 11).

11. Executors and administrators ⇐375.

Statutory grounds for sale of decedent's property are necessary to support confirmation of sale, and court must ascertain their existence before acting (Code Civ. Proc. § 1556, and §§ 1536, 1552, 1554, as amended by St. 1919, pp. 1178, 1180, §§ 6, 10, 11).

12. Executors and administrators ⇐383.

Court's erroneous conclusion respecting existence of statutory grounds for sale of decedent's property constitutes error merely in exercise of jurisdiction, correctible on appeal (Code Civ. Proc. §§ 963, 1556, 1704, and §§ 1536, 1552, 1554, as amended by St. 1919, pp. 1178, 1180, §§ 6, 10, 11).

13. Executors and administrators ⇐333.

In proceedings to sell decedents' property, Superior Court exercises its general jurisdiction derived from Constitution (Const. 1879, art. 6, § 5).

14. Judgment ⇐496.

On collateral attack, same presumptions attach to Superior Court's decrees in probate matters as to judgments at law or in equity (Const. 1879, art. 6, § 5; St. 1858, p. 95).

15. Executors and administrators ⇐383.

Where record is silent respecting statutory grounds for sale of decedent's property, and Superior Court is exercising its general jurisdiction, nothing will be intended to be out of its jurisdiction except what expressly appears to be so.

16. Executors and administrators ⇐383.

In proceedings involving sales of decedents' property, where Superior Court acts under its general jurisdiction, existence of facts

consistent with validity of judgment is presumed on collateral attack.

17. Executors and administrators ⇐383.

Although neither petition for confirmation nor order confirming sale of testator's realty stated statutory grounds, record did not show on face that order was void, precluding collateral attack (Code Civ. Proc. §§ 1556, 1704, and §§ 1536, 1552, 1554, as amended by St. 1919, pp. 1178, 1180, §§ 6, 10, 11).

18. Pleading ⇐193(6), 364(1).

Allegation that her coexecutor fraudulently conveyed testator's realty, although not germane to allegations that order confirming sale was void for want of jurisdiction, *held* not ground for demurrer; proper remedy being motion to strike.

19. Action ⇐38(1).

Complaint to quiet title and incidentally to invalidate instrument conveying title states single cause of action.

20. Quieting title ⇐34(1).

In action to quiet title and invalidate deed, if damages for use and occupation are recoverable, factual basis of claim need not be stated as separate cause of action.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action by Mary Baldwin Wood, as executrix of the estate of William Sidney Wood, deceased, against Elizabeth Dihel Roach and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Luther Elkins, of San Francisco, and Chris B. Fox, of Oakland, for appellant.

William T. Paullin, and McKee, Tasheira & Wahrhaftig, all of Oakland, for respondents.

PER CURIAM.

This action was brought to quiet the title to certain real property in Alameda county. The complaint alleged that William Sidney Wood died testate on January 30, 1908; that his will was admitted to probate in the Superior Court of the city and county of San Francisco, and that plaintiff and Baldwin Wood, now deceased, were duly appointed and qualified as executors thereof; that decedent first named was the owner and in possession of the property in suit, title to which upon his death vested in his heirs and devisees subject to administration, and that there has been no distribution thereof; that, pursuant to an order of the Superior Court in the matter of said estate made on March 20, 1922—which purported to confirm a sale of said property to E. J. Sittig—the said Baldwin Wood, in his own name and that of plaintiff, as executors executed a deed thereof to Sittig; that the order was based upon a return of sale and petition for confirmation; that the proceeding and sale were void for lack of jurisdiction, and the order obtained by means of extrinsic fraud.

Defendants and respondents Roach, Mercantile Securities Company and Mercantile Trust Company demurred generally and specifically to the complaint. The special grounds of demurrer were that several causes of action had been joined and not separately stated, that the complaint was ambiguous, uncertain, and unintelligible in certain respects, and that the causes of action alleged were barred by the provisions of subdivision 2 of section 336, and subdivisions 2 and 4 of section 338, of the Code of Civil Procedure. The demurrer was sustained with leave to amend, and, plaintiff having failed to do so, a judgment—from which she has appealed—was entered against her.

The ground of attack upon the proceeding for the sale of the property is that neither the petition for confirmation nor the order confirming the sale stated the jurisdictional facts, and that consequently the order and the deed based thereon were void.

[1] Originally the probate courts of California were of limited and inferior jurisdiction (Townsend v. Gordon, 19 Cal. 188; Pryor v. Downey, 50 Cal. 388, 19 Am. Rep. 656), and it was held that the power of the court over the sale of lands belonging to the estate of a decedent did not come from its general jurisdiction over the administration of estates but from the statute. Pryor v. Downey, supra; Richardson v. Butler, 82 Cal. 174, 23 P. 9, 16 Am. St. Rep. 101.

[2] By the Constitution of 1879 (article 6, § 5) Superior Courts were given jurisdiction of all matters of probate in like manner as of cases at law or in equity (Burris v. Kennedy, 108 Cal. 331, 41 P. 458, 459), and since 1858 the orders and decrees of Superior Courts in the exercise of their probate jurisdiction have been as conclusive against collateral attack as those in any other branch of their jurisdiction. Stats. 1858, p. 95; 15 Cal. Jur. Judgments, § 164, p. 92. According to the early cases, an application for the sale of land was a special, independent proceeding, and it was essential, to enable the court to act, that the application be made substantially as provided by statute. Pryor v. Downey, supra; Richardson v. Butler, supra. It was also held that the jurisdiction of the court rested upon the averments of the petition. Stuart v. Allen, 16 Cal. 473, 76 Am. Dec. 551; Haynes v. Meeks, 20 Cal. 288; Estate of Devincenzi, 119 Cal. 498, 51 P. 845. Under the statute, however, a failure to set forth the facts showing the sale to be necessary did not invalidate

subsequent proceedings if the defect was supplied by proofs at the hearing, and the general facts showing such necessity were stated in the decree. Code Civ. Proc. § 1537; Stats. 1873–74, p. 370.

The Burris Case was an action to quiet title brought by an heir of James Kennedy, deceased, against defendants who claimed under a probate sale had in the matter of the decedent's estate. It was contended that neither the application nor the order of sale contained a statement of the jurisdictional facts, and that consequently the sale was void. It was concluded on appeal that facts showing a sale to be necessary were sufficiently alleged in the application; and, although the allegations were erroneous, the sale was not void for that reason. Further, that while an application to sell the real property of an estate was an independent proceeding, in that it was essential that the application be made substantially as provided by statute, nevertheless the court in entertaining the application and passing upon it was not acting as a special tribunal, but in the exercise of its general jurisdiction over the subject-matter, derived from the Constitution and not from the statute; and that the same presumption must attach to decrees in probate proceedings upon collateral attack as to judgments at common law or in equity, and that the sufficiency of the proceedings or petition must be decided by the same liberal rule which applies to the pleadings in an ordinary action upon such an attack. In the same connection, quoting from In re Burton, 93 Cal. 459, 29 P. 36, the court said: "The superior court, while sitting in matters of probate, is the same as it is while sitting in cases in equity, in cases at law, or in special proceedings; and, when it has jurisdiction of the subject-matter of a case falling within either of these classes, it has power to hear and determine, in the mode provided by law, all questions of law and fact, the determination of which is ancillary to a proper judgment."

Judge Van Fleet in his work, "The Law of Collateral Attack," section 275 (citing Culver v. Hardenbergh, 37 Minn. 225, 33 N. W. 792), says: "The administration of the estate of a decedent * * * is one indivisible judicial proceeding from the order appointing the administrator to that of his final discharge. The proceeding is one purely in rem, and all parties in interest—heirs, devisees, legatees, distributees and creditors—are necessarily in court at all times. Petitions to sell and mortgage land are simply motions in a pending cause, and in principle no want of form or substance ought to make the sale void. The adverse parties are given the opportunity to examine and object * * * to the entire proceeding on motion for confirmation of the sale, and the court is always open to their motions and petitions to compel the administrator to do his duty in the interim between the order to sell and the confirmation; and as the purchaser furnishes the money to pay their ancestor's debts equity and good conscience loudly demand an estoppel against their proceeding afterwards in a collateral action to recover the land thus sold."

[3] Previous to the amendment of 1919 (Stats. 1919, p. 1177), a sale of real property could only be had upon an order of court, to obtain which it was necessary to present a verified petition setting forth the facts enumerated in the statute, it being provided, however, that a failure to set forth such facts should not invalidate subsequent proceedings if the defect be supplied by proofs at the hearing and the facts stated in the decree. Code Civ. Proc. § 1537. The amendments of 1919 (St. 1919, p. 1177), which were in force when the proceeding in question commenced, repealed sections 1537, 1538, 1539, 1540, 1542, 1543, and 1544 of the Code of Civil Procedure, and provided that, when a sale of property was necessary to pay the allowance to the family or the debts outstanding against the decedent, or the debts, expenses, charges of administration or legacies, or when it was for the best interest of the estate or those interested therein, the executor or administrator might sell any of the real as well as personal property of the estate. Code Civ. Proc. § 1536; Stats. 1919, pp. 1178, 1179, § 6. It was also provided that notices of sale be given as prescribed therein, and that the executor or administrator after making any sale should make a return of his proceedings to the court, following which a hearing should be had upon notice. At such hearing the court was required to examine into the necessity for the sale or the advantage, benefit, and interest to the estate in having the sale made (Code Civ. Proc., § 1552; Stats. 1919, p. 1180, § 10), and confirm the sale if it appeared that there was reason therefor upon the grounds set forth in section 1536 of the Code of Civil Procedure, provided the sale was legally made and fairly conducted and the sum bid not disproportionate to the value and a sum above that specified in the statute could not be obtained (Code Civ. Proc. § 1554; Stats. 1919, p. 1180, § 11). These amendments contained no requirement that any of the reasons for making the sale mentioned in said section 1536 of the Code of Civil Procedure be stated in the return, nor was a finding that such reasons existed made necessary, the only finding required being that "before any order is entered confirming the sale, it must be proved to the satisfaction of the court that notice was given of the sale as prescribed, and the order of confirmation must show that such proof was made." Code Civ. Proc. § 1556. Since the above enactments, an executor or administrator can negotiate a sale without

first procuring an order (Estate of Benvenuto, 183 Cal. 382, 191 P. 678), but no title passes until confirmation (Lass v. Eliassen, 94 Cal. App. 175, 270 P. 745).

In the present case the return of sale and petition for confirmation contained a description of the property, a statement of the notices given, and the expenses and terms of the sale, but no facts showing its necessity or the purpose or that it would be to the advantage or best interest of the estate or those interested therein, nor was there a finding on any of these matters in the order of confirmation. The order found, however, that notices of sale were given in accordance with the statute and a previous order of the court, and that due and legal notice of the hearing of the return had been given pursuant to an order appointing a day for that purpose; also that the amount bid was within 90 per cent. of the appraised value of the property to be sold.

No cases referring to the change in proceduce under the amendments, except the two last cited, have been called to our attention. Estate of Benvenuto, supra, was an appeal from an order confirming a sale of real estate by an administrator. It was held among other things that the amendment did not deprive the heirs of the right under section 1380 of the Code of Civil Procedure to a notice of the proceedings for a sale, and that section 1389 of the same Code remained applicable to the mode of sale under the amendment, since the sale "is ordered" when it is confirmed and the deed directed to be made. In discussing these matters, it was said that the questions whether a sale be necessary or for the best interest of the estate are under the new procedure to be decided upon the application for confirmation instead of upon the hearing of a petition for an order of sale as formerly. The sufficiency of the return of sale was not questioned on the appeal, but the court in passing said: "Such return must state the terms of the sale agreed on and the purposes for which the money is to be used."

[4] As shown above, the amendment directed a return of the proceedings and an inquiry by the court, but contained no provision requiring a statement as to how the money was to be used. The language found in the opinion must be construed with reference to the particular facts then before the court; and while in some instances a dictum is entitled to weight (Adams v. Seaman, 82 Cal. 636, 23 P. 53, 7 L. R. A. 224), in applying cases which have been decided, what may have been said in the opinion should be confined to the facts of the case under consideration and not extended to cases where the facts are essentially different (7 R. C. L. Courts, § 31, p. 1004), and it cannot affect subsequent decisions where it is plainly inconsistent with the statute (Cardenas v. Miller, 108 Cal. 250, 39 P. 783, 41 P. 472, 49 Am. St. Rep. 84).

[5-9] By the enactments of 1919 it was manifestly the intention to establish a new and complete scheme with respect to proceedings for the sale of the property of decedents' estates. This is equivalent to a legislative declaration that whatever is embraced in the new act shall prevail. State v. Conkling, 19 Cal. 501; Sponogle v. Curnow, 136 Cal. 580, 69 P. 255; In re Weymann, 92 Cal. App. 646, 268 P. 971. And, where a statute is revised and some parts omitted, and it was clearly the intention to cover the whole subject revised, the omitted parts cannot be revived by construction, but are to be considered as annulled. 36 Cyc. Stats., p. 1080; Carter v. Stevens, 208 Cal. 649, 284 P. 217; Stead v. Curtis (C. C. A.) 191 F. 529. This is, of course, subject to the rule that the Legislature cannot by amending a law after his death authorize the sale of the property of a decedent for new reasons or purposes, although it may prescribe a different mode of procedure. Estate of Benvenuto, supra.

[10-16] We are satisfied that by the repeal of the sections mentioned and the omission of the same provision from the new procedure it was the intention that no allegation or finding of the statutory grounds for a sale should be necessary to jurisdiction. Such grounds are, of course, necessary to support a confirmation of sale, and the court is required to ascertain their existence before acting; but an erroneous conclusion in that regard would constitute error in the exercise of jurisdiction, which might be corrected on appeal (Code Civ. Proc. § 963) rather than a want of jurisdiction. As held in the Burris Case, supra, the Superior Court in such matters acts in the exercise of its general jurisdiction derived from the Constitution, and the same presumptions attach to its decrees in probate matters upon collateral attack as to judgments at law or in equity. Johnson v. Canty, 162 Cal. 391, 123 P. 263. In the present instance, the record is silent as to the existence of facts making a sale necessary or proper. In such cases, where the Superior Court is acting in the exercise of its general jurisdiction over the subject-matter, nothing will be intended to be out of its jurisdiction but what expressly appears to be so (Johnson v. Canty, supra; Estate of Schandoney, 133 Cal. 387, 65 P. 877); and it will be presumed on collateral attack that any facts consistent with the validity of its judgment existed (Estate of Twombley, 120 Cal. 350, 52 P. 815; Estate of Davis, 151 Cal. 318, 86 P. 183, 90 P. 711, 121 Am. St. Rep. 105; Estate of Ryan, 177 Cal. 598, 171 P. 297; Estate of Sankey, 199 Cal. 391, 249 P. 517; Fletcher v. Superior Ct., 79 Cal. App. 468, 205 P.

195). It has likewise been held that presumably, when property is sold by an executor or administrator, the sale was made for the purpose of paying costs and expenses of administration, or debts of the estate, or to pay specific cash legacies. Pendell v. Vesper, 85 Cal. App. 21, 258 P. 986. Moreover, at the time of the sale in question, section 1704 of the Code of Civil Procedure provided that orders and decrees in probate proceedings need not recite the existence of facts upon which the jurisdiction of the court depended, but that it should only be necessary that they contain the matters ordered or adjudged except as otherwise provided in title II, of which the repeal sections referred to above formed a part. Stats. 1921, p. 105.

[17] These rules apply to the present case; and we must therefore hold that the record on its face does not show the order in question to be void, and that therefore it was not subject to collateral attack. 15 Cal. Jur. Judgments, § 144, p. 59.

Plaintiff alleged that her signature was forged to the return of sale and to the deed mentioned. She also averred other acts of fraud and concealment on the part of her coexecutor, as the result of which she did not discover the facts alleged until after his death, on April 28, 1926. These allegations were relied on as grounds for her claim that the order of confirmation was procured by extrinsic fraud. It was not alleged, however, that the defendants were parties to the fraud, or purchased with knowledge thereof, and she now concedes that her pleading in this respect was insufficient. Doyle v. Hampton, 159 Cal. 729, 116 P. 39; Julien v. West, 96 Cal. App. 558, 274 P. 421. It is also conceded by respondents that the action was not barred by the statute of limitations (citing Murphy v. Crowley, 140 Cal. 141, 73 P. 820).

[18-20] Respondents urged another ground of demurrer; namely, that several causes of action were alleged and not separately stated. In addition to the allegations that the proceedings leading to the execution of a deed by her coexecutor were void, and upon which averments a decree quieting title were prayed, the complaint alleged the acts of fraud recited above. The latter were admittedly insufficient to constitute a cause of action, were not germane to the other allegations, and on motion might have been stricken from the pleading. Such defects are not grounds for demurrer, the proper remedy being a motion to strike. 21 Cal. Jur. Pleading, §§ 69, 173, pp. 111, 249; Henke v. Eureka Endowment Ass'n, 100 Cal. 429, 34 P. 1089. It is well settled that a complaint which seeks to quiet title, and incidentally to have the instrument under which defendant derived title declared void, states but one cause of action (Parsons v. Weis, 144 Cal. 410, 77 P. 1007); and, while the right to recover damages for the value of the use and occupation in such action has been questioned (51 Cor. Jur. Quieting Title, §§ 263, 264, pp. 274, 275; Polack v. Gurnee, 66 Cal. 266, 5 P. 229, 610), if the same be recoverable, the facts upon which the claim is based need not be stated as a separate cause of action (Keele v. Clouser, 92 Cal. App. 526, 268 P. 682).

There appear to be no grounds for respondents' special demurrer, but, for the reasons stated, their general demurrer was properly sustained, and the judgment must accordingly be affirmed.

The judgment is affirmed.

125 Cal.App. 670

PATE et al. v. PICKWICK STAGES SYSTEM et al.

PATE v. SAME.

Civ. 4586, 4587.

District Court of Appeal, Third District, California.

Sept. 7, 1932.

1. Automobiles ⇐244(14, 36).

Finding that driver of stage striking automobile stopped on highway at night after collision was negligent and that such negligence was proximate cause of injuries suffered by occupants of automobile *held* supported.

2. Appeal and error ⇐1001(1).

Finding of jury supported by substantial evidence is conclusive.

3. Trial ⇐108½.

In action for damages, counsel may ask in good faith questions necessary to ascertain whether prospective jurors are free from bias or prejudice though this results in showing that defendant is insured.

4. Appeal and error ⇐1060(1).

Permitting plaintiffs' counsel in personal injury action to ask prospective jurors whether they were interested in certain insurance company *held* not reversible error where plaintiffs' case was not weak.

5. Damages ⇐132(1).

$1,000 for broken jaw, permanently disfiguring face, and permanent injury to wrist, *held* not excessive.

6. Damages ⇐132(8).

$5,000 for injuries to shoulder, arm, and neck causing permanent disability, *held* not excessive.

7. Appeal and error ⇐1004(1).

Decision of trial court and jury, on damages, cannot be vacated unless verdict is so excessive as to suggest passion, prejudice, or corruption.

Appeals from Superior Court, Humboldt County; T. H. Selvage, Judge.

Actions by Belle Pate and another and by Frank Pate against the Pickwick Stages System, J. Lima, and another. The actions were consolidated by stipulation of counsel. From adverse judgments, the named defendants appeal.

Affirmed.

B. P. Gibbs, of Los Angeles, and Barry J. Colding and Theodore Hale, both of San Francisco, for appellants.

Cleveland R. Wright, of San Francisco, and Puter & Quinn, of Eureka, for respondents.

JAMISON, Justice pro tem., delivered the opinion of the court.

These were actions for damages for personal injuries suffered by plaintiffs through the alleged negligence of defendants. They were consolidated by stipulation of counsel. The jury found for the plaintiff Belle Pate in the sum of $5,000 and for Frank Pate in the sum of $1,000.

Judgments were thereupon rendered for said plaintiffs for said respective sums and from those judgments defendants appeal.

The facts are substantially as follows: Plaintiffs, in a Dodge coupé, were traveling north on the state highway, called the Redwood highway, and one W. S. Chisholm with two passengers was traveling south in a Ford coupé on said highway. The two cars collided at a point on said highway where the road was practically straight for a distance of 450 feet, the place of collision being about 150 feet north of the northerly end of said straight piece of road. This collision occurred at 7:30 p. m. on October 28, 1928. At the time of the collision it was dark and a misty rain was falling. According to the evidence produced by respondents, this collision was a slight one and inflicted no injury upon the occupants of the two automobiles. As a result of this collision the two cars were placed at an angle across said highway and both of them were stopped. Shortly after they had stopped they were both struck by a stage operated by the Pickwick Stages System and driven by its agent, J. Lima, and as a result thereof respondents' car was thrown from the road and landed about 25 feet down on a steep incline and both of the respondents were injured. There is a serious conflict between appellants and respondents as to the distance the stage was from the point where the Dodge and Ford automobiles had their collision. Lima, the driver of the stage, testified that he was 30 or 35 feet from the place where the collision between the Dodge and Ford cars occurred; that he was traveling about 30 miles per hour; that, when he saw the collision between these two cars, he started to apply his brakes; and that the brakes were set when the stage was 15 or 20 feet from them.

On the other hand, Chisholm and Meakin, passengers in the Ford car, testified that immediately after the collision between the Dodge and Ford cars, and after they had stopped, they saw the stage coming from the south, around the bend or curve at the southerly end of the straight piece of road. Chisholm placed this distance at 300 feet and Meakin at 150 to 175 feet. Lima telephoned a report of the accident the night it occurred to the superintendent of the Pickwick Stages System, and this report stated that the stage was 75 feet from the point where the Dodge and Ford cars collided at the time of said collision. Chisholm also testified that the stage was traveling fast as it came around the bend of the road, its speed being 40 or 45 miles per hour.

There was also evidence on the part of respondents that some time elapsed after the Dodge and Ford cars stopped before they were struck by the stage. Chisholm testified that he turned off the ignition and started to open the door of the Ford car before the stage struck the Ford, and Pate testified that he turned up his window and put his head out and called out to know what was happening before the stage struck his car. There was nothing to prevent the driver of the stage from seeing the position of the Dodge and Ford cars as the stage came around the southerly bend of the highway, and common prudence would have dictated the application of the brakes of the stage as soon as the position of the Dodge and Ford cars standing on the highway was seen or should have been seen by the driver of the stage.

[1, 2] If the driver of the stage did see the Dodge and Ford cars standing on the highway when he came in view of them, he was guilty of negligence in not then applying his brakes, and if at that point he did not see them standing in the highway, with no obstacle intervening obstructing his view, he was also guilty of negligence. We are of the opinion that there is substantial evidence supporting the verdict of the jury that the driver of the stage was negligent and that his negligence was the proximate cause of the injuries suffered by respondents. Such being the

case, the decision of the jury is binding on this court. Gornstein v. Priver, 64 Cal. App. 249, 221 P. 396; Putnam v. Pickwick Stages, 98 Cal. App. 268, 276 P. 1055.

[3, 4] Appellants contend that the court committed reversible error in permitting respondents, over the objection of appellants, to ask the jurors the following question: "Are any of you interested as stockholders or otherwise in the California Highway Indemnity Exchange?" It is contended that the purpose of this question was to inform the prospective jurors that the appellants were insured. While evidence that a defendant in an action for damages is insured against loss is not admissible (Roche v. Llewellyn Iron Works Co., 140 Cal. 563, 74 P. 147), and it is improper for counsel to endeavor to get the fact before the jury by questions designed solely for that purpose, nevertheless it is proper for counsel to ask, in good faith, such questions as may be necessary to ascertain whether prospective jurors are free from bias or prejudice that might affect their verdict (Girard v. Irvine, 97 Cal. App. 377, 275 P. 840; Reneau v. Hirsch, 88 Cal. App. 1, 8, 262 P. 1100; Arnold v. California Portland Cement Co., 41 Cal. App. 420, 183 P. 171).

In Hasty v. Trevillian, 102 Cal. App. 405, 283 P. 148, 149, the court, after holding that asking prospective jurors whether or not they owned stock or bonds in any insurance company engaged in writing indemnity insurance, stated that such question standing alone was not error, and said: "The defendants argue that, if the verdict is excessive or the case made by the plaintiff is weak, such questions constitute prejudicial error. An examination of the record will disclose that the instant case cannot be said to fall within the rule last stated. As we have shown below, the verdict was not excessive; and the plaintiff introduced evidence tending to show that at the time of the impact the defendant driver was driving on her left-hand side of the street at a speed of 45 miles per hour. If the jury believed that evidence, then it cannot be said the case of the plaintiff was weak."

So, in the instant case, if the jury believed the evidence on the part of respondents that the driver of the stage saw or should have seen the Dodge and Ford cars standing on the highway when he was from 150 feet to 300 feet from them, and by the exercise of ordinary diligence could have stopped the stage in time to have avoided a collision with them, it cannot be said that respondents' case was weak.

[5] The next contention of appellants is that the damages are excessive.

Frank Pate testified that as a result of the impact of the stage with his car he suffered a broken jaw and a sprained wrist, the skin being torn loose almost all around it; that he and his wife were taken to a hotel in the town of Scotia, and there secured a physician, who after examination of his injuries took him to a hospital and had an X-ray made; that for a period of three weeks he could not open his mouth and for six weeks after the accident could not chew; that he suffered a great deal of pain; and that by reason of the injury to his wrist it is weakened.

[6] Belle Pate testified that her shoulder, arm, and neck were seriously injured and caused her great pain; that the muscles were torn loose; that for a long period, by reason of the pain, she could not sleep at night; that as a result of said injury she has to a large extent lost the use of her left arm and hand; that she cannot raise or put her hand behind her; that she is hampered in doing her housework; that she cannot do her ironing or washing or similar work; that she went to San Francisco and had treatment from a physician there, but that the pain and disability continued to exist.

Dr. John N. Chain made an examination of both respondents on December 6, 1930. His examination of Frank Pate showed that the wrist had not recovered from the injury, the grip of his hand had diminished 25 per cent. and was tender under pressure. He found a permanent disfigurement of the face and that the wrist would be permanently disabled.

From his examination of Belle Pate he found that the muscles of the left shoulder had been torn loose; that her left arm was disabled so that she could not raise it up and any attempt to do so caused her pain; that this disability was permanent.

[7] It is the well-settled law that, upon appeal, the decision of the trial court and jury, upon the amount of the damages, cannot be set aside unless the verdict is so plainly and outrageously excessive as to suggest, at first blush, passion or prejudice or corruption on the part of the jury. Lahti v. McMenamin, 204 Cal. 415, 268 P. 644; Hale v. San Bernardino, etc., Co., 156 Cal. 713, 106 P. 83. We find nothing in the record in these cases that indicates that the jury were influenced in rendering the verdicts by passion or prejudice or corruption.

The judgments are affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

126 Cal.App. 28

WILLIAMS v. ZELZAH WAREHOUSE CO. et al.

Civ. 4103.

District Court of Appeal, Third District, California.

Sept. 15, 1932.

1. False imprisonment ⇐8.

Prisoner is entitled to hearing within reasonable time after arrest, and unreasonable delay in bringing him before magistrate constitutes false imprisonment.

2. False imprisonment ⇐8.

Failure to take person arrested without warrant for grand larceny by police officer before magistrate for about 32 hours after arrest *held* false imprisonment (Pen. Code, §§ 145, 849).

Facts disclosed that police officer arrested prisoner without warrant for grand larceny between hours of 7:30 and 9 o'clock a. m., that prisoner was taken to police station and booked for grand larceny, and that prisoner was left in jail until about 2 o'clock p. m. on the next day, when he was arraigned before a magistrate and acquitted.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Thomas E. Williams against the Zelzah Warehouse Company and others. From a judgment for plaintiff, defendant G. A. Gray appeals.

Affirmed.

Thomas C. Ridgway, R. F. Bailey, Erwin P. Werner, and J. V. Lambert, all of Los Angeles, for appellant.

Earl D. Killion, of Los Angeles, for respondent.

JAMISON, Justice pro tem., delivered the opinion of the court.

This action was brought by plaintiff against defendants for false imprisonment and malicious prosecution. The complaint contains two counts, the first count being for false imprisonment, and the second count being for malicious prosecution. The second count was dismissed by plaintiff, and a trial was had on the first count. Judgment was rendered in favor of defendants Zelzah Warehouse Company and Fred Cooper and against defendant G. A. Gray for damages in the sum of $100, and from this judgment the said Gray has appealed.

On the 27th day of October, 1924, appellant was a police officer in the city of Los Angeles, and on that day between the hours of 7:30 o'clock a. m. and 9 o'clock a. m. he arrested respondent, without a warrant authorizing him so to do. After making said arrest, appellant took respondent to the Van Nuys police station in said city, and had him imprisoned. He did nothing further until shortly before noon of the next day, when he went to the office of the district attorney and had a complaint filed charging respondent with a misdemeanor.

According to the evidence, appellant was informed by defendant Cooper, who was the manager of the Zelzah Warehouse Company, that the warehouse of said company, located in the city of Los Angeles, had been entered by a burglar and several sacks of grain were stolen therefrom; that upon investigation appellant found a trail of grain leading from the said warehouse to the vicinity of a residence where respondent was boarding, and, upon examining said premises, found grain sacks and grain corresponding to that taken from the warehouse.

It appears that the residence, to the vicinity of which the trail of grain led, was owned by a Mrs. Roe, and that respondent and two other men were boarding with her. Respondent was arraigned upon said charge at 2 o'clock p. m. on the 28th day of October, 1924, and thereafter was tried and acquitted.

The court found that, after he had arrested respondent, appellant took him to the Van Nuys police station in the city of Los Angeles, and there booked him for a felony, to wit, grand larceny, and that appellant was wrongfully and unlawfully imprisoned and confined therein for a period of about 32 hours without a legal or any warrant for respondent's arrest, or any legal process whatever.

Appellant contends that, when he booked respondent at the said police station, his liability for the confinement thereupon ceased. He bases this contention upon the rules and regulations of the police department of the city of Los Angeles, but no rules or regulations of the said city were produced in evidence, and none are contained in the record.

In the case of Korkman v. Hanlon Drydock, etc., Co., 53 Cal. App. 147, 199 P. 880, 884, commenting on the case of Gisske v. Sanders, 9 Cal. App. 13, 98 P. 43, the court said: "The court held that the arrest of the plaintiff was justified; also, that plaintiff consented thereto, and voluntarily accompanied the arresting officer to the station, where the sergeant made an independent investigation, and his incarceration was at the instance of the sergeant." It is said in that case: "The rule as to the responsibility of the arresting officer is otherwise where he has authority to and does direct the confinement

of the prisoner, or where confinement is the direct result of the arrest."

Appellant testified that he took respondent to the Van Nuys police station after his arrest and left him there in jail, and that the next day he and defendant Cooper called at the office of the city prosecutor to get a complaint against respondent, which was secured about 11 o'clock a. m. of the 28th day of October, 1924. Section 849 of the Penal Code provides that: "When an arrest is made without a warrant by a peace-officer or private person, the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and an information, stating the charge against the person, must be laid before such magistrate." Section 145 of the same Code is as follows: "Every public officer or other person, having arrested any person on a criminal charge, who willfully delays to take such person before a magistrate having jurisdiction, to take his examination, is guilty of a misdemeanor."

[1] In the case of Vernon v. Plumas Lumber Co., 71 Cal. App. 112, 234 P. 869, 872, the court said: "The rule is well established that a prisoner is entitled to a hearing within a reasonable time after his arrest, and that a delay for an unreasonable time in bringing him before the magistrate for examination constitutes false imprisonment"—citing authorities. The duty of an officer to bring the prisoner, arrested without warrant, before a magistrate, that proceedings for a trial may be instituted, and that he may have an opportunity to give bail or otherwise procure his release, is even more imperative than if a warrant had been issued before arrest. 11 R. C. L. 801.

There is no evidence that any efforts were made by appellant to comply with the requirements of said section 849 of the Penal Code, nor was there any evidence tending to justify this delay. It appears from the evidence that magistrates having jurisdiction of the offense for which respondent was imprisoned were easily accessible.

It has been held that a delay of from 1½ to 4 hours in failing to take a prisoner before the magistrate, arrested by an officer without a warrant, constitutes false imprisonment. Vernon v. Plumas Lumber Co., supra; Gomez v. Scanlan, 155 Cal. 528, 102 P. 12; Keefe v. Hart et al., 213 Mass. 476, 100 N. E. 558, Ann. Cas. 1914A, 716.

[2] In the instant case respondent was imprisoned for more than 30 hours prior to any charge being preferred against him, with no opportunity of being released on bail or otherwise procuring his release. This, according to the authorities, was manifestly an unnecessary delay. Nor was there any evidence offered by appellant tending to justify this delay. Respondent was confined in jail for an unreasonable length of time as the result of his arrest by appellant. The arrest was made without a warrant, and appellant failed to take respondent before a magistrate for upwards of 30 hours after the arrest had been made. This was a plain violation of law, and constitutes false imprisonment.

The judgment is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

216 Cal. 318

GREEN v. JORDAN, Secretary of State.

S. F. 14757.

Supreme Court of California.

Sept. 13, 1932.

Mandamus ⇐16(1).

Mandamus to compel state secretary to omit from election ballot initiative measure permitting race track gambling was denied where sufficient time was not available to hear and determine matter.

In Bank.

Application for writ of mandate by L. C. Green against Frank C. Jordan, as Secretary of the State of California, to compel respondent to omit from the general election ballot an initiative measure permitting race track gambling.

Writ denied.

Sterling Carr, of San Francisco, for petitioner.

PER CURIAM.

The petition herein for an alternative writ of mandamus to compel the respondent to omit from the ballot to be used at the next general election the question of the adoption or rejection by the voters of the proposed initiative measure described in the petition was denied, in the exercise of the discretion of the court, for the reason that sufficient time was not deemed available to hear the matter and pass upon the many constitutional questions presented by the petition prior to the time the respondent is required by law to prepare the printed matter necessary to submit the question to the electors of the state. For the same reason the petition for a rehearing is denied. Such denials should not be taken or understood as an adjudication in any way of the questions of law presented by said petition.

216 Cal. 372

TITLE GUARANTEE & TRUST CO. v. LESTER.

L. A. 13300.

Supreme Court of California.

Sept. 23, 1932.

1. Appeal and error ⇐417(1).

Notices of appeal are not strictly construed.

2. Appeal and error ⇐422.

Appeal will not be dismissed because of misdescription of judgment or order to which it relates, unless respondent has been misled by misdescription.

3. Appeal and error ⇐422.

Erroneous date of order denying motion to vacate order appointing receivers in notice of appeal *held* no ground for dismissing appeal; order appealed from being sufficiently described therein (Code Civ. Proc. § 963, subd. 2, and § 953a).

Facts disclosed that the notice of appeal gave notice of appeal from that order made and entered on or about the 12th of August, 1931, wherein two specified parties were appointed receivers and ordered to take possession of certain realty; but that the transcript showed that the order appointing the receivers was not entered on August 12, 1931, the date specified in the notice of appeal.

4. Appeal and error ⇐607(1).

That notice for preparation of transcript was not filed within 10 days *held* not to require dismissal of appeal; ten-day requirement not being jurisdictional as to an appeal already taken (Code Civ. Proc. § 953a).

5. Appeal and error ⇐801(1).

Supreme Court, whenever possible, seeks to review case on merits.

In Bank.

Appeal from Superior Court, Los Angeles County; Dailey S. Stafford, Judge.

Action by the Title Guarantee & Trust Company against George M. Lester. From the judgment for plaintiff, defendant appeals. On motion to dismiss appeal or to affirm order appealed from.

Motions denied.

Rush & Beirne and William B. Beirne, all of Los Angeles, for appellant.

Willis I. Morrison and Laurence W. Beilenson, both of Los Angeles, for respondent.

WASTE, C. J.

Motion to dismiss appeal or to affirm order appealed from.

Plaintiff instituted this action to recover possession of certain real property. The complaint, among other things, alleged that the defendant had violated the terms of a certain deed of trust in a manner warranting the requested relief. In accordance with the prayer of the complaint, the trial court on July 24, 1931, made its ex parte order appointing receivers to take possession of and care for the property pending the trial of the cause. Thereafter, and on August 12, 1931, the trial court overruled defendant's demurrer to the complaint, and denied his motion to vacate the order appointing receivers. On August 22, 1931, the defendant filed a notice of ap-

peal, which notice reads as follows: "Notice is hereby given that the defendant herein does hereby appeal to the Supreme Court of the State of California from that certain order and decision and the whole thereof made and entered in the above entitled action on or about the 12th day of August, 1931, wherein and whereby Charles F. Allison and A. J. Showalter were appointed by said court as receivers and were ordered to take possession of the real property mentioned and described in said order."

Inspection of the transcript discloses that the order appointing receivers was not entered August 12, 1931, the date specified in the notice of appeal. That appears to be the date of entry of the order denying appellant's motion to vacate the order appointing receivers. Relying upon this apparent discrepancy in the notice of appeal, and contending that the order refusing to vacate is a nonappealable order, respondent moves to dismiss.

[1, 2] Notices of appeal are not strictly construed, and an appeal will not be dismissed because of a misdescription of the judgment or order to which it relates unless it appears that the respondent has been misled by such misdescription. Estate of Smead (Cal. Sup.) 10 P.(2d) 462; Harrelson v. Miller & Lux, 182 Cal. 408, 414, 188 P. 800.

[3] The present notice of appeal, while erroneously referring to the date of the order denying the motion to vacate, specifically declares that the appeal is from the order "wherein and whereby Charles F. Allison and A. J. Showalter were appointed by said court as receivers and were ordered to take possession of the real property mentioned and described in said order." A more definite description of the order appealed from could not be given. Any misdescription as to the date thereof could not have misled respondent, and should not serve to work a dismissal of the appeal. Wilson v. Union Iron Works, 167 Cal. 539, 541, 140 P. 250; 2 Cal. Jur. 318, § 110.

A perusal of the appellant's opening brief, filed herein prior to the noticing of the present motion, confirms our conclusion that the appeal is from the order appointing receivers, which order is made appealable by subdivision 2 of section 963 of the Code of Civil Procedure. The notice of appeal was filed well within the time specified in section 939 of the same code.

The clerk's transcript contains everything essential to a proper consideration and determination of the propriety of the order appointing receivers. Anything therein referring to the order refusing to vacate may, for the purposes of this appeal, be disregarded as surplusage.

[4] Respondent next urges that the appeal should be dismissed because the notice for preparation of transcript was not filed within the ten-day period prescribed in section 953a of the Code of Civil Procedure. Assuming such notice to be essential to the preparation and certification of a clerk's transcript, as distinguished from a reporter's transcript (in this connection see Miller v. Price, 203 Cal. 772, 775, 265 P. 931, and Pioneer Truck Co. v. Hawley, 39 Cal. App. 481, 482–483, 179 P. 447), it has repeatedly been held that none of the proceedings prescribed in sections 953a, 953b, and 953c, is jurisdictional to an appeal already taken. Smith v. Jaccard, 20 Cal. App. 280, 287, 288, 128 P. 1023, 1026; Lynch v. Coe, 203 Cal. 422, 423, 264 P. 747; Tasker v. Warmer, 202 Cal. 445, 449, 261 P. 474.

As already indicated, the order appointing receivers was made ex parte, and recites on its face that it was made on the basis of the allegations of the complaint. The order may therefore be reviewed on the duly certified clerk's transcript now before us.

[5] Technical objections are not favored, and this court, whenever possible, seeks to review a cause on its merits. Lynch v. Coe, supra.

For the foregoing reasons, the motion to dismiss, and the motion to affirm are, and each is, hereby denied.

We concur: PRESTON, J.; TYLER, Justice pro tem.; SHENK, J.; LANGDON, J.

216 Cal. 254

NATIONAL CITY FINANCE CO. et al. v. LEWIS.

L. A. 13326.

Supreme Court of California.

Aug. 29, 1932.

Rehearing Denied Sept. 26, 1932.

1. Corporations ⇐121(5).

In action on notes given as part purchase price for stock which defendant pledged to secure such notes, evidence *held* to show plaintiffs' agent fraudulently induced purchase of stock with intent to appropriate it to own use.

2. Appeal and error ⇐110, 870(6).

Order granting new trial of action tried without jury *held* not appealable, nor reviewable on appeal from judgment on second trial.

3. Appeal and error ⇐1041(3).

In suit on notes, allowing amended answer alleging notes were fraudulently procured and without consideration *held* not error, where plaintiffs were not thereby prejudiced.

4. Pleading ⇐236(1).

Motion to file amended answer is addressed to sound discretion of court.

5. Bills and notes ⊂=350.

Parties who acquired notes after maturity were in no better position than parties from whom they obtained them.

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by the National City Finance Company, a trust, and E. L. Junod and others, as trustees, doing business in their collective capacity under the name and style of the National City Finance Company, against Willis O. Lewis, in which John E. Frymier and another intervened, and plaintiffs filed a cross-complaint. From the judgment for defendant against plaintiffs and interveners, plaintiffs appeal.

Affirmed.

For prior opinions, see 3 P.(2d) 316; 4 P.(2d) 163.

Roy Maggart, of Los Angeles, and Walter J. Richards, of Pasadena, for intervening appellants.

Samuel A. Miller and Paul J. Ziegler, both of Los Angeles, for other appellants.

Euler & Subith, Louis J. Euler, and Fred E. Subith, all of Los Angeles, for respondent.

TYLER, Justice pro tem.

Action to recover the sum of $87,550 upon twelve promissory notes alleged to have been executed by defendant to plaintiffs. Plaintiff National City Finance Company alleges itself to be a common-law trust, organized under a declaration of trust dated the 14th day of June, 1924, with E. L. Junod, John L. Junod, and Myron J. Sophy as its trustees, and doing business under the name of National City Finance Company. Defendant, answering the complaint, alleged payment. As a separate defense, he further alleged that at the time of the execution of the notes he delivered to plaintiffs 1,700 shares of the preferred stock and 850 shares of the common stock of the Vanderbilt Newspapers, Inc., as collateral security for the payment of the notes sued upon. He then alleged that he had consented to have the said collateral stock sold, and plaintiffs did sell the same and received a sum therefor in excess of the face value of the notes. In addition thereto, he alleged there was a total failure of consideration for the execution of the notes. Thereafter John E. Frymier and Charles F. Keefe filed complaints in intervention, alleging themselves to be the owners by assignment of various of the notes set up in the complaint. Defendant filed an answer thereto, alleging lack of title in the interveners, and in addition thereto he filed a cross-complaint in which he asked for an accounting of the sums received by plaintiffs from the sale of the stock held by them as collateral. After trial, judgment went in favor of plaintiffs and interveners. Defendant moved for, and was granted, a new trial. Thereafter defendant applied for and was granted permission to file an amended answer to the complaint, and to the complaints in intervention. Under his amended pleadings he charged, among other things, that plaintiffs, upon receiving the stock deposited with them as security for the payment of the notes, had immediately sold the same for a sum in excess of the amount of the notes, contrary to their agreement; he also alleged that the notes were executed without consideration. As an additional, separate, and distinct defense he alleged that they were secured by fraudulent representations in the following manner: That plaintiff E. L. Junod, as the agent and trustee of plaintiff company, represented to him that such company was connected with the National City Bank of New York, and that the two organizations were identical in ownership and management; that, relying upon these statements, he was induced to execute the notes. He further alleged that plaintiffs had no legal capacity to sue or maintain the action, for the reason that the name "National City Finance Company" was a fictitious name, and the plaintiffs E. L. Junod, John L. Junod, and Myron J. Sophy, named as trustees of the company, had not complied with the provisions of sections 2466 and 2468 of the Civil Code pertaining to the filing and publication of a certificate of doing business under a fictitious name. Under his amended answer to the complaints in intervention, he denied that interveners held title to any of the notes, and he further alleged that interveners took with knowledge of the facts surrounding the execution thereof.

Trial was had, and it appeared in evidence that, in the year the plaintiff trust was organized, the Vanderbilt Newspapers, Inc., was engaged in the business of publishing a newspaper in Los Angeles, known as the Illustrated Daily News, and was offering its stock for sale to the public at $100 a unit, under a permit issued by the corporation commissioner, providing that it might sell its stock at the price stated, and might accept in payment thereof 50 per cent. in cash and the balance in notes of the subscriber. One Harvey was the executive head of the newspaper company which had engaged the services of James O. Allen, Inc., as its fiscal agent in selling its stock to the public. This agency had in its employ a salesman named Simpson. Some time prior to the execution of the notes is question, Harvey and Simpson had induced the defendant W. O. Lewis, an elderly and wealthy man, to subscribe for $30,000 worth of the stock. This transac-

tion is not here involved. Shortly thereafter Simpson again approached defendant and induced him to subscribe for an additional $30,000 worth of stock. In payment thereof he executed three several promissory notes, each of which was in the sum of $5,150, payable to plaintiffs, and these notes were thereupon delivered by defendant to plaintiffs, together with the $30,000 worth of stock in the newspapers as security for the loan made by plaintiffs. Plaintiffs then paid to Vanderbilt Newspapers, Inc., the sum of $15,000, which the newspaper company credited to defendant on his purchase. Shortly thereafter defendant was again approached and induced to subscribe for a further $40,000 worth of stock. To make payment thereon he executed to plaintiffs four promissory notes each in the sum of $5,150. Plaintiffs thereupon paid to the Vanderbilt publication, on behalf of defendant, the sum of $20,000, which was credited to defendant on this subscription. Again, and for the fourth time, defendant was induced to subscribe for additional units at the price of $100,000. To make payment of this subscription he delivered five notes to plaintiffs, each in the sum of $10,300. Thereupon plaintiffs paid to the newspaper company the sum of $40,000 in cash, and defendant was credited with $50,000 by the newspaper on this subscription, plaintiffs receiving the difference of $10,000 as a commission from the newspaper company for making the sale of the stock.

Under all of these transactions, defendant deposited the stock he had received on account of his various subscriptions with plaintiffs as security for the loans. Thus there was a total of $170,000 worth of stock pledged as security for $87,550 worth of notes. As stated, in each of the transactions, plaintiffs loaned defendant one-half of the cost of the stock; the excess amount being for interest for six months in advance, at 6 per cent. Thereafter defendant failed to pay further interest on his notes, and this action was brought to obtain recovery upon the various notes.

It further appeared in evidence that plaintiffs had made false representations, through Junod, to defendant concerning their connection with the National City Bank of New York. It also appeared that, while the plaintiffs were authorized to sell the stock, Junod had assured defendant that they would not exercise this right unless the stock depreciated in value. Other evidence shows that, notwithstanding this agreement, Junod fraudulently sold the stock immediately upon receiving it, for a sum less than its cost price, but in an amount in excess of what had been advanced thereon, and out of the sums so received the advances or so-called loans had been made, and the difference retained by Junod. It likewise appeared that the interveners had placed valuable stock with Junod as security for loans made to them, and that their security had been immediately disposed of and a "loan" made to them out of the proceeds of such sale. There was also evidence to the effect that, when Junod demanded additional interest on the notes, which had been fully paid through the fraudulent acts of Junod, defendant had offered to pay him the full amount of his notes, at the same time demanding his stock. Junod did not possess it, he having disposed of the same in the manner above indicated, and he could not deliver it. Defendant thereupon accused Junod and Harvey of having defrauded him and of having loaned him his own money which they had received from the sale of his stock at a depreciated price.

A further discussion of the evidence would answer no useful purpose. The trial court found, among other things, that the notes in question were procured through fraud and misrepresentation; that defendant had relied upon such misrepresentations, and had been deceived in the execution thereof, and further that, at the time of the making of the notes, plaintiffs did not intend to return the stock. The court further concluded that National City Finance Company, E. L. Junod, John L. Junod, and Myron J. Sophy had no legal capacity to maintain the suit, having failed to comply with the provisions of sections 2466 and 2468 of the Civil Code requiring the filing of a certificate when doing business under a fictitious name. It also found defendant not to be entitled to an accounting. Judgment followed in favor of defendant and against plaintiffs and interveners.

[1] The appeals are by plaintiffs and interveners from the judgment. Several grounds are urged for a reversal. It is claimed that the trial court was influenced in rendering the judgment it did by the fact that Junod, as agent of the plaintiffs, had been found guilty and sentenced to the penitentiary at Folsom for his fraudulent transactions in managing the affairs of the National City Finance Company, and because of the further fact that the transaction as an entirety seems to be tainted by fraud. Whatever effect, if any, the conviction of Junod had on the mind of the court in reaching its conclusion we do not know, but certain it is, considering the evidence and all the surrounding circumstances, together with the reasonable and legitimate inferences to be drawn therefrom, that Junod's acts were but mere tricks and devices used by him as a means of fraudulently obtaining possession of securities for the purpose and with the intent of feloniously appropriating the same to his own use. The evidence speaks for itself, and fully supports the finding of fraud.

[2-4] Plaintiffs further claim that the trial court erred in granting defendant a new tri-

al after the first trial of the action. The matter is not before us. The action was tried by the court sitting without a jury. Under such circumstances no appeal lies from the order, and appellants have noticed none. Moreover, such an order is not subject to review on an appeal from the judgment rendered on the second trial. Furlow Pressed Brick Co. v. Balboa L. & W. Co., 186 Cal. 754, 200 P. 625. Nor did the court err, as claimed, in granting defendant's motion to file his last amended answer. Such a motion is addressed to the sound discretion of the court in furtherance of justice. Trial was had eight months after the amended answer was filed, and the record shows that plaintiffs were not prejudiced or injured by the granting of the motion.

[5] A further discussion of the case is unnecessary. Interveners herein acquired title to the various notes recited in their complaints after maturity. They therefore stand in no better position than plaintiffs, and the judgment that they take nothing as against defendant was proper. Defendant at the trial claimed that the deposit by him of his stock with plaintiffs constituted a pledge, and that, the stock having been sold, he was entitled to an accounting. The trial court denied him this relief. Upon what ground it does not appear. However, respondent waives this point, considering the fact that the National City Finance Company is bankrupt and a recovery against it is hopeless. Considering the conclusion we have reached, it is unnecessary to consider or discuss whether or not the action should have been abated, for the reason that plaintiff National City Finance Company was doing business under a fictitious name, for which reason it should have filed the certificate required by section 2466 of the Civil Code.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

216 Cal. 340

MURRAY v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 14667.

Supreme Court of California.

Sept. 16, 1932.

Rehearing Denied Oct. 13, 1932.

1. Master and servant ⇐367.

Aviator, injured while delivering plane for purchaser over route he chose, but under purchaser's directions as to all other matters, and paid traveling expenses, *held* purchaser's "employee," not "independent contractor" (St. 1917, p. 835, § 8 (b).

St. 1917, p. 835, § 8 (b), provides that any person rendering service for another, other than as an independent contractor, or as expressly excluded herein, is presumed to be an employee within the meaning of the act, and defines the term "independent contractor" as any person who renders service, other than manual labor, for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished.

[Ed. Note.—For other definitions of "Employé" and "Independent Contractor," see Words and Phrases.]

2. Master and servant ⇐403.

Purchaser had burden of proving that aviator delivering plane for him for agreed compensation was independent contractor and not employee (St. 1917, p. 835, § 8 (b).

3. Master and servant ⇐417(7).

It was Industrial Commission's province to weigh evidence, and, if conflicting, commission's determination was final.

4. Master and servant ⇐367.

It is principal's right to exercise control and not exercise of that right which determines whether person performing service is employee or independent contractor (St. 1917, p. 835, § 8 (b).

5. Master and servant ⇐405(2).

Evidence showed that employment of aviator to deliver plane was not casual, but within purchaser's business.

Evidence disclosed that purchaser owned at least one plane before he purchased the one the aviator was employed to deliver; that purchaser held a dealership for the sale of planes from the seller, which was a contract which allowed him a discount or commission on planes purchased by him; that purchaser intended to sell the plane; that he authorized the aviator to sell it if he could find a buyer on the trip; and fact that he had not actually sold a plane did not render aviator's service without scope of purchaser's business.

6. Master and servant ⇐405(4).

Evidence sustained finding that aviator employee did not knowingly depart from course of employment when he accepted plane from seller other than one employer purchased.

In Bank.

Proceeding under the Workmen's Compensation Act by Carl R. Long, claimant, op-

posed by Hamilton Murray, alleged employer. To review an award of the Industrial Accident Commission, employer brings certiorari.

Award affirmed.

For prior opinion, see 10 P.(2d) 97.

Hamilton Murray, in pro per.

A. I. Townsend, of San Francisco, and McIntyre Faries, of Los Angeles, for respondents.

CURTIS, J.

Action to annul an award of the Industrial Accident Commission in favor of Carl R. Long and against the petitioner, Hamilton Murray.

Petitioner resides at Ross, Marin county, in this state. Some time prior to June 3, 1931, he purchased an airplane from the Curtiss-Wright Airplane Company, at its factory situated at Robertson, Mo. He desired some one "to fly" the machine from the plant of the company in Missouri to his home in California, and so informed the company. The company recommended Long, and thereafter Long and Murray arranged through correspondence that Long should fly the plane out to California for his actual expenses incurred in making the trip, which expenses were estimated to be $5 per day. Petitioner sent a certified check for $85, which was delivered to Long as expense money for the trip. On June 4, 1931, the Curtiss-Wright Company delivered to Long a plane for Murray, and Long began his trip therein to California. After his arrival in this state, and while he was near Los Alamos on his way to petitioner's home, he met with an accident in which the plane was wrecked and he was seriously injured. He made application to the Industrial Accident Commission for compensation, and, after a hearing thereon, the commission made an award for compensation in Long's favor and against Murray. The latter, after a motion for a rehearing was made and denied by the commission, brought this proceeding to review and annul said award.

In support of his petition Murray contends that the commission exceeded its jurisdiction in rendering said award in three particulars: (1) That Long was an independent contractor in his undertaking to bring the plane from Missouri to California; (2) that Long's employment was casual and not in the trade, business, or profession or occupation of Murray; (3) that Long stepped out of the course of his employment when he accepted delivery of machine No. 10984, instead of machine No. 10983, from the Curtiss-Wright Company at its plant at Robertson, Mo.

In its very essence the contract between Murray and Long was that Long should fly Murray's plane from the factory in Missouri to Murray's home in California, and that Murray should pay Long's actual traveling expenses during the time spent by Long in making the flight. Long was either an employee or an independent contractor. By section 8 (b) of the Workmen's Compensation Insurance and Safety Act (St. 1917, p. 835, § 8 (b)), it is provided that: "Any person rendering service for another, other than as an independent contractor, or as expressly excluded herein, is presumed to be an employee within the meaning of this act. The term 'independent contractor' shall be taken to mean, for the purposes of this act: Any person who renders service, other than manual labor, for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished."

The evidence showed that Long insisted on traveling the southern route. In all other respects he followed the suggestions and directions of Murray as to the manner in which the trip should be made. On May 14th he wrote to Murray a letter and stated therein that: "I didn't know if you wanted ship hangared of a night, or just tie it down, although when staying over night at fields like this one everything has to be put in hangar at night. It is your airplane and you are paying the expenses of getting it to your vicinity, and I am not telling you what to do." On May 29th, probably in answer to Long's letter of May 14th, Murray wrote Long a lengthy letter in which he informed Long that he had sent to a Mr. Parks a check for $85 to pay Long's traveling expenses and the expense of operating the machine on the trip, and in which he gave Long numerous suggestions and directions to be followed on the trip out. As to the route to be traveled, Murray stated he would leave it to Long's discretion. He cautioned him to take plenty of drinking water and chocolate with him "when you hit a dry country." He wrote regarding the 4B-"B.G." plugs as the ones to use on the engine; they having been recommended by an acquaintance of his. He mentions "frequent valve oiling," and suggests that it would be less expensive to stop in smaller towns. He states also in his letter that he has known of some pilots who had stopped at ranches and had been guests for several days, giving the owners "a little hop." He informed Long that he (Murray) was going to Coronado, and, if Long traveled the southern route, maybe he might make there a connection—meaning a chance to fly a machine back to his home. In this event Murray would fly his own machine up to his home. Finally Murray closes his letter by stating that he is inclosing a note to the Curtiss-Wright people "so that they will turn over the ship to you," and adds a postscript directing that Long drop him a line by air mail the first day or two, and a wire on the morning of the last day, stating the time and place of his expected arrival.

In the case of Hillen v. Industrial Acc. Comm., 199 Cal. 577, 250 P. 570, 571, the question was before the court as to whether the person injured was an employee or an independent contractor. The injured person, Downing, at the time of receiving his injury, was shingling a house under a contract with Hillen, the owner of the building, who was engaged in the business of building and selling houses. The contract between Downing and Hillen was that the former should do the shingling on the house then under construction, and was to be paid at the rate of $1.25 for each 1,000 shingles laid. While so engaged, he sustained the injury complained of. In passing upon the question as to whether Downing was an employee or an independent contractor, this court said: "It is admitted that Downing was at the time of his injury actually performing service for Hillen. Consequently the burden of proof rests upon Hillen to establish that Downing was an independent contractor. Section 19 (d) (1). It was therefore necessary for him to show that Downing was, within the definition of the term, a person rendering 'service, other than manual labor, for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished.' Section 8 (b). Whether or not the relation of employer and employee existed in this case, under the oral contract entered into, is a question of mixed law and fact, to be proved like any other question. The finding of the commission, in effect, that the relation existed between Hillen and Downing, is binding on this court. Pacific Gas & Elec. Co. v. Industrial Accident Com., 180 Cal. 497, 499, 181 P. 788. Unless there is such an entire absence of evidence in the record as to render the finding unreasonable, or in excess of the powers of the commission, the court is not empowered to set it aside. Eastman Co. v. Industrial Accident Com., 186 Cal. 587, 598, 200 P. 17. The award of the commission may be annulled only if there is no substantial evidence in support of its findings. Press Pub. Co. v. Industrial Accident Com., 190 Cal. 114, 124, 210 P. 820."

[1-4] Applying the principles of law approved in that case to the facts in the instant action, we think it must be held that the evidence before the commission was sufficient to support its finding that Long was an employee, and not an independent contractor. He was rendering service for Murray, and for this service Murray paid Long compensation. The fact that the amount paid Long was only sufficient to meet his personal expenses during his employment does not affect his status as an employee. A person may work for his board and lodging, and during such employment he is just as much an employee as if he were paid a stipulated sum per day, or for any other fixed period of time. The sum paid might be only enough to pay his board and lodging, or it might be more, or even less. The amount of the wage has no bearing whatever upon the relation existing between him and his employer. As Long was rendering service to Murray for an agreed compensation, the burden was upon Murray to prove by competent evidence that Long was an independent contractor and not an employee. Assuming that there was evidence before the commission tending to establish that fact, it was the province of the commission to weigh that evidence, and, if there was a substantial conflict in the evidence on that issue, the determination of the commission was final. We think that there was not only such a conflict in the evidence, but that the evidence before the commission greatly preponderated in favor of Long's contention that he was an employee. Murray owned the machine. He was paying all expenses of its being removed from the factory to his home. He was in control of the whole enterprise. Not only did he have the right to control Long as to the results of the latter's work in delivering the plane to him, but he had control of the means by which the removal was accomplished, and he actually exercised this right of control. Nothing was left to Long's discretion except the choice of the route. As to all other matters Murray gave Long express directions. As the owner of the airplane and the person solely interested in having it brought from the factory to his home, he necessarily had complete right of control over all its movements. Whether he exercised this right in every respect is not decisive of the question. It is the right to exercise control, and not the exercise of that right, which determines whether the person performing the service is an employee or an independent contractor. Upon this question, this court said in the Hillen Case (page 581 of 199 Cal., 250 P. 570, 571): "One of the best tests to determine whether the relation is that of an independent contractor or that of employer and employee is the right of control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent. Tuttle v. Embury-Martin Lumber Co., 192 Mich. 385, 399, Ann. Cas. 1918C, 664, 158 N. W. 875. It is not a question of interference, or noninterference, not a question of whether there have been suggestions, or even orders, as to the conduct of the work, but a question of the right to act, as distinguished from the act itself or the failure to act."

In this case we have evidence that Murray gave Long numerous suggestions and some direct orders as to the method and manner to be followed by Long in flying the airplane on

the proposed trip. Considering the relations of the parties, even the suggestions given by Murray were in reality orders, and Long would be justified in acting upon them, and would have been held legally responsible for failure to follow them. Taking the evidence as a whole, we think that there can be no question but that it was sufficient to justify the finding of the commission that Long was an employee of Murray at the time he sustained the injury for which he now seeks compensation. Some reliance is placed in support of the petition upon the recent cases of Becker v. Industrial Acc. Com., 212 Cal. 526, 298 P. 979, and New York Indemnity Company v. Industrial Acc. Comm. (Cal. Sup.) 1 P.(2d) 12. Neither of these cases is, we think, in conflict with the conclusion arrived at in the instant case. In the Becker Case the employee was killed by a passing automobile just after he had alighted from a street car. At the time of his injury he was engaged in an endeavor to serve a summons, given him by an attorney. The facts as recited in the opinion show that the attorney gave to the deceased two addresses where the defendant could possibly be found, but gave him no instructions or directions as to how or when the summons should be served. The deceased was to receive $1 for making the service, and was at liberty to adopt any means of travel and any method of procedure which suited his convenience and could use his own judgment in making the service. The decision holds that, while the deceased at the time he met his death was under the control of his principal as to the result of his work, he was not as to the means by which the result should be accomplished.

In New York Indemnity Company v. Industrial Acc. Comm. (Cal. Sup.) 1 P.(2d) 12, supra, the injured person was a newsboy selling papers on the streets of San Francisco. He bought his papers outright from the publishers and sold them to the public. His profit was the difference between what he sold the papers for and the amount he paid to the publisher for them. There was no contract of hire between him and the publisher as there was between Murray and Long. The publisher designated the corner to be occupied by the newsboy while selling his papers, and required him to be diligent and aggressive in his efforts to sell as many papers as possible. The publisher did not attempt, however, to direct or control the newsboy as to the means or method the latter might employ in selling the papers. This was left entirely to the discretion of the newsboy. That case differs radically from the present case. Here Murray owned the machine, hired Long to fly it, and paid the latter for his services. Not only so, but Murray not only had the power to control the actions of Long in making the trip, but gave the latter specific and detailed directions as to how the trip should be made.

[5] The further contention of Murray that Long's employment was casual, and was not within the trade, business, or profession of Murray, we think is equally untenable. Murray not only owned at least one plane before he purchased the one from the Curtiss-Wright Company, but the evidence shows that he held a "dealership" for the sale of airplanes from that company which was a contract which allowed him a discount or commission on planes purchased by him from said company. Asked what he intended to do with the plane purchased from the Curtiss-Wright Company, he said: "I had no definite actual sale made. I had been promised the very first machine. By having the first machine out here, I would have been in a very good position because it was about the newest thing out in aviation and supposed to be reasonable. * * * If I could have sold the thing, I would have sold it and made something out of it, it being the very first ship." He also authorized Long to sell the machine if he could find a buyer on the trip out. This evidence, we think, was sufficient to justify the implied finding of the commission that Long's employment was not casual. While Murray's regular business was that of land appraiser, it is quite evident that he had stepped out of his regular calling and was engaged in an endeavor to sell airplanes on the side. His employment of Long to assist him in this enterprise was not, therefore, casual, but, on the other hand, was in the course of a business in which he was endeavoring to establish himself. The fact that he had not up to that time actually made a sale of an airplane did not render the service performed by Long without the scope of that business. Hendrickson v. Industrial Accident Commission (Cal. Sup.) 8 P.(2d) 833.

[6] The third and last contention of petitioner in support of his petition to have the award against him set aside and annulled by this court is that Long departed from the course of his employment when he accepted delivery of a machine from the Curtiss-Wright Company other than the precise one purchased by Murray from said company. We have gone carefully over the record of the evidence introduced before the commission at the hearing of this matter. We fail to find any evidence that Long was ever informed by Murray or any one else that Murray had purchased any particular machine from the Curtiss-Wright Company or that Long was directed by Murray to get from the company any particular machine. Murray had purchased a machine from the company and he wrote Long to call, get the machine, and drive it to Murray's home. In Murray's last letter to Long, being the letter heretofore referred to, and dated May 29, 1931, Murray writes, "I enclose a note for the Curtiss-Wright people so that they will turn over the ship to you." The note referred to, omitting the formal parts, read as follows: "Mr. Carl

Long, a transport pilot, would like to make the trip out and kindly has consented to fly the Junior out to San Francisco Bay District. I trust that you will have a ship ready for me as per your last letter." It will be noted that the only reference to the kind of a "ship" Long was to get from the Curtiss-Wright Company was that it was to be a "Junior." It is conceded that such a "ship" was delivered to Long by the Curtiss-Wright Company and that Long "flew" it out to the coast. It appears, however, that Murray in fact bought machine No. 10983, but that the company delivered to Long machine No. 10984. There is some dispute as to whether these two machines were not precisely alike except as to their serial numbers. Long, however, was not directed to get a machine bearing any particular number, and it does not appear that he knew the number which Murray's machine bore. When Long called at the office of the company and presented Murray's written order for *a* machine, he was told that Murray's machine would be ready for delivery the following Thursday. On that day Long again put in his appearance at the company's office, fixed up the necessary papers in order to have the machine delivered to him, and made ready to take the machine from the company. He was taken to the assembly room, and the machine intended for Mr. Murray was not ready. He was given another machine by the company. While there was some conversation within his hearing between the representatives of the company that Mr. Murray's machine was not ready and that he would be given another, Long testified that, "I didn't know the difference that it was not the ship that Murray was supposed to get. So about eleven o'clock I go right along in there and took off on my way out here with an airplane No. 10984." It seems that the machine which Murray was to receive from the Curtiss-Wright Company was to be numbered 10983, but, as we have seen, Murray did not inform Long of that fact, nor did he direct Long to accept from the company a machine bearing that or any particular number. He simply directed Long to secure from the Curtiss-Wright Company the machine purchased and fly it to California, and Long was given no power or discretion to determine whether the machine the company delivered to him was the right machine or not. In fact, he had no information from Murray, or from any other person, for that matter, which would have enabled him to determine whether the machine delivered to him was or was not the machine Murray purchased. Under the circumstances, he was justified in accepting from the company the machine it delivered to him as the machine which Murray had purchased and as the machine which Murray had hired him to fly to California. It is true that he testified that he heard one representative of the Curtiss-Wright Company say to another that the ship intended for Murray was not ready, and that he was told that he could take the other ship, but he also testified that he did not know the difference that it was not the ship Murray was supposed to get. Of course, if Murray had in fact purchased ship No. 10983, and had instructed Long of that fact, and had directed him to get a ship bearing that number from the company, or had given him any directions, which would have enabled him to determine whether the ship he accepted was the right ship, the situation would have been entirely different, and Murray might not have been liable to Long for any injury the latter might have sustained after he had departed from the instructions given him by Murray. As it was, however, in the absence of any definite instructions as to the particular machine he was to receive from the company, and in view of his testimony that he did not know the difference between the two machines and supposed he was getting the machine which Murray bought, we think there is substantial evidence to support the conclusions of the commission that Long did not knowingly depart from the course of his employment, but to the best of his knowledge and information was attempting to comply with the instructions of Murray, his employer, when he accepted machine No. 10984 from the company. As he was injured while flying this machine, the award of commission compensating him for his injuries so received should be sustained.

The award is accordingly affirmed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; TYLER, Justice pro tem.; SHENK, J.

125 Cal.App. 61

DE BRITO et al. v. SAN DIEGO PACKING CO.

Civ. No. 904(4).

Supreme Court of California.

Sept. 10, 1932.

In Bank.

Appeals from Superior Court, San Diego County; L. N. Turrentine, Judge.

Hearing denied.

For former opinion, see 13 P.(2d) 798.

William H. Wylie and H. P. L. Beck, both of San Diego, for appellants.

James G. Pfanstiel, of San Diego, for respondent.

PER CURIAM.

Hearing denied.

PRESTON, J.

I concur in the denial of the foregoing petition because on the merits the judgment should be affirmed.

I disapprove the holding of the majority opinion of the District Court of Appeal that the specifications of error are insufficient. Moreover, the attorney for respondent specifically approved them, and this too should foreclose the opposite position.

216 Cal. 351

STATE COMPENSATION INSURANCE FUND v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 14569.

Supreme Court of California.

Sept. 16, 1932.

Master and servant ⇐367.

As respects compensation, paper carrier injured delivering papers for lessee of paper route *held* not "employee" of newspaper publisher who was not party to the lease, and who paid lessee no wages, but merely sold lessee papers which he circulated under responsibility to publisher only for result accomplished (St. 1917, p. 835, § 8 (a).

[Ed. Note.—For other definitions of "Employé," see Words and Phrases.]

In Bank.

Proceeding under the Workmen's Compensation Act by the Globe Indemnity Company and another, claimants, opposed by the Examiner Printing Company, alleged employer, and the State Compensation Insurance Fund, insurance carrier. To review an award of the Industrial Accident Commission, the insurance carrier brings certiorari.

Award annulled.

Daniel W. Burbank and C. F. Laumeister, both of San Francisco, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

John Francis Neylan and Grove J. Fink, both of San Francisco (John B. Connolly, of San Francisco, of counsel), amici curiæ.

CURTIS, J.

Proceeding in review to annul an award of the Industrial Accident Commission in favor of the Globe Indemnity Company and against the State Compensation Insurance Fund. The State Compensation Insurance Fund was the insurance carrier of the Examiner Printing Company, the publisher of the San Francisco Examiner. On January 1, 1931, a paper carrier named Marc was injured while delivering Examiners on his regular newspaper route, which route is known as route 45. This route was being operated by T. O. Throndson under a lease thereof from Mrs. Abbie Paulsen. Mrs. Paulsen secured the route from her husband, Peter Paulsen, who in turn had secured it, on September 1, 1903, from Ed Delsani. In just what manner the latter became the owner of said route, the record does not indicate. This fact is not material, as all of the parties hereto agree that the route was owned and operated as stated above. The injured employee, Marc, was at the time of his injury employed by Throndson, whose insurance carrier was the Globe Indemnity Company. The Examiner Printing Company was a party to all of the above transfers; that is, it gave its written consent to said transfers. It was not a party to the lease from Mrs. Paulsen. It, however, was fully informed as to the nature of said lease, its circulating manager having witnessed the execution of the same, and thereafter recognized Throndson and dealt with him as the lessee of said route, and the person entitled to conduct and operate the same from April 30, 1928, the date of said lease, until the injury to Marc, which occurred on January 1, 1931. At the time of said injury, Throndson carried compensation insurance with the Globe Indemnity Company, which company settled in full with Marc for all compensation and other charges due him by reason of his said injury. An application was filed before the Industrial Accident Commission by the Globe Indemnity Company and Throndson against the Examiner Printing Company, and its insurance carrier, the State Compensation Fund, to determine the person or company legally liable for the payment of said compensation and charges. As already stated, Marc has been paid in full. Throndson and the Examiner Printing Company were each insured. This controversy, therefore, is solely between the Globe Indemnity Company on the one hand and the State Compensation Fund on the other.

There is no substantial conflict in the evidence. Therefore, the only question for our determination is whether the evidence before the commission was, as a matter of law, sufficient to justify the findings of the commission and its award based upon said findings. The commission found that, at the time Marc received his said injuries, he was in the employ of the Examiner Printing Company, and at that time the State Compensation Insurance Fund was the insurance carrier of the Examiner Printing Company. The award of the commission accordingly ran in favor of the Globe Indemnity Company and against the State Compensation Insurance Fund.

It is the contention of petitioner, the State Compensation Insurance Fund, that at the time Marc was injured he was in the employ of Throndson, and not in the employ of the Examiner Printing Company, while the respondents contend that he was not in Throndson's but in the Examiner's employ. In determining this question, it will be necessary for us to ascertain the legal relation existing between the Examiner Printing Company and Throndson, as well as the relation between Throndson and Marc at the time the latter was injured.

Throndson's regular business was the insurance business. He, however, conducted two newspaper routes for the Examiner Printing Company. These routes were known as route 31 and route 45. Route 45 he operated under the lease from Mrs. Paulsen. He paid Mrs. Paulsen $20 per month as rental under the lease, and was entitled to all the profits of the business. He bought his papers outright from the Examiner Printing Company, paying the company at the rate of $1.60 per hundred for the daily issues and 6 cents each for the Sunday issues. Under the assignment whereby Mrs. Paulsen acquired route 45, to which assignment the Examiner Printing Company was a party and gave its consent in writing, Mrs. Paulsen agreed to canvass the route regularly, and upon her failure to do so the Examiner Printing Company was given the right to put canvassers on the route and to make deliveries required in the course of the business at the expense of Mrs. Paulsen. She also agreed to comply with all the rules and regulations of the Examiner Printing Company, regulating the conduct of its business and that of the carriers of its papers and also to pay for all papers weekly at the then rate, or at such rate as might be established from time to time. The term of the lease from Mrs. Paulsen to Throndson was five years, with a proviso that either party might terminate the same after one year by giving sixty days' notice to the other. The lease further provided that, if it should appear to Mrs. Paulsen or the Examiner Printing Company that Throndson was guilty of any breach of the terms thereof, Mrs. Paulsen might, at her option, terminate the lease; also that at the expiration of the lease Throndson would furnish to Mrs. Paulsen and to the Examiner Printing Company the addresses of all subscribers on the route, and that he would render assistance to his immediate successor by "breaking in" said successor and by giving him full and complete information without remuneration or compensation on all particulars relating to the route. As stated above, the Examiner Printing Company was not a party to the lease from Mrs. Paulsen to Throndson. The terms of the lease, therefore, had no bearing upon the relationship existing between Throndson and the Examiner Printing Company. Throndson, however, was bound by the terms of the assignment of the lease to Mrs. Paulsen, to which the Examiner Printing Company was a party. As lessee of Mrs. Paulsen he stood in her place, and sustained the same relationship to the Examiner Printing Company as Mrs. Paulsen sustained prior to the execution of the lease. Throndson hired Marc and paid him $60 per month for the latter's services. Marc's duties were to get the papers at the office of the publisher and deliver them to subscribers throughout the territory within the route. He conveyed the papers from the office to his route on the street car. He paid his own street car fare and other expenses incident to the delivery of the papers. The Examiner Printing Company never paid him anything for his services in delivering the papers, or otherwise. He attended to all complaints, and had a box or pigeonhole in the office of the Examiner, where he would receive complaints and get the names of new subscribers. Throndson left the delivery of the papers entirely to Marc. He, however, attended to the collection of subscriptions from the subscribers, and paid the Examiner Company for the papers purchased.

It is clear from the foregoing facts that Marc, at least primarily, was the employee of Throndson. He was hired by Throndson, paid by him, and his actions were under the complete and direct control of Throndson. However, if Throndson was an employee of the Examiner Printing Company, with authority to hire Marc, then, while primarily Marc was in the employ of Throndson, in the final analysis of the situation, he was an employee of the Examiner Printing Company. It is apparent, therefore, that the vital question in issue in this proceeding depends upon the relation existing between Throndson and the Examiner Printing Company.

As we have seen from the facts stated above, the Examiner Printing Company did not pay Throndson any wages or compensation of any kind or nature. It sold outright to Throndson the papers which he circulated to the subscribers throughout his route. Throndson was not on the pay roll of the Examiner Company. His profits came from the sale of the papers which he had bought of the Examiner Company, after deducting the cost to him of the papers and the expense of delivering them to the subscribers. Section 8 (a) of the Workmen's Compensation, Safety and Insurance Act (Stats. 1917, pp. 831, 835) defines an employee as "every person in the service of an employer * * * under any appointment or contract of hire or apprenticeship, expressed or implied, oral or written." We think it would be an unwarranted extension of this definition of an employee to hold that one who is not hired but who simply purchases papers or other com-

modities of another for the purpose of reselling them comes within the terms thereof. In the recent case of New York Indemnity Company v. Industrial Accident Commission, 1 P.(2d) 12, we held that a "newsboy" who purchased papers from the publisher to sell them upon the streets was not an employee of the publisher, even though the publisher allotted to the newsboy a certain corner of the city where the latter would conduct his business of selling papers. We can see but little, if any, difference in principle between the relation existing between the newsboy and the publisher in that case and between Throndson and the Examiner Company here. Respondents rely, as did the commission in that case, upon the case of Globe Indemnity Company v. Industrial Accident Commission, 208 Cal. 715, 284 P. 661, but we pointed out the distinction between those two cases in our opinion in the case of New York Indemnity Company v. Industrial Accident Commission, 1 P.(2d) 12, 14, supra. That same distinction exists between the Globe Indemnity Company Case and the instant action. We there said in the more recent of those two cases: "Nor do we think that there is a sufficient analogy between the facts involved in this proceeding and those existing in the case of Globe Indemnity Co. v. Industrial Accident Commission, 208 Cal. 715, 284 P. 661, to justify its application to the case at bar, since in that case the evidence showed that an express relation of agency for the distribution of the daily issues of the Oakland Tribune to its subscribers in San Rafael existed between the applicant for an award and the publishers of said newspaper, in pursuance of which the applicant not only received a percentage of the monthly price which the subscribers paid, but was also paid a regular sum in addition thereto to cover the cost of distribution in outlying territory."

We there held (New York Indemnity Co. v. Industrial Accident Commission) that the newsboy was a sales agent as that term was employed in the authorities cited in that opinion. We further held that, while the publisher retained the right to sell papers to the newsboy only upon the latter complying with certain regulations adopted by the publisher respecting the conduct of the newsboy in making individual sales of papers to the public, the control thus reserved by the publisher was not as a matter of law sufficient to constitute the newsboy an employee of the publisher. The regulations under which the newsboys operated, as shown by the evidence in that case, consisted of the following: "That certain specified corners or places upon the public streets were allotted, when unoccupied, to particular newsboys applying for the same, who received instructions from the district manager not to intrude upon or interfere with the corner or place allotted to another. Each particular newsboy was expected and in fact required to be active and vigilant in making sales of a prescribed minimum number of each of said newspapers at or near his designated place; in short, to be a 'hustler' in making sales. Otherwise his allotted place or corner would be given to another newsboy and he would be refused further copies by the district manager." The control exercised by the Examiner Printing Company over those in charge of its delivery routes, including Throndson, may be briefly stated to include prompt and regular distribution of the paper to the subscribers residing in the respective routes; a thorough canvass of the residents thereof as prospective subscribers of the paper; prompt adjustments of all complaints made by subscribers; and compliance by the carriers with all the rules and regulations of the publisher respecting the conduct of its business and that of its carriers. We think it apparent from this statement that the control exercised by the Examiner Printing Company over the owners of its routes, or their lessees, did not convert them into mere employees of the company. The purpose of these regulations prescribed by the company was to insure a certain and definite result—the prompt and regular distribution of its publication to all persons in the several routes who might be secured as subscribers of said publication. The means by which this result was to be accomplished was left entirely to the route owner, or carrier, in each route. As long as he produced the result desired, the Examiner Printing Company did not interfere with the manner or means by which this result was accomplished. The carrier might personally make deliveries of the papers, or he might employ others to act for him. The carrier might use any manner of conveyance in his work, or he might make deliveries on foot. When we take into consideration the limited control which the Examiner Printing Company exercised over Throndson, with the further fact that the Examiner Printing Company paid Throndson no wages or salary, but simply sold him papers which the latter was to resell, we are forced to the conclusion that the relation of employer and employee did not exist between the Examiner Printing Company and Throndson, but that, on the other hand, Throndson, either as a sales agent, or, we think more properly, as an independent contractor, was performing the service of delivering papers in said route No. 45.

A case strikingly like the instant one is that of Gall v. Detroit Journal Company, 191 Mich. 405, 158 N. W. 36, 37, 19 A. L. R. 1164. In that case a newspaper carrier injured the plaintiff while the former was delivering papers for the defendant. That case was much stronger than the case before us, in that the carrier there was paid wages for his services, but was left free to employ

any means or method which he might choose in the performance of said services. In deciding that the defendant was not liable for the acts of the carrier in injuring the plaintiff, the court said: "Rebtoy [the carrier] was to deliver the papers to such persons, at such places, and on such time as the company should from day to day, designate. Such delivery was the result to be obtained. And Rebtoy was to effect such delivery and obtain such result by any means and by any conveyance and in any way he saw fit. He could make the deliveries in person, or through others employed by him. It is shown by the evidence that those making deliveries for the company did occasionally employ others to do the work. He could use a horse, an automobile, or carry the papers on foot, provided he got them to the right persons, at the right places, and upon time. So far as the terms of the contract are concerned Rebtoy was certainly an independent contractor and not a servant. One whom the employer does not control, and has no right to control, as to the method, or means, by which he produces the result contracted for is an independent contractor"—citing authorities.

We have not overlooked the provision in the assignment to Mrs. Paulsen, whereby she agreed to comply with all the rules and regulations of the Examiner Printing Company, made to regulate the conduct of its business and that of the carriers and owners of its newspaper routes. This obligation was binding upon Throndson, the lessee of Mrs. Paulsen. In so far as these rules and regulations might apply to the owners of the newspaper routes, they were limited to the conduct of such route owners. They did not purport to deal with the means or methods employed by the route owners in making delivery of papers throughout their respective routes. In the "newsboy" case referred to above, it was shown that the district manager of the paper "supervised the daily conduct" of the newsboys in the selling of their papers, but we held that such control did not make them employees of the publisher.

Respondents rely with some assurance upon the cases of Globe Indemnity Company v. Industrial Accident Commission, 208 Cal. 715, 284 P. 661; Call Publishing Company v. Industrial Accident Commission, 89 Cal. App. 194, 264 P. 300; and Carlson v. Industrial Accident Commission (Cal. Sup.) 2 P.(2d) 151. We have already shown how the facts in the Globe Indemnity Company Case differ from those in the instant case, and further reference to that authority is unnecessary. The facts in the Call Publishing Company Case are more like those in the Globe Indemnity Company Case than in the case before us. In the Call Publishing Company Case, the injured employee, who was in the employ of that company, was paid, in addition to the receipts from the route covered by him, a regular weekly wage or salary of $32.50 per week for his services in delivering the papers on said route. His was a contract of hire. He held no definite agreement from his employer, but could be dismissed at any time. It is apparent that this case has no controlling effect upon the instant case.

In the case of Carlson v. Industrial Accident Commission (Cal. Sup.) 2 P.(2d) 151, supra, the court was asked to annul an award in favor of the dependents of a man named Rodgers, who was fatally injured while performing services upon the ranch owned by the plaintiff. The plaintiff, Mrs. Carlson, was the owner of the ranch, and had executed an instrument whereby she purported to lease the ranch to Rodgers. By the terms of this instrument Rodgers was to receive a share of the crops produced on the ranch as compensation for his services rendered in operating the ranch. Among other things, this instrument, termed a lease, provided: "That all work of every description shall be done under the supervision of the party of the first part [Mrs. Carlson], her agent, or representative, and in strict accordance with her wishes, ideas and instructions, and the different lines of work must be carried out in their proper time and season, as directed by the party of the first part." It was held by reason of this provision of the lease, as well as others of less potency, that Mrs. Carlson reserved control over the manner in which the ranch was to be farmed by Rodgers; that is, while Rodgers had agreed to work the ranch, Mrs. Carlson had reserved control of the means and method by which this work was to be performed. The evidence, therefore, was held to be sufficient to support the finding of the commission that Rodgers was an employee of Mrs. Carlson at the time of his injury and not her tenant. It will be noted that in the instrument whereby Mrs. Carlson sought to lease the ranch to Rodgers that she explicitly reserved control of the manner and means of doing all work performed by Rodgers. No such reservation of control exists in the instant case. On the other hand, as we have seen, Throndson had exclusive control of the means by which his work was to be done, and was responsible to the Examiner Printing Company only for the result to be accomplished. We find nothing in the Carlson Case helpful to respondents.

Another case which has been referred to in the briefs of the parties hereto is the case of Boehm v. Spreckels, 183 Cal. 239, 191 P. 5, 8. That case involved a controversy between the owner of a newspaper route and the publisher of the paper. It was there held that a contract whereby a publisher transferred and delivered to a carrier a certain route for the delivery of newspapers "created an agency and did not declare a sale of property." The plaintiff in

that action contended that, by the purchase of a route by the carrier, he acquired an interest in the business of the publisher of the newspaper. The decision holds that no interest in the business was involved in such transaction. It is true the decision states that an agency was thereby created rather than that a sale was declared. However, the court was not in that action concerned with any question involved in the instant case, and we do not consider the decision therein determinative of any of the issues of this action. The term "agency" is a broad one, and may include every relation in which one person acts for another. It is frequently used in connection with an arrangement which does not in law amount to an agency, as where the essence of an arrangement is bailment or sale, as in the case of a sale agency exclusive in certain territory. Piper v. Oakland Motor Company, 94 Vt. 211, 109 A. 911, 912.

From the foregoing we conclude that there is no evidence in the record to support the finding of the commission that Marc was at the time of his injury in the employ of the Examiner Printing Company. The award, therefore, based upon said finding should be, and it is hereby, annulled.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; TYLER, Justice pro tem.; SHENK, J.

125 Cal.App. 774

PACIFIC GAS & ELECTRIC CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8557.

District Court of Appeal, First District, Division 2, California.

Sept. 14, 1932.

Master and servant ⊜417(9).

Judgment annulling Industrial Commission's decision denying compensation, and remanding proceeding with directions was not court mandate that commission apportion award subsequently granted (St. 1917, p. 833, § 3, subd. 4).

Judgment annulling Industrial Commission's decision denying compensation, and remanding proceeding with directions was not a court mandate that, in making an award in compliance with the directions, the commission should apportion the award between injury and pre-existing disease as provided in St. 1917, p. 833, § 3, subd. 4, since the award under consideration by the court was an award that claimant take nothing and presented no issue of apportionment, and, in so far as the court spoke of apportioning, it was addressing itself to the issue whether the award should have been affirmative instead of negative.

Proceeding under the Workmen's Compensation Act by Emma G. Mullane, claimant, for the death of Edward A. Mullane, her husband, opposed by the Pacific Gas & Electric Company, employer. To review an order of the Industrial Accident Commission, awarding compensation, employer brings certiorari.

Award affirmed.

Thomas J. Straub and John J. Briare, both of San Francisco, for petitioner.

Edmund J. Holl, of San Francisco, for respondent Emma G. Mullane.

A. I. Townsend and Frank J. Burke, both of San Francisco, for respondent Industrial Accident Commission.

STURTEVANT, J.

Heretofore Edward A. Mullane had suffered from tuberculosis but the disease ceased to progress. While the disease was quiescent, he took employment under the Pacific Gas & Electric Company. While so employed and within the course of his employment, he suffered an injury which resulted in the activation of the pre-existing tubercular condition in the laryngeal and spinal region. Soon afterwards he died. An application by his widow was made to the defendant commission to fix the compensation. After certain proceedings had, it filed an award denying any compensation. The widow filed a petition for a rehearing. The petition was denied and thereafter she applied for a writ of review. The writ was granted by the First Division of this court. Later the court handed down a decision, Mullane v. Industrial Acc. Com. (Cal. App.) 5 P.(2d) 483. After the remittitur went down, the application was again called up before the defendant commission. No further evidence was taken, but the matter was submitted to the defendant commission for it to make an award in compliance with the mandate of the court. Thereafter, on the 22d day of March, 1932, the defendant commission filed its decision. It fixed the compensation in the sum of $3,375.51. Paragraph 5 is as follows: "The evidence is insufficient to warrant an apportionment of the death benefit or to make an apportionment between injury and preexisting disease. This Commission now finds that all the disability found herein and said death were the direct result of the injury which forms the subject matter of this

action." The employer filed a petition for a rehearing. The petition was denied, and it applied to this court for a writ of review. In its briefs it makes merely one point and that is that the defendant commission did not apportion its award (Workmen's Compensation Insurance and Safety Act, § 3, subd. 4 [St. 1917, p. 833]), as directed by the mandate of the court. We think the point may not be sustained. There was no mandate of the court to apportion. The award under consideration by the court was an award that the applicant take nothing. It presented no issue of apportionment. In so far as the court spoke of apportioning, it was addressing itself to the issue whether the award should have been affirmative instead of negative. Moreover, there was no evidence before the defendant commission on which an apportionment could have been based. The evidence was without conflict that before the accident the decedent had suffered from tuberculosis; but that at the time of the accident it was quiescent. There was evidence that the accident caused the quiescent tuberculosis to become active, and that such tuberculosis caused the death of the decedent.

The award is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

PEOPLE v. FERGUSON. *

Cr. 2225.

District Court of Appeal, Second District, Division 2, California.

Sept. 19, 1932.

Rehearing Granted Oct. 4, 1932.

1. Weapons ⇐17(4).

Evidence *held* to justify conviction of possession of metal knuckles (St. 1923, p. 695, as amended).

2. Constitutional law ⇐200.
Weapons ⇐3.

Statute making mere possession of metal knuckles a crime *held* not ex post facto as applied to knuckles possessed when statute was enacted (St. 1923, p. 695, as amended).

3. Weapons ⇐3.

Statute making mere possession of deadly weapons a crime *held* not repealed by implication by statutes referring to use and intention to use weapons therein referred to (St. 1923, p. 695, as amended; Pen. Code, §§ 417, 467).

4. Statutes ⇐4.

In enacting legislation, Legislature may take note of and act on common facts.

5. Constitutional law ⇐81.

Legislature can regulate and proscribe the use of a thing so that its beneficial use may be enjoyed and its detrimental use prohibited.

6. Constitutional law ⇐81.

If beneficial use of a thing is entirely lacking or grossly disproportionate to its harmful use, police power may absolutely prohibit its possession.

7. Constitutional law ⇐38.

Legality of statutes is not measured by extreme or unlikely possibilities.

8. Weapons ⇐3.

Statute making mere possession of metal knuckles a crime *held* within police power of state; hence instruction that possession of metal knuckles was test of guilt was correct (St. 1923, p. 695, as amended).

Appeal from Superior Court, Ventura County; William D. Dehy, Judge.

A. L. Ferguson was convicted of the possession of metal knuckles, and he appeals from the judgment and from the denial of a motion for new trial.

Judgment and order affirmed.

See, also, 11 P.(2d) 636.

Jarrett Beckett, of Ventura, for appellant.

U. S. Webb, Atty. Gen., and James C. Hollingsworth and Burton L. Rogers, both of Ventura, for the People.

STEPHENS, Justice pro tem.

Defendant was convicted by a jury of the possession of "metal knuckles" (Stats. 1923, p. 695; Stats. 1925, p. 542, and Stats. 1931, p. 2316), and appeals from the judgment and from the denial of a motion for new trial. Several specifications of error are presented to us for consideration.

[1] The specification that the verdict is contrary to the evidence cannot be sustained, for the reason that the evidence is conclusive even to the extent of the admission by defendant himself that he was the owner and possessor of the knuckles for a long time prior to and at the time of his arrest.

[2] The specification that the statute is invalid for the reason that it acts as an ex post facto law cannot be sustained. People v. McCloskey, 76 Cal. App. 227, 244 P. 930.

The specification that the district attorney was guilty of misconduct is without merit.

[3] The specification that the statute is repealed by implication by the enactment of sections 417 and 467 of the Penal Code cannot be sustained, as those sections refer to the use and to the intention to use the weapons

*For subsequent opinion see 18 P.2d 741.

therein referred to, while the statute invoked herein refers to the possession of deadly weapons.

The specification that the court erred in denying defendant's motion for a new trial is dependent wholly upon the rulings in the other specifications.

There is, then, but one point raised by the appeal which merits discussion: Is the statute, which makes the mere possession of metal knuckles a crime, within the police power of the state, or is it unconstitutional as being unreasonable and arbitrary? The evidence of defendant is that he acquired the knuckles from his father and brought them to California several years ago; that he has never carried them on his person, although he has moved them with him when removing from one residence to another; that during the last few months prior to his arrest they were kept in a dresser drawer, or upon a shelf in the house where he was living; and that he had always kept them as a keepsake or curio. The trial judge permitted this testimony over objection, but instructed the jury that possession was the test of guilt, and declined to instruct that their use or lack of use, or their being kept as a keepsake or curio, would affect the guilt or innocence of the accused.

In principle, the question has been conclusively answered by the appellate courts of this state. In People v. Gonzales, 72 Cal. App. 626, 237 P. 812, the constitutionality of the so-called Firearms Act (Stats. 1923, p. 695) was under consideration. In that case, as in the instant case, the conviction was sought to be reversed because the statute made criminal the mere possession of a weapon. Likewise in each case the appellant claims an entire lack of criminal intent. The court in the case cited, quoting from page 630, of 72 Cal. App., 237 P. 812, 813, said: "In the case of People v. Wolfrom, 15 Cal. App. 732, 115 P. 1088, it is said: 'When the intent is not made an affirmative element of the crime, the law imputes that the act knowingly done was with criminal intent, and it need not be alleged nor proven.' A perusal of the statute which is the subject of appellant's attack shows that the mere possession of a firearm by any person described in the act is sufficient to constitute a criminal offense. The language of the statute is that '* * * No person who has been convicted of a felony against the person or property of another or,' etc., 'shall own or have in his possession or under his custody or control any pistol, revolver or other firearm capable of being concealed upon the person.' By the statute, intent on the part of a defendant accused of the commission of the offense is not made an essential to the completion of the criminal act; and whether or not the act was committed knowingly would necessarily be a question of fact for determination by the jury." See Ex parte McClain, 134 Cal. 110, 66 P. 69, 54 L. R. A. 779, 86 Am. St. Rep. 243.

The general subject under discussion is treated in the following cases: People v. Gonzales, supra, 72 Cal. App. 626, 237 P. 812; People v. James, 71 Cal. App. 374, 235 P. 81; People v. Camperlingo, 69 Cal. App. 466, 231 P. 601; People v. McCloskey, 76 Cal. App. 227, 244 P. 930; People v. Rogers, 112 Cal. App. 615, 297 P. 924. We find the following in section 64, volume 5, California Jurisprudence: "Where the power exists to legislate, the court is not concerned with the wisdom or expediency of the law. If there is any theory upon which the provision might reasonably have been concluded by the legislature to be essential, the court may not interfere."

[4-6] Firearms have their legitimate uses; hence the law regulates their use and prescribes who shall be prohibited their possession. But there is impressed upon slungshots, sandbags, black-jacks, and metal knuckles the indubitable indicia of criminal purpose. To every person of ordinary intelligence, these instruments are known to be the tools of the brawl fighter and cowardly assassin and of no beneficial use whatever to a good citizen or to society. The Legislature may take note of and act upon such common facts. Ex parte Yun Quong, 159 Cal. 508, 114 P. 835, Ann. Cas. 1912C, 969. It can regulate and proscribe the use of a thing so that its beneficial use may be enjoyed and its detrimental use prohibited. It follows that, if the beneficial use of a thing is entirely lacking or grossly disproportionate to its harmful use, the police power may absolutely prohibit its possession. Ex parte Yun Quong, supra.

There is no question of mistake or unwilling or unwitting possession in this case. Appellant intentionally brought this unlawful weapon into this state, an offense in itself, and moved it about with him as he removed from place to place. Should he have resolved to use it for the cruel purpose for which it was made, it was ever in easy reach. His defense of innocent intention in its possession would in principle permit the same defense by one bearing concealed weapons. Such a defense would, in the main, necessarily be dependent upon the testimony of the accused as to his intention. The almost impossibility of proof is obvious, and in good reason may have been the primary cause for making "possession" the gravamen of the offense.

[7] The suggestion of the remote possibility that the keeper of a museum might be convicted under the terms of the statute may be grounds for an amendment to it, but the legality of statutes is not measured by extreme or unlikely possibilities. United States v. Kirby, 7 Wall 482, 19 L. Ed. 278. When the

statute is read as a whole, it seems clear that the Legislature meant to enact no halfway measure, for it is therein provided that "blackjacks, slungshots, billies, sandclubs, sandbags, and metal knuckles are hereby declared to be nuisances and shall be subject to confiscation and summary destruction whenever found within this state." St. 1923, p. 698, § 7. It seems clear to us that the effective prohibition of the use of weapons of this sort depends upon the right to prohibit possession thereof. In such case there can be no doubt that the right to protect society must prevail over the mere individual desire to possess.

[8] The statute does not offend against the state or the national Constitutions, and we think the trial court was right in instructing the jury that possession under the facts of this case was the essence of the offense and in refusing to give instructions in conflict with that principle.

Judgment and order affirmed.

I concur: IRA F. THOMPSON, J.

I concur in the judgment: WORKS, P. J.

126 Cal.App. 158

PEOPLE v. WOODS.

Cr. 2207.

District Court of Appeal, Second District, Division 2, California.

Sept. 21, 1932.

Jury ⇐29(6).

Assumption of waiver of jury from accused's counsel's statement that jury had been waived *held* ineffective, since accused must personally express consent to proceed without jury (Const. art. 1, § 7).

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Benjamin J. Woods was convicted of having violated St. 1923, p. 553, § 112, as amended by St. 1929, p. 537, § 44, and he appeals.

Reversed.

William G. Kenney and John E. Glover, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CRAIG, Acting P. J.

The appellant was tried before the superior court sitting without a jury, and was found guilty, upon a charge of having violated section 112 of the California Vehicle Act (as amended by St. 1929, p. 537, § 44).

It is contended by the appellant and conceded by counsel for the people that the record fails to disclose any proceedings before the court below which constituted an express waiver by the defendant or by his counsel of a trial by jury. The transcript does disclose a notation of "jury having been waived," and of the following inquiry and response:

"The Court: Has the jury been waived?

"Mr. Glover: Yes, your Honor, we waived the jury over in Department 22."

At the conclusion of the trial it appears that the court stated previously to passing sentence:

"At both trials you joined the prosecution, the district attorney, in waiving a jury trial; the case was tried before the court without a jury. After evidence was received, the court finds that you are guilty of the offense as alleged in the information. Have you any legal cause now to show why judgment should not be pronounced against you?

"The defendant: No, sir."

It is suggested on behalf of the respondent that the observation of the trial court, relying upon the statement of the defendant's counsel, might justify an assumption that a jury was in fact waived, under the rule that all intendments are in favor of the regularity of the proceedings.

Section 7, article 1, of the Constitution provides in such cases: "A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel. * * *" No authority in this state of which we are aware tends to suggest that a departure from the strict construction of this constitutional provision may be justified. It would seem that an assumption of waiver from counsel's remark that a jury had been waived can be afforded no greater weight than an express waiver by counsel who may have been authorized to speak for a defendant. As to such delegation of authority the decisions have consistently held that the accused must personally express consent to proceed without a jury. In People v. Spinato, 100 Cal. App. 600, 280 P. 691, 692, quoting from People v. Garcia, 98 Cal. App. 702, 277 P. 747, the rule was expressed in the following language: "From previous rulings and the express language of the Constitution it is at once obvious that this inviolate constitutional right may not be taken away in disregard of the fundamental legal privilege and power of election guaranteed to the party charged, by attempting to vest in his representative the dual capacity and authority of counsel and accused. Not only is the Constitution explicit as to the parties who may consent to waive a trial by jury, but it is equally definite as

to the form in which * * * it must be 'expressed in open court.'" And further: "The issue here presented, and one which was necessarily involved and finally determined in the Garcia Case, is not whether a jury may be waived, but how it may be waived. We repeat what was said in that decision, that where, as in this instance, the Constitution has prescribed the method and form of such waiver, it cannot be otherwise accomplished."

The contention that the corpus delicti was not supported by sufficient evidence aside from the defendant's admissions is untenable. There was positive evidence of the operation of the automobile in question in violation of the statute, and such evidence was not disputed.

The contention that the trial court erroneously denied the defendant the right to file an application for probation is also admitted by the respondent, and requires no discussion. It follows that the judgment must be reversed.

Judgment reversed.

We concur: IRA F. THOMPSON, J.; STEPHENS, Justice pro tem.

MERCANTILE DEVELOPMENT CO. et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.*

Civ. 8473.

District Court of Appeal, Second District, Division 2, California.

Sept. 20, 1932.

Rehearing Denied Oct. 17, 1932.

Hearing Granted by Supreme Court Nov. 17, 1932.

1. Dismissal and nonsuit ⇐60(1).

Oral stipulation for filing of amended complaint over five years after filing of answer, and such complaint, not shown to have been filed, must be disregarded in determining propriety of dismissal for want of prosecution (Code Civ. Proc. § 583).

2. Dismissal and nonsuit ⇐60(6).

Oral understandings, extending time for trial, do not preclude dismissal of action for want of prosecution (Code Civ. Proc. § 583).

3. Dismissal and nonsuit ⇐60(6).

Stipulation for trial over five years after filing of answer did not preclude defendant from insisting on dismissal, where parties stipulated for numerous continuances during five-year period (Code Civ. Proc. § 583).

4. Dismissal and nonsuit ⇐45.

Dismissal of action, not brought to trial within five years after defendant filed answer, is mandatory, in absence of written stipulation for extension of time (Code Civ. Proc. § 583).

Application by the Mercantile Development Company and others for a writ of mandate, requiring the Superior Court of the State of California, in and for the County of Los Angeles, to dismiss an action against petitioner.

Writ granted.

Frank H. Love, A. L. Abrahams, and Cooper & Collings, all of Los Angeles, for petitioners.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondent.

Louis N. Whealton, Fred Miller, and Raymond J. Kirkpatrick, all of Long Beach, amici curiae.

CRAIG, Acting P. J.

A civil action commenced in 1924 against the petitioner herein and others was continued from time to time, and was brought to trial on April 12, 1926; but the same was again continued owing to defective pleadings. On April 27 and 29, 1926, following amendments to the complaint, answers were filed. Numerous further continuances of the trial date followed, and on February 3, 1932, the action was dismissed. The order of dismissal was vacated upon motion of the plaintiff, and the defendants instituted the instant proceeding in mandamus, praying that said action be dismissed. The return to the alternative writ presents in resistance of the petition an asserted answer claimed to have been filed within five years next preceding said dismissal, and a stipulation in writing that the trial of the case might be held "on the 10th day of November, 1931, or such day subsequent thereto as may suit the convenience of the court."

[1] The answer mentioned was originally filed, as above stated, more than five years before the order of dismissal was entered; but in November, 1931, it was stipulated by the parties that a third amended complaint might be filed by the plaintiff, and that said answers of April, 1926, might be deemed the pleadings of the defendants thereto. However, so far as appears, such complaint was not filed, nor was the stipulation reduced to writing or delivered to the clerk of the trial court, and they must therefore be disregarded. Nor does it appear that the trial was commenced on the 10th day of November, 1931, as previously stipulated. Section 583 of the Code of Civil Procedure provides in part, that: "The court may in its discretion dismiss any action for want of prosecution on motion of the defendant

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 25 P.2d 12.

and after due notice to the plaintiff, whenever plaintiff has failed for two years after answer is filed to bring such action to trial. Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended."

[2-4] It is insisted that extenuating facts and circumstances which appear by affidavits tend to show that a dismissal would amount to an abuse of discretion. Oral understandings are not within the protection of the provisions of said section in such a case. Perrin v. Miller, 35 Cal. App. 129, 169 P. 426. The fact that the parties stipulated that the trial might be had on a date subsequent to the expiration of the five-year period does not preclude the defendants from insisting upon a dismissal, when it appears that numerous continuances during such period have been stipulated by the parties. Boyd v. Southern Pacific R. Co., 185 Cal. 344, 197 P. 58. The statute evinces an intent to cover the entire subject of dismissals for failure to bring an action to trial after answer filed, and after the expiration of five years a dismissal is mandatory. Romero v. Snyder, 167 Cal. 216, 138 P. 1002. Cited authorities warranting a different conclusion we think distinguish themselves from the facts here presented.

The writ of mandate is granted.

We concur: IRA F. THOMPSON, J.; STEPHENS, Justice pro tem.

126 Cal.App. 88

In re BROAD'S ESTATE.

Civ. 8642.

District Court of Appeal, First District, Division 2, California.

Sept. 19, 1932.

Pleading ⇐406(7).

Failure of propounders to demur to contestant's allegation of testator's general mental incompetency *held* waiver of alleged ambiguity, in contestant's pleading (Code Civ. Proc. § 434).

Failure of the propounders to demur to such allegation was, under Code Civ. Proc. § 434, a waiver of the ambiguity, if any, in contestant's allegation of testator's general mental incompetency, so that contestant was not bound to amend although given permission by the court to amend when propounders claimed contestant's pleading was ambiguous.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Proceeding by the Wells Fargo Bank & Union Trust Company, as executor of the estate of Alfred Fry Broad, deceased, for the probate of the purported will of decedent, under which Gerald Jackson and others were legatees, contested by Louise M. Broad, decedent's widow, and another. From the orders of the superior court, named contestant appeals. On motion to dismiss the appeal or to affirm the orders.

Motion denied.

Milton Marks, of San Francisco, for appellant.

Harry G. McKannay, of San Francisco, for respondent Harriet Kemp.

F. V. Keesling and Garton D. Keyston, both of San Francisco, for executor, etc.

STURTEVANT, J.

After the death of Alfred F. Broad a document purporting to be his will was admitted to probate. Afterwards his surviving widow filed a contest. At about the same time a surviving daughter filed a contest. The respondents did not demur, but filed answers. A jury was waived and both causes were tried together before the trial judge sitting without a jury.

Immediately after the cause was called for trial the contestants started to make an opening statement. They were interrupted by the respondents, who claimed that the pleadings were not clear, but were ambiguous. The trial court gave the contestants permission to amend and that the amended pleadings could be filed at a later date. Such pleadings were not filed. In their opening statement both of the contestants claimed that the testator was of unsound mind at the time he executed the document purporting to be his will. Later they introduced evidence to that effect. The trial court made findings of fact in favor of the respondents on that issue and other material issues. From the orders based thereon the surviving wife has appealed.

It is not claimed that she has not filed proper transcripts nor that her brief is not on file (Code Civ. Proc. § 954), nevertheless the respondents have filed a motion to dismiss or to affirm, relying on subdivision 3, rule V, as adopted May 6, 1932, Rules of Supreme Court and District Courts of Appeal.

In support of the motion the respondents contend that this contestant did not plead general mental incompetency of the deceased and that she did not amend after permission was given to her to amend. We think the appellant attempted to plead general mental incompetency. If her pleading was ambiguous the respondents waived the attack by failing to demur. Code Civ. Proc. § 434. Therefore appellant was not bound to amend. As the motion rests on the assumption that this contestant did not plead that the decedent was of unsound mind, it follows that the motion is not well founded.

It is therefore ordered that the motion be and it is hereby denied, and it is further ordered that the respondents be and they are hereby given twenty days from and after filing of this order within which to prepare, serve, and file their brief.

We concur: NOURSE, P. J.; SPENCE, J.

126 Cal.App. 144

A. S. O'NEIL CONST. CO. v. MacDONALD.

Civ. 7332.

District Court of Appeal, Second District, Division 1, California.

Sept. 21, 1932.

1. Appeal and error ⇐1071(5).

Error in holding defendant estopped to assert claim for damages *held* immaterial, in absence of showing of valid claims therefor.

2. Appeal and error ⇐690(5).

Admission of evidence respecting extras, etc., not subject of written building contract, *held* not reversible error, in absence of record showing of importance thereof.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by the A. S. O'Neil Construction Company against A. H. MacDonald. Judgment for plaintiff, and defendant appeals.

Affirmed.

Carroll Allen, of Los Angeles, for appellant.

Cooper & Collings, of Los Angeles, for respondent.

CONREY, P. J.

Pursuant to a contract made between these parties, the plaintiff constructed for the defendant a hotel building at Las Vegas, Nev. This action was brought to recover an alleged balance claimed as due on the contract. Judgment was entered in favor of the plaintiff. Defendant appeals therefrom.

[1] There are no specifications of insufficiency of the evidence to sustain the findings of fact. The findings are sufficient to support the judgment. Appellant contends that the court erred in holding that defendant waived any imperfections, alterations, etc., in the building, and was estopped from asserting any claim for damages or for breach of contract. But, since it does not appear that there were any valid claims for damages, the suggested point becomes immaterial.

[2] The only other point is that the court erred in admitting evidence, over objections, as to extras, etc., which were not the subject of any writing. Appellant has not presented enough of the record to enable us to see that, even if the court did err in this matter, the error would be of any importance in the consideration of this appeal. Apparently the court overruled the objection to the particular question then presented, and admitted the evidence because it showed an oral executed agreement, and also because the matter had been brought into the record by the defendant himself on cross-examination of a witness.

We think that the appeal is entirely without merit.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

126 Cal.App. 160

KERR v. KERR et al.

Civ. 8615.

District Court of Appeal, Second District, Division 2, California.

Sept. 21, 1932.

Appeal and error ⇐477.

Application for supersedeas is addressed to appellate court's sound discretion.

Application to secure a writ of mandate by Marian S. Kerr, administratrix with the will annexed of the estate of A. T. W. Kerr, deceased, to compel Ruth Kerr, president and treasurer of Alexander H. Kerr & Co. and the Kerr Glass Manufacturing Corporation, and others to permit the inspection of the books of two corporations. From the judgment granting the writ, defendants appeal and apply for the writ of supersedeas.

Writ denied.

Roane Thorpe, of Los Angeles, for appellants.

Edythe Jacobs, of Los Angeles, and Yancey, Spillers & Fist, of Oklahoma City, Okl., for respondent.

IRA F. THOMPSON, J.

This is an application for the writ of supersedeas. The action was commenced for the purpose of securing a writ of mandate to compel the appellants to permit an inspection of the books of two corporations. The writ was granted, and defendants have perfected an appeal and applied for the writ. An application for the writ of supersedeas is addressed to the sound discretion of the court in the exercise of its appellate jurisdiction. Luckenbach v. Krempel, 188 Cal. 175, 204 P. 591; In re Albori, 95 Cal. App. 42, 272 P. 321. The appellants here have failed to demonstrate to us by portions of the record or otherwise a situation which warrants us in interfering with the ordinary processes of the law. It is claimed that certain findings are not supported by the evidence, but we are not furnished with anything further from which we may hazard a guess that the trial court was in error. A legal contention is advanced which may possibly have merit but which on its face seems rather barren of possibilities.

Application for writ denied.

We concur: CRAIG, Acting P. J.; STEPHENS, Justice pro tem.

126 Cal.App. 106

HEINTZ v. HEINTZ.

Civ. 8572.

District Court of Appeal, First District, Division 1, California.

Sept. 20, 1932.

Rehearing Denied Oct. 20, 1932.

Hearing Denied by Supreme Court Nov. 18, 1932.

1. Husband and wife ⇐264.

Evidence in wife's divorce action sustained finding that designated realty standing in her name was husband's separate property, in which wife was entitled to no interest (Civ. Code, §§ 139, 146).

2. Appeal and error ⇐994(3), 1012(1).

Credibility and weight to be given testimony is for trial court.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Suit by Hermine Heintz against August Henry Heintz, in which defendant filed a cross-complaint. From the decree, plaintiff appeals.

Affirmed.

Harry I. Stafford and Daniel R. Shoemaker, both of San Francisco, for appellant.

G. R. Perkins, of San Francisco, for respondent.

PER CURIAM.

An appeal by plaintiff from an interlocutory decree of divorce granted to her on the ground of defendant's extreme cruelty. The appeal is limited to that portion of the decree by which it is adjudged that certain real property on Hancock street in San Francisco is the separate property of the defendant and that plaintiff has no interest therein.

As stated, the complaint was based on allegations of cruelty, and defendant cross-complained upon like grounds; the findings in this regard being in plaintiff's favor. The court found that the community property of the marriage consisted of a promissory note, certain money, and a parcel of land in or near San Bruno in San Mateo county. Plaintiff was awarded a half interest in the land and note and a portion of the money. It was also found that she owned as her separate property certain household furniture and a parcel of land on Santa Marina avenue in San Francisco. The land in dispute was found to be the separate property of the defendant. Plaintiff claims that the evidence does not support this finding or the part of the decree based thereon, and that an interest in this property should have been awarded to her.

[1, 2] It has been held that where a divorce is granted for an offense of the husband the court, in view of section 139 of the Civil Code, has no power to award to the wife his separate property in kind, its power being limited to a money allowance (Tremper v. Tremper, 39 Cal. App. 62, 177 P. 868; McKannay v. McKannay, 68 Cal. App. 701, 230 P. 214; 1 Cal. Jur. Alimony, § 92, p. 1043); but if the decree is rendered on the ground of adultery or extreme cruelty the statute provides that the community property shall be assigned to the respective parties in such proportions as the court from all the facts of the case and the condition of the parties may deem just (Civ. Code, § 146). The record title to the property in dispute stood in plaintiff's name. Notwithstanding this she alleged in her complaint and testified at the trial that the same was community property, while defendant's pleadings averred the same to be his separate property. In support of his claim he testified that when the property was acquired in 1923 he gave in exchange a ranch which he owned before his marriage, and agreed to pay

in addition $2,500; that $500 was paid in cash and the balance from rentals received from the property; further, that the cash payment was made from money which he acquired before his marriage. In addition he testified to payments either from his separate property or the community property of the marriage in satisfaction of a mortgage on plaintiff's Santa Marina avenue property and for improvements thereon. While his testimony was contradicted in many particulars by that of plaintiff, we cannot say that it was inherently improbable. The question of his credibility and the weight to be given his testimony were for the trial court, and the evidence was sufficient to support its finding. The judgment, which is sustained by the evidence, is fair to both parties, and nothing has been shown which would justify a reversal.

The judgment is affirmed.

126 Cal.App. 152

In re EDWARDS' ESTATE.*

EDWARDS v. AGNEW et al.

Civ. 8120.

District Court of Appeal, Second District, Division 2, California.
Sept. 21, 1932.

Rehearing Denied Oct. 14, 1932.

Hearing Denied by Supreme Court Nov. 18, 1932.

1. Wills ⇨440.

Although will should be read so as to determine testator's intention, intention must be fairly found from wording therein.

Testator's intention must be found from the wording in the will itself, and courts cannot generally supply needed words or expressions nor dismiss from consideration words or expressions in order to arrive at maker's intention.

2. Wills ⇨456.

No strained meaning can be attributed to any word or phrase in will.

3. Wills ⇨446.

Wills should be construed to validate rather than to invalidate them.

4. Perpetuities ⇨4(15).

Provision in will that upon death of testatrix' nieces who were testatrix' grandnieces' cobeneficiaries under testamentary trust, trust should terminate provided grandnieces should have reached age of 50 or died, *held* not to violate rule against perpetuities (Civ. Code, § 715; Const. art. 20, § 9).

Such provision was not invalid so as to render the trust itself invalid as violative of Const. art. 20, § 9, relative to the rule against perpetuities, or of Civ. Code, § 715, relative to the rule against the suspension of alienation, since testatrix' evident intention as determined by considering whole will was to provide for each of the nieces during her lifetime and for each of the grandnieces, at least until she became 50 years of age; the intention not being that the provision for terminating the trust be limited to the moment of the death of last surviving niece.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Probate proceeding in the matter of the estate of Anna Edwards, deceased. From a final decree of distribution and from an order denying the petition of Richmond A. Edwards, legatee under decedent's will, for a distribution of certain portions of the estate upon the alleged ground that certain trust provisions of the will, under the terms of which Margaret E. Agnew and others were beneficiaries, were invalid, Richmond A. Edwards appeals.

Order affirmed.

Glensor, Clewe, Schofield & Van Dine, of San Francisco, for appellant.

Harry W. T. Ross, of Santa Barbara, for respondent Security-First Nat. Bank of Los Angeles.

Griffith & Thornburgh, of Santa Barbara, for respondents Miriam B. Edwards, Abby E. Randall, Dorothy Edwards, and Margaret Edwards Agnew.

STEPHENS, Justice pro tem.

This is an appeal by Richmond A. Edwards, a nephew of decedent and a legatee under her will, from a final decree of distribution and from an order of the probate court denying his petition for a distribution of certain portions of the estate in accordance with his contention that certain trust provisions of the will are invalid.

Appellant is entitled to a one-twelfth share in any estate with respect to which the decedent died testate. The will provided for certain gifts which we need not consider. We shall quote such parts of the document as is necessary to a full understanding of the controversy: "Seventh: I give and bequeath to Security First National Bank of Los Angeles, a corporation, the sum of sixty thousand (60,000) dollars in trust nevertheless for the following uses and purposes: To collect, hold, manage, invest and reinvest the same, and to pay the net income therefrom as follows." (Here follows bequests of the net income from $10,000 each to Elizabeth R. Jones, a niece, and to John B. Edwards, Richmond Edwards, Alfred R. Edwards, William A. Edwards and Carl Edwards, neph-

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Rehearing denied 15 P.(2d) 194.

ews.) "As each of my said nieces and nephews die, then the share of the principal of the trust fund of the one so dying in the trust fund created by this paragraph of my will shall be added to the residuum of my estate and be disposed of as provided in paragraph 8 of this my will. Eighth: All the rest, residue and remainder of my property, real, personal and mixed, and wheresoever the same may be situate or being, I give, devise and bequeath to Security-First National Bank of Los Angeles, a corporation, in trust nevertheless for the following uses and purposes: To collect, hold, manage, sell, lease, control and possess, invest and reinvest the same, and pay the net income therefrom to the following persons and in proportions as follows: To pay the sum of twenty-five (25) dollars per month to Miss Lolita Krug, or to the superintendent of such sanitarium or other institution as the said Lolita Krug may be confined in, for her benefit for and during the life of said Lolita Krug and upon her death such payments shall cease. The balance of said net income (and upon the death of said Lolita Krug, all of said income) shall be paid as follows"—one-seventh thereof to each of decedent's nieces and grandnieces, namely, Abby Edwards Randall, Dorothy Edwards, Margaret E. Agnew, Miriam B. Edwards, Patricia A. Ryon, and Anna Bermingham Edwards. "Should either of my said nieces or grand-nieces die leaving lawful issue her surviving, then the share of the income of the one so dying shall go to such issue; however, should either of my said nieces or grand-nieces die leaving no lawful issue her surviving, then the share of the income of the one so dying shall go to the survivor or survivors of my said nieces and grand-nieces. *Upon the death of the last of my four nieces in this Paragraph 8 above named, this trust shall cease and terminate, provided my said grand-nieces shall have attained the age of fifty years (or shall have died)* and the property so held in trust by my said trustee shall go to and vest per stirpes in my said grand-nieces and in the lawful issue of my said four nieces and in the lawful issue of any of my grand-nieces who may have died prior to the termination of this trust; and should all of my said nieces and grand-nieces die without lawful issue her or them surviving, then the property so held in trust shall go to and vest in my said nephews, Archie M. Edwards and John S. Edwards, or should they die prior to the termination of this trust, to their lawful issue, per stirpes, or as they, my said nephews, may by will designate." (Italics ours.)

Appellant claims that the part of the will italicized for convenience and reading, "Upon the death of the last of my four nieces in this Paragraph 8 above named, this trust shall cease and terminate, provided my said grand-nieces shall have attained the age of fifty years (or shall have died)," leaves the distribution of the property placed in trust under this paragraph subject to a condition that may never happen; that upon the death of the nieces the events mentioned in the proviso may not have occurred and for that reason is ineffective. If ineffective, then the trust sought to be created by paragraph 8 of the will is itself ineffective and invalid as violative of article 20, section 9, of the Constitution and section 715 of the Civil Code. The constitutional provision refers to the rule against perpetuities and the Code provision to the rule against the suspension of alienation.

The case presents only a controversy over the construction of language.

[1-3] It is apparent to us that decedent intended to dispose of all of her property by this will. It is also apparent that her primary intention in paragraph 8 was to provide an income for her nieces during their lifetime and for the younger generation, to wit, the daughters of her nieces, up to the ripe period of fifty years. After this had been accomplished she no longer sought to limit the use of her estate except to provide that it should be distributed to the heirs of those specifically mentioned in said paragraph. No other intention can be deducted from a careful reading of the whole questioned paragraph. Of course, while a will should be read so as to arrive at the intention of the maker, such intention must be fairly found from the wording of the will itself and courts cannot generally supply needed words or expressions nor dismiss from consideration words or expressions in order to arrive at the maker's intention. Then, too, construction of the English language is too inaccurate to arrive at the meaning of any phrase by a strict adherence to the dictionary definition of its component words or by isolating it from its context. On the other hand, no strained meaning can be attributed to any word or phrase used. Wills should be construed to validate them rather than to invalidate them.

[4] With these general principles in mind, and no authority seems necessary to support them, let us examine the paragraph and see whether or not the evident intention of the maker is within a reasonable interpretation of the language used. If we must conclude that the provision for terminating the trust is limited to the moment of death of the last surviving niece, then unquestionably the provision that the grandnieces shall either be dead or have then arrived at fifty years of age injects a condition precedent that may never be realized. But we think such a construction is contrary to the evident plan and, of course, acts to invalidate the whole paragraph and possibly paragraph 7 of the

will, though we are not here deciding that point. If, however, we look upon the paragraph as saying in effect, "I want to provide for each of my nieces during her lifetime and for each of my grand-nieces at least until she is 50 years of age, after that the property to be distributed to my surviving grandnieces or the lawful issue of my deceased grand-nieces," we have not only done no violence to the simple rules and logic of construction, but have read the paragraph so as to keep all of its provisions valid and so as to effectively sustain the unmistakable intention of the testator. It is a question of how much of the passage modifies the word "upon." Appellant asks us to hold that no part of the passage modifies "upon" excepting that which refers to the death of the nieces, but such a construction vitiates the whole trust plan. It is just as reasonable from the standpoint of construction and much more reasonable, when the whole paragraph is considered, to hold that all of the passage modifies the word "upon." That is, the trust ends when the nieces are dead, and it is also true when the grandnieces are either dead or over fifty years old. Otherwise the trust shall continue according to the other terms of the paragraph.

We think appellant's petition for distribution of a part of the estate to him as property left intestate was properly denied and that the order of the distribution which sustained the trust provisions of both paragraphs 7 and 8 was correct.

The orders are affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

126 Cal.App. 117

BRASHEARS v. GIANNINI.

Civ. 683.

District Court of Appeal, Fourth District, California.

Sept. 20, 1932.

1. Appeal and error ⇐628(2).

Appellate court would not dismiss appeal for lack of diligence in preparing transcript, where court officer's oversight caused delay (Code Civ. Proc. § 953a; Rule VI of Rules of Supreme Court and District Courts of Appeal).

2. Appeal and error ⇐628(2).

Where court officer's oversight caused delay in preparing transcript, respondent's remedy is to move trial court to terminate proceedings for preparing transcript, and, until terminated, appellate court will not dismiss appeal (Code Civ. Proc. § 953a; Rule VI of Rules of Supreme Court and District Courts of Appeal).

Appeal from Superior Court, Tulare County.

Action by M. W. Brashears against Frank Giannini. From the judgment, defendant appeals, and plaintiff files a motion to dismiss the appeal.

Motion denied.

Russell & Heid, of Tulare, for appellant.

Walker R. Flint, of Los Angeles, for respondent.

BARNARD, P. J.

The respondent has moved to dismiss the appeal taken in this action upon the ground of lack of diligence in preparing and filing a transcript of the proceedings in the trial court.

It may first be observed that the moving party has failed to make any showing, by certificate or by affidavit, that no proceeding for the preparation of a transcript is still pending in the trial court. Rule VI of Rules of the Supreme Court and District Courts of Appeal.

In opposition to this motion, a showing has been made that the appellant filed on March 30, 1932, a notice to prepare the transcript on appeal in accordance with section 953a of the Code of Civil Procedure, and that he thereafter made arrangements with the official reporter for the payment of his compensation for the preparation of said transcript. It further appears that, through some oversight or inadvertence, the official reporter was not informed of the filing of this notice to prepare transcript until August 23, 1932, and that upon the application of said official reporter the trial court entered an order extending the time in which to prepare said transcript to October 1, 1932. By affidavit and by the certificate of the clerk, it appears that proceedings for the preparation of said transcript are still pending in the trial court, and have not been terminated or ended therein.

[1, 2] While there has been considerable delay in the preparation of this transcript, it would appear that such delay has occurred through some oversight or inadvertence on the part of some officer of the court, and no fault on the part of the appellant is shown. The law is well settled that under such circumstances the remedy of the respondent is by way of a motion in the trial court for the purpose of terminating the proceedings for the preparation of such a transcript, and that until such proceedings have been there ter-

minated an appellate court will not dismiss the appeal. Mill Valley v. Massachusetts, etc., Co., 189 Cal. 52, 207 P. 253; Crocker v. Crocker, 76 Cal. App. 606, 245 P. 438; Engstrom v. Atkins, 102 Cal. App. 393, 283 P. 79.

For the reasons given, the motion is denied.

We concur: MARKS, J.; JENNINGS, J.

LUDWIG v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. *

Civ. 8452.

District Court of Appeal, Second District, Division 2, California.

Sept. 19, 1932.

Rehearing Denied Oct. 17, 1932.

Hearing Granted by Supreme Court Nov. 17, 1932.

1. Executors and administrators ⇐111(1).

Probate court cannot allow executors for extraordinary attorney's services, except upon application of attorney who has already rendered services (Probate Code, §§ 900, 910, 911).

2. Executors and administrators ⇐510(3).

Creditor *held* not entitled to certiorari restraining allowance to executors for reporter's transcript for resistance of appeal from judgment on creditor's exceptions to executors' account (Probate Code, § 900).

Creditor was not entitled to certiorari, since executors did not need to secure the permission of the court to make this expenditure, nor was the permission of the court a final determination of the propriety of the expenditure, so that no good purpose could be served by vacating the order allowing the reporter's transcript at the expense of the estate; the creditor having his remedy in his right to except to the item on final settlement of the executors' account, and the right to appeal from an adverse judgment on his exception.

Petition for certiorari by Clarence Ludwig against the Superior Court of the State of California, in and for the County of Los Angeles, and Haakon Berg and another, executors of the estate of Stephen M. Meyers, deceased.

Judgment in accordance with opinion.

Pottle & Pottle, of Los Angeles, for petitioner.

Charles R. Dyer and Mark A. Hall, both of Los Angeles, for respondents.

CRAIG, Acting P. J.

The executors of the estate of Stephen M. Meyers, deceased, filed with the Superior Court their first account and report, to which the petitioner interposed numerous exceptions, certain of which were overruled, whereupon said petitioner appealed and presented for settlement a proposed bill of exceptions. Thereafter the attorney for the executors made application for an order to procure the reporter's transcript of evidence adduced upon the hearing of the exceptions to said account and to employ special counsel to act in the place and stead of said counsel for the executors in resisting the appeal. This latter application was granted by the court below. The petitioner thereupon applied to this court for a review of such last-mentioned order, upon the ground, as stated by him, that the expenses of sustaining items of an executor's account which deprive an estate of money are not properly chargeable against the estate, and that the services of other counsel would not be rendered to said estate, nor would they be extraordinary services contemplated by the Probate Code.

[1] The respondents urge that articles 1 and 2 of chapter 15 (section 900 et seq.) of the Probate Code, and decisions upholding applications of executors or administrators for allowances of expenditures necessarily made for services and transportation of their counsel, justified the order in controversy in that respect. Section 900 (article 1) reads in part as follows: "The executor or administrator shall be allowed all necessary expenses in the care, management and settlement of the estate, and, for his services, the compensation hereinafter provided. * * *" Sections 910 and 911 (article 2), respectively, read as follows:

"Attorneys for executors and administrators shall be allowed out of the estate, as fees for conducting the ordinary probate proceedings, the same amounts as are allowed by the previous article as commissions to executors and administrators; and such further amount as the court may deem just and reasonable for extraordinary services.

"Any attorney who has rendered services to an executor or administrator, at any time after six months from the issuance of letters testamentary or of administration, and upon such notice to the executor or administrator and to the persons interested in the estate as the court or a judge thereof shall require, may apply to the court for an allowance upon his fees; and on the hearing the court shall make an order requiring the executor or administrator to pay such attorney out of the estate such compensation, on account of services rendered up to that time, as the court shall deem proper, and such payment shall be made forthwith."

It does not appear from the record before us that the executors' attorney claimed to have rendered services, nor that any attorney who had rendered services for which application to the court for an allowance upon his fees was authorized presented a claim therefor, upon notice or otherwise. In re Rose's Estate, 80 Cal. 166, 22 P. 86, 89, approved an allowance of a "credit for payments made for the services and traveling expenses of his [the administrator's] attorney, not exceeding a reasonable compensation for the labor actually performed," after the conclusion of two appeals. Other citations of respondents disclose no sanction of the allowance of a further amount for extraordinary services except upon application of an attorney who has rendered services to an executor or administrator. Painter v. Estate of Painter, 78 Cal. 625, 21 P. 433; Estate of Prather, 183 Cal. 314, 191 P. 521.

[2] The remaining question is as to whether or not an order should issue for a reporter's transcript, at the expense of the estate, for resistance of an appeal by a creditor. The executors did not need to secure permission of the court to make this expenditure. The giving of such permission, however, is not a final determination of the propriety of the expenditure nor of its being a proper charge. Since this is so, no good purpose can be served by vacating the order of which complaint is made. The petitioner has his remedy in his right to object to this item on final settlement of the executors' account, and if the question is then decided adversely to him, to an appeal from such decision. Estate of Smith, 118 Cal. 462, 50 P. 701.

The order is annulled as to the allowance of attorney's fees. With respect to the order for a reporter's transcript the writ is dismissed.

I concur: IRA F. THOMPSON, J.

126 Cal.App. 113

BROWN v. GOW.

Civ. 660.

District Court of Appeal, Fourth District, California.

Sept. 20, 1932.

1. Appeal and error ⇨801(5).

Appeal should be dismissed where question involved can be determined as unsubstantial from appellant's opening brief alone, but if examination of entire record is required dismissal should be denied (Rules of Supreme Court and District Courts of Appeal, rule 5, § 3).

Motion to dismiss appeal should be denied if unsubstantiality of appeal cannot be determined from consideration of appellant's opening brief, together with the assistance of argument of counsel for respondent and the points and authorities filed in support of the motion to dismiss, because otherwise it would make of the motion to dismiss, in reality, a motion to advance on the calendar of the appellate court, appeals there pending, and would require the reviewing court to twice examine the entire record.

2. Appeal and error ⇨801(5).

Motion to dismiss appeal as based on unsubstantial question *held* denied where determination of sufficiency and admissibility of evidence and whether error was prejudicial required examination of entire record (Rules of Supreme Court and District Courts of Appeal, rule 5, § 3).

Questions involved as set out in appellant's brief consisted of alleged errors in exclusion of certain book account, and of admission of certain receipts and checks without showing to whom such checks and receipts were delivered, or for what purpose, with appropriate reference to exhibits and to pages and lines of the reporter's transcript where the testimony referred to was to be found; error in declaring certain evidence immaterial because of production of other evidence; and question, although error may have been committed, whether such error was prejudicial to appellant's rights as to require a reversal of the judgment.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by M. E. Brown against Mabel Brightman Gow, as executrix of the last will and testament of Joseph R. Brightman, also known as J. R. Brightman, deceased. From the judgment, plaintiff appeals. On motion to dismiss appeal by plaintiff or affirm judgment of the superior court.

Motion denied.

Martin J. Coughlin, of San Bernardino, for appellant.

Zach Lamar Cobb and Earl A. Littlejohns, both of Los Angeles, for respondent.

JENNINGS, J.

[1] This is a motion to dismiss an appeal or to affirm the judgment of the trial court. The notice of motion filed herein specifies that the ground of the motion is that the questions upon which the decision of the

cause depends are so unsubstantial as to require no further argument and the appeal is entirely lacking in merit. It is further specified in the notice of motion that it will be based upon "Appellant's Opening Brief, the Clerk's Transcript, the Reporter's Transcript, and the Points and Authorities of respondent in support of this motion served and filed herewith."

The motion is presented pursuant to the provisions of the new section 3 of rule V of the rules of the Supreme Court and District Courts of Appeal, which became effective on July 1, 1932. Unsubstantiality of questions involved in the appeal is made the principal ground for invoking the power of an appellate tribunal wherein the appeal is pending to dismiss such appeal or to affirm the judgment or order from which the appeal is taken. If this unsubstantiality is apparent upon consideration of appellant's opening brief alone, invocation of the power to dismiss an appeal or to affirm a judgment is manifestly proper and in strict conformity with the obvious purpose of the rule, viz., the more rapid disposition of appeals. If, however, consideration of appellant's opening brief, together with the assistance furnished by the argument of counsel for respondent and the points and authorities filed in support of the motion to dismiss, does not enable the appellate court to arrive at a decision that the appeal lacks merit and final decision of the motion requires examination of the entire record, a different problem is presented. The logical effect of the latter procedure will be to make of the motion to dismiss, in reality, a motion to advance, on the calendar of the appellate court, appeals there pending. A second and not less important effect produced thereby is that in all cases where the motion to dismiss or to affirm is denied the reviewing court will be required twice to examine the entire record. While the expeditious disposal of appeals is a "consummation devoutly to be wished for," the adoption of a policy with respect to the rule under consideration whose effect will be, in many instances, to double the labors of the reviewing court and materially to increase the time required for examination of appeals, may well defeat the very end desired. It is, therefore, our opinion that when it can be determined from appellant's opening brief alone that the questions involved in the appeal are so unsubstantial as to require no further elucidation, a motion of the character here considered should be granted. If, however, in the ordinary case, the unsubstantiality cannot be thus determined and an examination of the entire record is required for such determination, a motion to dismiss or to affirm the judgment should be denied.

In the appellant's brief filed herein the questions involved are thus stated:

"I. Is the evidence insufficient to support the findings:

"a. That the amount paid plaintiff was the agreed and reasonable wage where the only evidence is admissions by deceased that he owed plaintiff a larger amount, and where amount paid is not the wage prescribed by law for women.

"b. That plaintiff's claim was paid, where only evidence is receipt which the uncontradicted and only evidence shows was given in connection with another transaction.

"II. That said findings are erroneous.

"III. Did the court err in excluding evidence as to book account kept by plaintiff, and in admitting checks and receipts without foundation as to whom or for what given."

[2] Consideration will first be given to the third of the above-stated questions. It is the contention of appellant that the court committed two errors in the exclusion and admission of certain evidence and that these errors warrant a reversal of the judgment. The first of the alleged errors consists of the exclusion by the court of a certain book account kept by appellant. The second error charged consists in the admission by the court of certain receipts and checks without showing to whom such checks and receipts were delivered, or for what purpose or to cover what accounts. Objection is also made that the court erred in admitting sixteen check stubs from the check book of respondent's testator without any showing that the checks corresponding with the stubs were ever delivered to appellant, or that they were paid. Respondent, on the other hand, states that a proper foundation for the admission of the receipts and checks was laid and cites the name of a certain witness who, it is claimed, testified that each receipt was signed by appellant and that each check offered in evidence bore her indorsement. It is also declared that a second named witness identified the signature of respondent's testator to each check. Appropriate reference is made to the exhibits and to the pages and lines of the reporter's transcript where the testimony to which reference is made is to be found. As to the stubs from the check book, it is declared that they were immaterial because of the production of other evidence which, it is claimed, showed payment to appellant by respondent's testator during the period when the checks corresponding to the stubs were issued. It is apparent that, for the proper determination of this question of the admissibility of the receipts, checks, and check stubs, examination of the record is required, first, for the purpose of discovering whether a proper foundation for the admission of the instruments was laid, and second, whether, although error may have been committed in their admission, such er-

ror was so prejudicial to appellant's rights as to require a reversal of the judgment therefor.

With reference to the first and second questions, we are likewise of the opinion that proper determination of them will require an examination of the entire record herein.

In accordance therefore, with our hereinabove announced view of the rule here considered, it is our opinion that respondent's motion should be denied. It is so ordered.

We concur: BARNARD, P. J.; MARKS, J.

126 Cal.App. 59

DE ALBERGARIA v. AMERICAN TRUST CO.

Civ. 8486.

District Court of Appeal, First District, Division 2, California.

Sept. 16, 1932.

1. Mortgages ⇐338.

Sale under trust deed continued in violation of restraining order, but not held until order was vacated, *held* valid as against collateral attack.

2. Mortgages ⇐357.

That assistant secretary of trustee under trust deed signed letter requesting postponement of sale under deed, as vice president, *held* no such lack of authorization of postponement by trustee as would invalidate sale.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by M. S. De Albergaria against the American Trust Company. From a judgment for defendant, plaintiff appeals.

Affirmed.

See, also, 10 P.(2d) 1016.

Welles Whitmore, of Oakland, and H. H. McPike, of San Francisco, for appellant.

Brobeck, Phleger & Harrison and Southall R. Pfund, all of San Francisco (G. Demmink, of San Francisco, of counsel), for respondent.

STURTEVANT, J.

From a judgment in favor of the defendant in an action to quiet title, the plaintiff has appealed and has brought up a bill of exceptions. The complaint was in the usual form. In its answer the defendant interposed some denials, and then it pleaded affirmatively facts showing that on December 10, 1929, it purchased the property at a sale held by the trustee named in a certain deed of trust. On the trial evidence was introduced showing that notice was given that the sale would be held on October 29, 1929. On the latter date the sale was continued until November 29, 1929. On the 27th day of November, 1929, an order to show cause was issued in an injunction case directing the defendants in that case to show cause on December 5, 1929, why an injunction pendente lite should not issue restraining the holding of the sale. Said order contained a passage as follows: "It is ordered that the defendants and each, and all of them, and all their servants, agents and attorneys, and all other persons acting in their behalf, do desist and refrain from selling or attempting to sell, or continuing the sale, of the real property, or any part thereof, described in that certain deed of trust dated the 19th day of September, 1928." The order was served on the trustee, and, when the hour fixed for the sale arrived on November 29, 1929, the trustee continued the holding of the sale until the 10th day of December, 1929. On the date last mentioned the sale was held.

[1] The plaintiff calls attention to the fact that the act of the trustee in continuing the sale from November 29, 1929, to December 10, 1929, was in violation of the language of the restraining order, and he claims that the sale was therefore void. In support of his contention he cites Cohan v. Shibley (Cal. App.) 289 P. 169; Bagley v. Ward, 37 Cal. 121, 122, 99 Am. Dec. 256; Farnsworth v. Fowler, 1 Swan (Tenn.) 1, 55 Am. Dec. 718; Keys v. Alligood, 178 N. C. 16, 21, 100 S. E. 113. No one of those authorities supports the contention. Where, as here, the attack is collateral, it has been held that, where an injunction had issued restraining the holding of a sale by a trustee under a trust deed, a sale in violation of the injunction was irregular but not void. Bagley v. Ward, supra; Keys v. Alligood, supra; Powell v. Bank of Lemoore, 125 Cal. 468, 472, 58 P. 83. Those cases go further than we are called upon to go because in the instant case the sale was continued in violation of the restraining order, but the sale itself was not held until after the restraining order had been vacated.

[2] The second point made by the plaintiff is that the sale was never postponed from October 29, 1929, to December 10, 1929. In this connection the plaintiff calls attention to the fact that Mr. A. C. McIntyre was an "assistant secretary of the American Securities Company." He also calls attention to a part of the record to the effect that on the 27th day of November, 1929, Mr. McIntyre by letter requested L. W. Beede to postpone the sale from November 29, 1929, to December 10,

1929, and that he signed the letter as assistant vice president. The plaintiff then argues that there is nothing in the record to show that the American Securities Company, trustee in the deed of trust, ever authorized or consented to a postponement of the sale of plaintiff's property under said deed of trust. The point is without merit. The American Securities Company, being a corporation, could act only through its officers and agents. The fact that Mr. McIntyre was assistant secretary was not inconsistent with the fact that he was also an assistant vice president. There was not a particle of evidence that he or any one else exceeded his authority.

On March 26, 1932, the defendant served and filed a notice of motion to dismiss this appeal. The hearing of that motion was continued and was submitted for determination at this time. In view of what has been said above, it becomes unnecessary to pass on the motion.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

HOPKINS v. GALLAND MERCANTILE LAUNDRY CO. et al. *

Civ. 8368.

District Court of Appeal, First District, Division 2, California.

Sept. 15, 1932.

Rehearing Denied Oct. 15, 1932.

Hearing Granted by Supreme Court Nov. 14, 1932.

1. Municipal corporations ⇐122(2).

Presumption exists, in passing on validity of ordinance or statute, that it is valid.

2. Municipal corporations ⇐122(2).

He who claims that ordinance is invalid must assume burden of showing its invalidity.

3. Municipal corporations ⇐703(1).

Ordinance providing that no pedestrian shall cross a roadway other than by a crosswalk when within central traffic district, and defining an "alley" as a street with a roadway less than 20 feet, *held* valid.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by H. B. Hopkins against the Galland Mercantile Laundry Company and another. From a judgment for defendants, plaintiff appeals.

Affirmed.

Walter E. Dorn, of San Francisco, for appellant.

O'Connor, Fitzgerald & Moran, of San Francisco, for respondents.

STURTEVANT, J.

[1, 2] The plaintiff commenced an action to recover damages for injuries suffered in an automobile collision. The action was tried before the trial court sitting with a jury. At the end of the defendants' case the defendants made a motion that the jury be directed to bring in a verdict in favor of the defendants. They based their motion on three grounds, one of which was the contributory negligence of the plaintiff. Confining its order to the ground last stated, the court granted the motion and the jury returned a verdict in favor of the defendants. From the judgment entered on the verdict the plaintiff has appealed and has brought up a bill of exceptions.

The accident happened in Stockton street between Sutter and Post in San Francisco. Stockton street runs north and south. Grant avenue is parallel to Stockton and is the next street to the east. Between Grant avenue and Stockton there is an alley known as Campton place. On the 30th day of November, 1929, the intersections of Sutter and Stockton and Post and Stockton were under such traffic regulations that the traffic during alternating periods was allowed to pass and then to stop. At about half past 8 in the morning of that day plaintiff left his hotel to go to a laundry. He passed along the west sidewalk of Stockton street toward the south until he arrived at a point directly opposite Campton place. He then started to cross Stockton toward the right-hand sidewalk of Campton place leading from Stockton to Grant avenue. At the same moment the defendants' truck which had been standing near the sidewalk opposite the western end of Campton place started to back. As it did so it hit the plaintiff, causing the injury complained of. It was stipulated that the territory where the accident happened was located in a central traffic district. The defendants introduced in evidence Ordinance No. 7691, which was then in full force and effect. That ordinance provides that no pedestrian shall cross a roadway other than by a crosswalk when within the central traffic district; that a "roadway" is that portion of a street between the regularly established curb lines; that a "crosswalk" is that portion of a roadway included within the prolongation of curb and property lines and street intersections; that an "intersection" is the area embraced within the prolongation of the property lines of two or more streets which join at an angle; that an "alley" is a street with a roadway

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 21 P.2d 553.

less than twenty feet and that a street is the roadway set apart for public travel except alleyways. The defendants called as a witness a certain engineer from the city engineer's office, who testified that he had recently measured Campton place and that at the easterly property line of Stockton street the width was 19 feet 4 inches; that 50 feet east of that point the width was 19 feet 8 inches; and 100 feet east of that point the width was 19 feet 5 inches. If Ordinance No. 7691 is a valid enactment, it follows that at the place where he was injured the plaintiff was there in violation of the terms of the ordinance and that he was guilty of contributory negligence as a matter of law. But the plaintiff contends that the ordinance is unreasonable and void. In that connection he argues that a pedestrian cannot know the intersection he is entitled to cross unless he carries a yardstick and first measures it. It will be conceded that the argument is forceful. However, the defendants reply that the use of measurements of distance in regulatory enactments on the subject of traffic regulations is not unusual but quite common. They might also add quite necessary. Continuing, they enumerate other enactments, both civil and criminal, in which certain measurements are adopted regarding the dimensions of buildings, the value of property, and the weights of articles. It is not claimed that Campton place is the only thoroughfare in San Francisco that is less than 20 feet in width. On the other hand, it is stated in the briefs that there are hundreds of similar intersections. In passing on the validity of an ordinance or a statute it will be presumed that it is valid. He who would claim that it is invalid must assume the burden of showing its invalidity. 42 C. J. 623. Neither party cites an authority that is directly in point. In the time we have had to investigate the subject we have not found one. However, cases are numerous that are very helpful.

In the case of Euclid, Ohio, Village of, v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A. L. R. 1016, the court was called upon to pass on the validity of a zoning ordinance. It was claimed that the zoning ordinance enacted by the village of Euclid was unreasonable. By the terms of that ordinance it applied or did not apply according to numerous measurements of length, breadth, and height. Commencing on page 386 of 272 U. S., 47 S. Ct. 114, 118, the court said: "Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall."

In the case of Snyder v. Campbell, 145 Miss. 287, 110 So. 678, 49 A. L. R. 1402, the Supreme Court of Mississippi was called upon to pass on the validity of the provisions of the traffic ordinance of the city of Laurel. That ordinance provided that crosswalks would be marked at certain intersections and that it was unlawful for pedestrians to cross the marked streets at other places. It was contended the ordinance was unreasonable. The court cited the Euclid Case, quoted from it, and held the ordinance to be reasonable.

In the case of People's Rapid Transit Co. v. Atlantic City, 105 N. J. Law, 286, 144 A. 630, the court was called upon to consider an ordinance which prohibited certain autobuses from driving on or using certain streets at any time. There, as here, it was claimed that the ordinance was unreasonable; however, after a careful consideration of the authorities, the court held that the attack was not well founded.

In Village of Wonewoc v. Taubert, 203 Wis. 73, 233 N. W. 755, 72 A. L. R. 224, the Supreme Court of Wisconsin was considering an ordinance which required automobiles to be parked on the center line of the street. It was claimed the ordinance was unreasonable. On page 757 of 233 N. W., 203 Wis. 73, the court quoted as follows: "The plaintiff's contention, when reduced to its last analysis, is that, under this act of the Legislature, all automobile owners and drivers are given full license to stop their cars upon the public streets when and where they please and for such a length of time as suits their pleasure and convenience, and to leave them standing there,

though to the great prejudice and inconvenience of the general public desiring to use the streets for their primary purposes; and the city whose duty it is to keep the streets open and free from nuisance, is rendered as helpless as the shackled prisoner at the bar. The mere statement of the proposition is its own answer."

[3] The very subject-matter of a traffic ordinance of necessity deals almost solely with courses and distances. Witness the testimony in every action based on a collision of automobiles. The regulation of traffic is itself a compilation of certain regulatory measures regarding courses and distances. California Vehicle Act, §§ 106, 107, 109, 113, 127, 128, 136, 138, et seq. (St. 1923, p. 517 et seq., as amended). The necessity of carrying a yardstick is no more burdensome with reference to one regulation than with reference to another regulation. Counsel cite us to no method of regulation that is more reasonable. None occurs to us.

It follows that the judgment should be affirmed. It is so ordered.

We concur: NOURSE, P. J.; SPENCE, J.

126 Cal.App. 118

GENERAL MILL & LUMBER CO. v. ROBERTSON et al.

Civ. 8532.

District Court of Appeal, First District, Division 1, California.

Sept. 21, 1932.

Principal and agent ⇐189(1).

Complaint alleging that defendant was agent of, and acting for, codefendant at all times mentioned *held* sufficient to charge latter as principal.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by the General Mill & Lumber Company against H. L. Robertson, Arabelle Siemsen, and others. From a judgment against defendant Siemsen, she appeals.

Affirmed.

True Van Sickle, of Oakland, for appellant.

L. L. Steele, of Oakland, for respondent.

GEORGE H. THOMPSON, Justice pro tem.

The plaintiff, General Mill & Lumber Company commenced action in the lower court on three separate counts of its complaint, to establish indebtedness against the said defendants and to foreclose against the said defendants liens set forth in the said three counts. To the said complaint and to each count thereof the said defendant Arabelle Siemsen filed an answer. During the course of the trial of said action, said plaintiff dismissed said action as to the real property described in the complaint and abandoned its action for foreclosure of the respective liens.

The said action was tried upon the issues raised by plaintiff's complaint and defendant's answer thereto. The court upon the submission of said cause of action rendered personal judgment in favor of the plaintiff and against said defendant Arabelle Siemsen on two counts. As to the other count, the court found that the plaintiff was not entitled to personal judgment against the defendant Arabelle Siemsen. The personal judgment so rendered against the defendant Arabelle Siemsen was rendered by the court upon its finding and determination that H. L. Robertson was the agent of Arabelle Siemsen in the purchase of the material and in the employment of labor used in the construction of an apartment building built on her premises. It is contended by the appellant that H. L. Robertson was not the agent of said defendant, but was in fact and in law an independent contractor under a contract with the said defendant in the nature of a cost-plus contract, and it is also contended that the court's finding that said H. L. Robertson was the agent of defendant in the premises is unsupported by either pleading or proof.

In connection with the objection that there was an insufficient pleading that Arabelle Siemsen was principal and that H. L. Robertson was her agent, it must be said that paragraph VIII of the first count of the complaint —repeated in each of the other two counts— reads as follows: "That at all times herein mentioned the above named defendant, H. L. Robertson, was the duly authorized and acting agent of the above named defendant, Arabelle Siemsen, and at all times herein mentioned was acting for and on her behalf." Such a pleading has been held sufficient to charge the principal. See Cochran & Van Winkle v. Goodman, 3 Cal. 244, where it is held that a declaration setting forth that plaintiff had purchased goods from W. & P. "then and there acting as the agents for defendant" is only another form of declaring that he had purchased from the defendant and is sufficiently certain to prevent any misapprehension of its meaning and is good on demurrer. That declaration is also responsive to the objection of the appellant on like ground to the finding of the court.

As to the proof bearing on the question whether H. L. Robertson was an independent contractor on the cost-plus or other basis or

the agent and representative of Arabelle Siemsen in the matters involved herein, we have by reason of the contention of appellant carefully read the record, and while we find presented a situation somewhat unusual in the way of contract, nevertheless it is apparent that the question to be answered in this aspect by the trial court was a mixed question of law and fact under all the evidence in the case (Luckie v. Diamond Coal Co., 41 Cal. App. 468, 183 P. 178), and we think the evidence is sufficient to support the court's finding and conclusion that H. L. Robertson was acting for Arabelle Siemsen as her agent and managing superintendent, and that he was not an independent contractor. As to agency, see 1 Cal. Jur. § 131, p. 854; Schader v. White, 173 Cal. 441, 160 P. 557; Eldridge v. Mowry, 24 Cal. App. 182, 140 P. 978; Puget Sound Lumber Co. v. Krug, 89 Cal. 237, 243, 26 P. 902.

We do not feel warranted in disturbing the judgment of the trial court. The said judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

126 Cal.App. 109

SNIDER v. SEVERANCE et al.

Civ. 8449.

District Court of Appeal, First District, Division 2, California.

Sept. 20, 1932.

Schools and school districts ⇐133.

Probationary school teacher refusing to accept contract for following school year, and not applying for reinstatement until two months after school opened, had no claim as to future tenure (School Code, §§ 5.401, 5.402, 5.640).

Probationary school teacher under such circumstances had no claim for future tenure even though she had not resigned within the purview of School Code, § 5.640, and notwithstanding section 5.401, providing that if the board took no action prior to June 10th, teacher would be deemed re-elected from year to year, since the board, if it saw fit not to rely upon section 5.401 nor to cause teacher to rely thereon, had the implied power under section 5.402 to re-elect her, which it did, and which re-election teacher, by her words and acts, voluntarily declined.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Marguerite J. Snider, formerly known as Marguerite J. West, for writ of mandate to compel H. D. Severance and others, as the Board of Trustees of Monterey Grammar School, to assign petitioner to classes as probationary teacher. From judgment for defendants, petitioner appeals.

Affirmed.

Piccirillo & Wolf, of San Francisco, and Anthony Brazil, of Pacific Grove, for appellant.

C. F. Lacey, of Salinas, for respondents.

STURTEVANT, J.

The petitioner commenced a proceeding to obtain a writ of mandate directed to the defendant Board of Trustees of Monterey Grammar School commanding it to assign the petitioner to her classes as a probationary teacher. The trial court made findings in favor of the defendants and from the judgment entered thereon the petitioner has appealed.

The findings made by the trial court were as follows:

"I. That prior to May 1st, 1931, the petitioner resigned from the employment referred to in the petition, which resignation was to take effect at the end of that school year, to-wit, June 12th, 1931.

"II. That the averments of Paragraph II of the Answer are true." (Paragraph II was as follows: "The respondents allege that at the commencement of the school year of 1931–1932, to-wit, on August 31st, 1931, the petitioner absented herself and failed to report for duty as teacher in the school referred to in the petition.")

"III. That prior to June 10th, 1931, the petitioner declined and refused the employment referred to in the petition for the school year of 1931–1932, and notified the respondents that she did not intend to teach longer at the school referred to in the petition and declined and refused to accept further employment, after June 12th, 1931, as teacher by the respondents.

"IV. It is not true that at the commencement of the school year 1931–1932, to-wit, on August 31st, 1931, the petitioner reported for duty as a probationary teacher, and it is not true that prior to October 26th, 1931, the petitioner ever demanded of the respondents, or of either of them, that she should be employed as teacher or assigned as teacher in the school referred to in the petition."

The petitioner attacks portions of findings No. I and No. III. She says: "The findings of the trial court we assert are based on evidence which is contradictory and which we challenge as to questions of law." The defendants reply: "Under the constitution, our courts of appeal have appellate jurisdiction only of questions of law. While the question

of whether there is any evidence to justify a verdict or findings presents an issue of law, the moment that a conflict in the evidence appears, there is no longer any question of law presented for the consideration of an appellate court." Continuing, the defendants state there is therefore nothing to discuss. The reply is sufficient, but we think the case does not even present a conflict as to material points.

During the school year 1930–31 the petitioner was employed by the defendant board and she acted as one of the teachers. No question regarding her efficiency was involved. Mr. J. H. Graves was the superintendent of the Monterey Grammar School District. Subject to the ratification of the board of trustees he employed the teachers. The contract of employment was made by the use of a blank including two parts. The first part notified the teacher of his or her employment and was signed by the clerk of the board. The second part was in the form of an acceptance, and contained a blank line for the signature of the teacher. Said contracts were made in triplicate. On the 23d day of April, 1931, Mr. Joseph, the principal of Monterey Grammar School, received triplicate contracts for each teacher to be employed during the year 1931–32. He presented to the petitioner the triplicate copies which had been signed by the clerk of the board and asked the petitioner to sign the acceptance. She stated that she was not ready to do so, that she intended to get married and on the opening of the new term she would be a married woman, and that she desired to inform the superintendent. Thereupon Mr. Joseph picked up the blanks and later reported to Mr. Graves. On May 1, 1931, the petitioner called on Mr. Graves and personally told him of her intentions and of her desire to continue in her position. Mr. Graves stated that he was opposed to employing more married women, but that the board of trustees was the employing power and that he would lay the matter before the board. He did so and the next day the petitioner called and asked what action the board had taken. He informed her and thereupon she left. When Mr. Joseph returned the blank contracts to Mr. Graves the latter tore them up and at once commenced a correspondence to obtain a teacher in the petitioner's place. The petitioner vigorously complains because Mr. Graves tore up those unexecuted forms of contract. The record discloses that they were printed blanks. We may assume that Mr. Graves had others to be furnished on application. Moreover, it is perfectly plain that a much more perfect document could have been written by the petitioner or any one else in a very few minutes. However, at no time did the petitioner execute anything purporting to be an acceptance, tender it, and ask to be recognized as a teacher. On August 21, 1931, she appeared at the superintendent's office and asked to be placed on the substitute list. The permission was granted and she was afterwards called and acted as a substitute on October 26, 1931. The school term opened August 31, 1931, and at no time did the petitioner appear or act as a probationary teacher. She took no action whatsoever until October 23, 1931, nearly two months after the school had commenced, and then she addressed to the defendant board a letter in which she asked it "to reinstate me as a probationary teacher. * * *" At this time the petitioner contends that the foregoing facts did not constitute a resignation. She argues that the defendant board did not accept her resignation and that it did not fix the time when such resignation should take effect and therefore that no resignation occurred. School Code, § 5.640. No resignation was necessary. She had been elected for one year. Before the end of that year she was elected for the next year, but she refused to accept that election. Thereupon she ceased to have any claim as to future tenure. Under the contract of employment which the petitioner held April 23, 1931, she was classified as a probationary employee. She was, under the law, required to hold, and did hold, a certificate. If the defendant board took no other action prior to June 10, 1931, she would be "deemed reelected from year to year." Section 5.401. If the defendant board saw fit not to rely on the statute nor to cause the plaintiff to rely on the statute it had the power to re-elect her. That power is clearly implied in section 5.401, which is as follows: "Persons in positions requiring certification qualifications may be elected on or after May second for the next ensuing school year, and each person so elected shall be deemed reelected from year to year except as hereinafter specified." Section 5.402 is as follows: "Any person not under permanent tenure who shall fail to signify his acceptance within twenty days after notice of his election or employment shall have been given him * * * shall be deemed to have declined the same." It likewise implies the power. No section cited to us in any way denies it. If, when notified of such action by the board, this petitioner had said, "No thank you, I am going to get married," no one would have contended that such statement was otherwise than a voluntary declination of employment during the ensuing year. She did not say, "No thank you," but the trial court had the right to place that meaning on the words she used, when taken in connection with her subsequent acts.

We find no error in the record.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J

125 Cal.App. 714

REED v. BOARD OF EDUCATION OF MONTEREY UNION HIGH SCHOOL DIST. et al.

Civ. 8496.

District Court of Appeal, First District, California.

Sept. 12, 1932.

Rehearing Denied Oct. 11, 1932. Hearing Denied by Supreme Court Nov. 10, 1932.

1. Mandamus ⇐168(4).

Evidence showed that prior to June 10th, high school teacher received no written notice declaring her position vacant (School Code, §§ 5.401, 5.681, 5.682).

2. Schools and school districts ⇐141(5).

That copy of resolution of board of education declaring high school teacher's position vacant was mailed without registration June 8th and received by her June 15th, *held* ineffective discharge, and teacher was automatically re-elected for ensuing year (School Code, §§ 5.401, 5.681, 5.682).

School Code, §§ 5.681, 5.682 provide that on or before the 10th day of June, the governing board may give notice in writing to a probationary employee that his services will not be required for the ensuing year, and such notice shall be deemed sufficient and complete when delivered in person to such employee by the clerk, or deposited in the United States registered mail with postage prepaid, addressed to such employee at his last known place of address, and section 5.401 provides that, when such notice is not given, the teacher is deemed re-elected from year to year.

Appeal from Superior Court, Monterey County; Harry J. Falk, Judge.

Action for writ of mandate by Hattie Belle Reed against the Board of Education of the Monterey Union High School District and others. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

C. F. Lacey, of Salinas, for appellants.

Lemuel D. Sanderson, of San Francisco, for respondent.

NOURSE, P. J.

Plaintiff sued for mandamus to compel the defendants to reassign her to duty in the Monterey High School. She had judgment and defendants appeal upon typewritten transcripts.

The trial court found that plaintiff had been employed as a teacher for three consecutive school years prior to June 11, 1931, and that on June 15, 1931, she received a letter from the clerk of the board of education by ordinary unregistered mail declaring her position vacant. The conceded facts are that prior to June 6, 1931, the respondent had numerous conversations with the superintendent of schools and with the principal of the high school in which she was informed that the board appeared unfavorable to re-electing her for the ensuing term. The superintendent suggested that she resign. She refused. He suggested that her work as a teacher was unsatisfactory; but no charges were filed and no intimation was given by the board that her work was not satisfactory. She obtained from the superintendent and from the principal flattering recommendations of her character and ability as a teacher. These were given with the knowledge that they were to be used publicly in seeking similar employment in the schools of this state. She notified the superintendent that she would attend the summer session at the University of California in Berkeley and left for that purpose on June 9th. On June 6th the board of education passed a resolution purporting to declare her position vacant. A copy of this resolution was mailed without registration to respondent at her old address on June 8th. It was forwarded to Berkeley and received by respondent on June 15th. No other notice was sent or received.

The statute applicable to this proceeding (School Code, §§ 5.681, 5.682) provided that "on or before the tenth day of June in any year the governing board may give notice in writing to a probationary employee that his services will not be required for the ensuing year." "Such notice shall be deemed sufficient and complete when delivered in person to such employee by the clerk * * * or deposited in the United States registered mail with postage prepaid, addressed to such employee at his last known place of address." When such notice is not given as required by the statute, the teacher is "deemed reelected from year to year" (School Code, § 5.401).

[1] The language of the statute is plain and requires no interpretation. Its application to the facts of this proceeding is equally clear. No written notice was personally delivered to the respondent nor addressed to her through the registered mail. As the notice must be in writing all the evidence of oral conversations with the superintendent and others is beyond the issues. Whether written notice was in fact received by the respondent prior to June 10th was a clear question of fact which the trial court determined adversely to appellants. The evidence fully supports this finding and this closes the inquiry on this appeal.

The case is controlled by Blalock v. Ridgway, 92 Cal. App. 132, 267 P. 713, in which the facts are practically identical. Steele v. Board of Trustees (Cal. App.) 9 P.(2d) 217, is not in conflict. There the conceded facts were that a written notice was actually received prior to June 10th. Here the facts and the findings are to the contrary. Two things must concur: The notice must be in writing and must be delivered to the teacher or deposited in the registered mail prior to June 10th. Failure in either respect is an insufficient notice under the statute which automatically re-elects the teacher for the ensuing year. Under certain circumstances, actual receipt of the written notice prior to June 10th, as discussed in the Steele Case, may work an estoppel upon the teacher. But such circumstances are not present here.

[2] Appellants complain that the trial court refused to permit them to try the qualifications of respondent and they urge that she must show that she had served as a successful teacher throughout the preceding year. This is a false issue in this proceeding. The statute provides a clear method whereby the board may dismiss a teacher for incompetence. The board failed to follow that method. The single issue before the trial court was whether the respondent had been re-elected automatically by reason of the statute.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

126 Cal.App. 15

DIETLIN v. MISSOURI STATE LIFE INS. CO. (two cases). *

Civ. 8371.

District Court of Appeal, First District, Division 2, California.

Sept. 15, 1932.

Rehearing Denied Oct. 15, 1932.

Hearing Denied by Supreme Court Nov. 14, 1932.

1. Insurance ⇐665(5).

Evidence showed that disability of plastering contractor who fell from scaffolding on February 18, 1929, was partial, not total after November 22d, within accident policy.

2. Insurance ⇐665(5).

Evidence supported finding that continuing partial disability after November 22, 1929, of plastering contractor who fell from scaffolding on February 18th, resulted from injuries independently and exclusively of all other causes entitling contractor to indemnity under accident policy.

3. Insurance ⇐530.

Allowing insured who had operation on each foot twice the amount specified in schedule for operation on "bones of foot" *held* erroneous where policy limited payment of surgical indemnities to largest amount specified in schedule for any one operation.

4. Insurance ⇐146(1).

In construing life policy, all of its terms must be read together.

5. Insurance ⇐155.

No presumption exists that parties intended that life policy provision that total disability existing continuously for not less than three months shall be presumed to be permanent should be rebuttable presumption.

> The word "presumed" is defined as to take or suppose to be true, or entitled to belief without examination or proof, or on the strength of probability; to take for granted; to infer; suppose.
>
> [Ed. Note.—For other definitions of "Presume," see Words and Phrases.]

6. Insurance ⇐516.

Provision in life policies that total disability existing continuously for not less than three months shall be presumed to be permanent *held* conclusive, not rebuttable presumption when read with other provisions.

> Life policies provided that total disability must be such as to prevent the insured then and at all times thereafter from engaging in any gainful occupation, and as so defined, total disability which exists and has existed continuously for not less than three months shall be presumed to be permanent, and thereafter the company may demand of the insured proof of the continuance of such disability and the right to examine his person, and the company's liability was to cease, if it appeared that the insured has recovered so as to be able to engage in any gainful occupation.

7. Insurance ⇐146(3).

In construing life policies any doubt must be resolved in assured's favor.

8. Insurance ⇐665(5).

Evidence showed that plastering contractor who fell from scaffolding on February 18, 1929, was totally and permanently disabled up to November 22d, but not thereafter within meaning of life policies.

Appeals from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Two actions by Eugene Dietlin against the Missouri State Life Insurance Company.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Rehearing denied 15 P.(2d) 188.

From judgments in favor of plaintiff, defendant appeals.

Reversed.

Myrick & Deering and Scott, of San Francisco, for appellant.

Edmund J. Holl, of San Francisco, for respondent.

SPENCE, J.

Plaintiff brought two actions seeking to recover on three insurance policies issued by the defendant company. One of these actions (superior court No. 212,855) involved an accident insurance policy and the other (superior court No. 217,765) was based upon two life insurance policies. The actions were consolidated and tried by the court sitting without a jury. Separate judgments were entered in favor of plaintiff, from which judgments defendant appeals upon a bill of exceptions.

Both actions involved the rights of plaintiff under the disability clauses of the policies and we will first outline the nature of plaintiff's injuries and disability as disclosed by the evidence. Plaintiff was a plastering contractor and in his application for the accident policy he "fully described" his occupation and the duties thereof as "Plastering Contractor—Office, Estimating and Supervising Duties Only." On February 18, 1929, and while all the policies were in force, plaintiff fell from a scaffolding and sustained injuries consisting of fractures of both heel bones and a wrenched back. He was confined to a hospital for approximately four months and about a month thereafter was able "to get around." Upon the advice of his physician he then went to the country "where it was warm and where he could walk on soft ground." He remained in Healdsburg for about four months and returned to his home on November 22, 1929. Any disability remaining after he returned was due to the condition of the left foot. The evidence shows that, even at the time of the trial in December, 1930, there had not been a complete recovery in said left foot. There was limitation of motion and some pain with the result that there was some disability. The testimony of both plaintiff and his physician indicated, however, that, since plaintiff returned to his home in November, 1929, he could do many things. He could walk about, but his physician testified that, due to the left heel, he did not believe that plaintiff "could walk uninterruptedly for more than twenty blocks." He could drive an automobile, but the doctor did not "believe a heavy truck could be driven continuously all day by him." Regarding his ability to perform the duties of supervising plastering work, his physician testified: "He will be able to do everything except climb scaffolds and ladders." His physician was then asked: "As far as the work of a contracting plasterer goes, he can do anything in the world except climbing a scaffold, is that about it?" To this question he answered: "As far as I know his duties, if his duties are not too strenuous—for instance I should not think he could carry big beams or things of that sort, but as far as I understand his duties, yes." With reference to his office work, plaintiff himself stated, "There is nothing whatever that would interfere with my doing that." He was asked: "Aside from your left foot what is the matter?" He answered: "There is nothing the matter."

About six months after the foregoing testimony was taken, the case was reopened for further testimony over the objection of defendant. The evidence then introduced showed that plaintiff's physician had since deemed it advisable to perform a further operation on the left foot and had done so. At the time of taking this testimony he still did not think that plaintiff could climb a scaffold, but his prognosis was that plaintiff would be able to resume all of the duties of his occupation in four or five months. He further testified: "The disability under which this man is laboring is a lack of flexibility of the foot because of loss of motion, of sideways motion. So far as carrying sacks of cement or climbing scaffolding, those things I believe he can not well do." It may be here noted that although the testimony showed that the climbing of scaffolds was one of the duties pertaining to plaintiff's occupation, there was no testimony showing that he was required to or did in fact at any time walk any great distances, drive a heavy truck, or carry big beams, sacks of cement, or other heavy objects in connection with his occupation. And it may be further noted that some of such acts would not in any event be in line with the statement of duties as given in respondent's application under which statement of restricted duties he was classified in the policy as one engaged in a "selected ordinary" occupation.

No payments were made by defendant under the life policies, but, after the accident, defendant commenced payment under the accident policy paying a total disability indemnity covering twenty-two weeks and one day in the total sum of $1,107.14, and also hospital indemnity in the sum of $750. Although conceding that further sums were due under the accident policy, a dispute apparently arose as to the totality and permanency of the disability. Thereupon these actions were filed. Briefly stated, plaintiff took the position that at all times after the accident and up to the time the judgments were entered, he was totally disabled within the meaning of the accident policy and that he was totally and permanently disabled within the meaning of the life policies and therefore entitled to the full disability benefits under all of said policies. The trial court so found and concluded and entered judgment accordingly.

Appellant attacks the findings in several particulars, but practically all of the questions raised on this appeal involve an interpretation of the disability clauses of the policies involved. We shall therefore proceed to consider these clauses, first taking up those contained in the accident policy.

The Accident Policy.

The accident policy insured respondent "against loss resulting from bodily injuries effected directly and independently of all other causes solely through accidental means." The disability indemnity clauses were as follows:

"Total disability. If such injuries, independently and exclusively of all other causes, shall wholly and continuously disable the Insured from date of accident from performing any and every kind of duty pertaining to his occupation, the company will pay, so long as the insured lives and suffers such total disability, the weekly indemnity hereinafter specified.

"Partial disability. Or, if such injuries, independently and exclusively of all other causes, shall wholly and continuously disable the insured from date of accident from performing one or more important daily duties pertaining to his occupation, or for like continuous disability following total loss of time, the company will pay, during the period of such disability, but not exceeding fifty-two consecutive weeks, a weekly indemnity of one-half of the amount payable per week for total disability."

[1] Appellant concedes that respondent was totally disabled within the meaning of this policy for some time after the injury. That he was totally disabled while in the hospital cannot be questioned, and appellant has conceded that such total disability may be said to have continued during the entire time that respondent was in the country where he was advised to go by his physician. Appellant contends, however, that any disability existing after November 22, 1929 (the date upon which he returned from the country), was partial rather than total within the meaning of the policy, and that the finding that the disability existing after that date was total is not sustained by the evidence. In our opinion this contention must be sustained. A review of the evidence offered by respondent in support of his claims convinces us that there was no evidence whatever to support the findings to the effect that respondent's disability was total within the meaning of the accident policy after November 22, 1929, and up to the time the case was called for trial. Any disability during that period was due solely to the condition of respondent's left foot. The testimony affirmatively showed that from November 22, 1929, until the trial in December, 1930, respondent could perform "any and every duty pertaining to his occupation" except that his physician did not believe that he could climb scaffolds and ladders. It must be remembered that the duties of respondent's occupation as fully described by him in his application consisted of "Office, Estimating and Supervising Duties Only." His testimony showed that climbing scaffolds and ladders constituted one of the duties pertaining to his occupation, but such acts by no means constituted all or even a substantial portion of such duties. Although the evidence was sufficient to show that after November 22, 1929, he was disabled from performing "one or more important daily duties pertaining to his occupation," such disability was clearly a partial disability and not a total disability as defined in the policy as he was not disabled from performing "any and every duty pertaining to his occupation." Numerous authorities have been cited by both sides on the interpretation of disability clauses but we find none directly in point. No case has been called to our attention construing the precise language employed in the accident policy in question. The language employed in the disability clause of the accident policy seems entirely clear in its application to the facts in the present case, and we find no uncertainty or ambiguity which would bring into play the rule of liberal construction in favor of the assured.

[2] In our opinion appellant's further contention to the effect that respondent was not entitled to even partial disability indemnity under the accident policy after November 22, 1929, cannot be sustained. Appellant argues that the continuing partial disability after that date was not due alone to the injuries but to arthritis, and that there is no liability under the policy as the continuing partial disability did not result from the injuries "independently and exclusively of all other causes." Appellant's position does not find support in the record. There was some testimony regarding arthritis and the effect thereof on respondent's condition, but we need not discuss it for appellant's physician gave his opinion that, regardless of any arthritic complications, the fracture of the left heel alone would have disabled respondent up to the time of the trial. This evidence was sufficient to support the finding that the continuing partial disability resulted from the injuries "independently and exclusively of all other causes."

We therefore conclude that respondent was entitled under the accident policy to total disability indemnity up to November 22, 1929, and to partial disability indemnity for fifty-two weeks following the total disability, being the limit of time provided in the policy for partial disability indemnity.

In the briefs counsel for respondent lays stress upon the fact that between the time

that evidence was presented in December, 1930, and the time that the cause was reopened for further evidence in June, 1931, respondent was totally disabled for a time by reason of a further operation. Appellant argues that the condition requiring the further operation was due to arthritic complications and not to the injuries "independently and exclusively of all other causes." In view of our conclusion that respondent was only partially and not totally disabled for more than fifty-two weeks following November 22, 1929, we deem it unnecessary to discuss the cause or causes of the alleged subsequent total disability. In order to recover for any period of total disability under the terms of the policy, it was necessary to show that the assured was "wholly and continuously" disabled from the date of the accident. Even if it be assumed that the alleged total disability following the partial disability resulted solely from the injuries, respondent would not be entitled to the total disability indemnity for such subsequent total disability under the terms of the policy.

[3] One further point should be considered with relation to the accident policy. The policy provided for surgical indemnities in specified amounts for various types of operations. It further provided that "if more than one such operation should be performed on account of such injuries sustained in any one accident, the limit of payment under this Part E shall be the largest sum Specified in the schedule for any one operation." As a result of the accident, respondent had two operations, one on each foot, and the trial court allowed twice the amount specified in the schedule for an operation on "Bones of Foot." This was erroneous as the policy clearly limits the payment of surgical indemnities to the "largest amount specified in the schedule for any one operation so performed."

The Life Policies.

The disability clauses contained in the life insurance policies are essentially different from the above quoted clauses found in the accident policy. These provisions contained in both of the life insurance policies were as follows:

"Total and permanent disability benefit. The Company will pay to the insured a life income of Ten Dollars each month for each $1,000 of the face amount hereof if the said insured shall become totally and permanently disabled, as hereinafter defined, before attaining age sixty. The first payment of such income shall be made immediately upon receipt by the Company of due proof of total and permanent disability, and subsequent payments shall be made monthly thereafter as long as the insured lives and suffers such disability, and shall be in addition to all other benefits provided by this policy.

"Total and permanent disability may be due either to bodily injuries or to disease, which must occur and originate while this policy is in full force after the first premium has been paid, and must be such as to prevent the insured then and at all times thereafter from engaging in any gainful occupation. Total Disability, as defined above, which exists and has existed continuously for not less than three months shall be presumed to be permanent. At any time after approval by the Company of the aforesaid proof and from time to time, but not oftener than once a year after disability has continued for two full years from the date of approval, it may demand of the insured proof of the continuance of such disability and the right to examine the person of the insured. Upon failure to furnish such proof or if it appears that the insured has recovered so as to be able to engage in any gainful occupation, the Company's obligations to pay further Disability Benefits shall cease and the insured shall be required to pay the premiums becoming due on this policy thereafter in accordance with the original terms hereof."

It is appellant's contention that the evidence is insufficient to support the findings to the effect that respondent was "totally and permanently" disabled within the meaning of the life policies, and that therefore respondent was not entitled to any disability benefits thereunder. Upon this subject both appellant and respondent have called our attention to numerous authorities interpreting the "total and permanent" disability clauses of insurance policies. We recently had occasion to review the authorities upon this subject and pointed out in Bagnall v. Travelers' Insurance Company, 111 Cal. App. 714, 296 P. 106, 107, that these authorities are not in accord. We deem it unnecessary, however, to prolong this opinion by a discussion of these authorities as our search has led us to the conclusion that the apparent conflict is attributable to a large extent to the varying terms of the policies considered. It is quite obvious that there is no standard form of "total and permanent" disability clause used in the policies issued by the numerous companies writing such insurance, and no case has been called to our attention construing the clauses embodied in the policies in question. In the Bagnall Case, supra, the policy provided for benefits "upon due proof that * * * the insured has become wholly disabled by bodily injuries or disease and will be continuously and wholly prevented thereby for life from engaging in any occupation or employment for wage or profit." The life policies in the present case provide that the bodily injuries or disease "must be such as to prevent the insured then and at all times thereafter from engaging in any gainful occupation." We believe that these provisions distinguish these cases from many of the au-

thorities cited. In the absence of further provisions in the policies it is apparent that there would be but few disabilities which would meet the test of both totality and permanency as thus defined. In both cases, however, we find what we may term "time clauses." Clauses of this type are frequently found in such policies, but the authorities show that there is but little similarity in the provisions of such time clauses. In both the Bagnall Case and the present case the time fixed was three months, but the time clause which we had occasion to construe in the Bagnall Case is essentially different from the time clause found in the policies in the present case. Here it is provided that "total disability as defined above, which exists and has existed continuously for not less than three months shall be presumed to be permanent." It is further provided that thereafter the company "may demand of the insured proof of the continuance of such disability and the right to examine the person of the assured," and that the company's liability should cease "if it appears that the insured has recovered so as to be able to engage in any gainful occupation."

In the absence of such time clauses expressly creating a presumption of permanency, we are of the opinion that respondent would not be entitled to any disability benefits under the life policies as his disability did not meet the test of being both "total and permanent" as defined in the preceding provisions of the policies. The evidence showed that, after November 22, 1929, and up to the time the case was called for trial, his disability was partial and not total and that even the partial disability was not such as to partially disable him "then and at all times thereafter," his physician testifying upon the subsequent hearing that in his opinion such disability would continue for but four or five months thereafter.

[4-7] However, all of the terms of the policy must be read together and this brings us to a consideration of the presumption referred to above. Respondent's total disability existed continuously for more than three months and therefore such total disability was "presumed to be permanent" within the meaning of the policy. This time clause expressly creating such presumption of permanency seems quite clear. The word "presumed" is defined in Webster's New International Dictionary as "to take or suppose to be true, or entitled to belief without examination or proof, or on the strength of probability; to take for granted; to infer; suppose." But despite the apparent clarity of the words "presumed to be permanent," it is uncertain whether these words were intended to create a conclusive or rebuttable presumption. It has been said that the word "presumed" has "no fast and fixed meaning" and that "in one instance the presumption declared may be only prima facie, and in another, conclusive." Wm. R. Moore Dry Goods Co. v. Rowe & Carithers, 99 Miss. 30, 54 So. 659, 660, note Ann. Cas. 1913C, 1213. In this state it was first indicated that the words "presumed to be valid" in section 172a of the Civil Code created a conclusive presumption (Rice v. McCarthy, 73 Cal. App. 655, 662, 239 P. 56), but subsequently a different conclusion was reached, but largely because of other provisions of the Codes relating to presumptions created by statute (Mark v. Title Guarantee & Trust Co. [Cal. App.] 9 P.(2d) 839). The presumption in the present case is not a creature of statute but is found in the agreement of the parties. We cannot assume that the parties merely intended that the presumption should be rebuttable. It is more logical to assume from a reading of all of the disability provisions of the life policies that the parties intended, by creating the presumption, to definitely set at rest the question of whether a total disability continuing for not less than three months should be treated as "permanent" within the meaning of the policies. While the clauses preceding indicate that the disability must be such as to "prevent the insured then and at all times thereafter from engaging in any gainful occupation," the clauses following clearly indicate that the company intended to assume liability in some cases until "it appears that the insured has recovered so as to be able to engage in any gainful occupation." The preceding clauses indicate the necessity of absolute permanency in order to render the company liable in any case while the clauses following indicate that absolute permanency is not always required. In between stands the clause in question, whereby the parties agreed that total disability existing continuously for not less than three months should be presumed to be "permanent" within the meaning of the policies. We believe that a reading of all of these clauses indicates that the parties intended to create a conclusive rather than a rebuttable presumption to apply so as to entitle the assured to the disability benefits during the entire period that such total disability might continuously exist. At any rate these life policies issued by the company are reasonably subject to such construction and under the settled rule, any doubt or uncertainty must be resolved in favor of the assured. 14 Cal. Jur., p. 443, § 24.

[8] Under this construction, respondent was entitled to the disability benefits under the life policies from the date of the accident up to November 22, 1929, as respondent's total disability, existing continuously during said period of approximately nine months, must be treated as "permanent" within the meaning of the policies. But it follows from what has been said that the findings to the effect that

respondent was totally and permanently disabled within the meaning of said life policies after November 22, 1929, are not sustained by the evidence, and that respondent was not thereafter entitled to any disability benefits thereunder.

The judgments appealed from are and each of them is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

126 Cal.App. 178

GRAF v. MONTECITO COUNTY WATER DIST. and three other cases.

Civ. 7918.

District Court of Appeal, Second District, Division 2, California.

Sept. 22, 1932.

Appeal and error ⇐123.

Where formal judgment of nonsuit dismissing action was signed by trial judge and entered by clerk on day following order dismissing action duly entered in clerk's minutes, appeal *held* properly taken from formal judgment (Code Civ. Proc. § 581).

Appeals from Superior Court, Santa Barbara County.

Separate actions by George Graf, by Curtis Payton, by Edward W. Sandell, and by Bacilio Padilla, against the Montecito County Water District, consolidated for trial. From a judgment of nonsuit in each case dismissing the action, the plaintiffs appeal. On motion to dismiss the appeals.

Motion denied.

Butcher & Haines, of Santa Barbara, for appellants Graf, Payton, and Sandell.

Robertson & Crawford and Maxwell Nichols, all of Santa Barbara, for appellant Padilla.

Heaney, Price & Postel and Marjorie Champion, all of Santa Barbara, for respondent.

CRAIG, Acting P. J.

Several actions for damages alleged to have been sustained from personal injuries incurred by the respective plaintiffs therein were filed, consolidated for the purposes of trial, and were tried to the conclusion of the plaintiffs' evidence in the Superior Court of Santa Barbara county. The defendant, an incorporated water district, interposed a formal motion in writing for dismissal of said actions, upon the ground [illegible] from all of the evidence adduced it appeared that the Superior Court was without jurisdiction of the subject-matter thereof; that each of the plaintiffs was an employee of the defendant; that he was injured in the performance of services growing out of and incidental to such employment; that said injuries were proximately caused by the alleged employment; and that the jurisdiction of their demands lay in the Industrial Accident Commission. Said motion was dated and filed on April 7, 1931. Two days thereafter, and on April 9, 1931, after argument of counsel, the trial court announced and there was entered in the clerk's minutes the following: "* * * Defendant's motion for a judgment of nonsuit having heretofore been submitted to this court for consideration and decision and the court having duly considered the same, and being fully advised in the premises now renders its decision thereon from the bench and orders that said motion be and the same is hereby granted. Let judgment be entered accordingly. * * *"

On the same day, April 9, 1931, there was prepared and presented to, and signed by, the judge of said Superior Court a formal "Judgment" in writing, the material portions of which were as follows:

"* * * Each and all of the plaintiffs having rested their case; and in the above-entitled actions as consolidated the defendant having made and presented its motion for a judgment of nonsuit dismissing said actions, and each of them, upon the ground that upon the trial, the plaintiffs have failed to prove a sufficient case for the jury in this, that it appears from all the proof of plaintiffs that this court has no jurisdiction of the subject matter of said consolidated actions for the reason that said plaintiffs were, at the time of the occurrence of the injuries complained of and proven herein, employees of defendant Montecito County Water District, an employer as defined and contemplated by the 'Workmen's Compensation, Insurance and Safety Act of 1917' * * *; [St. 1917, p. 831, as amended] that said Industrial Accident Commission of the State of California has sole and exclusive jurisdiction of the claims of the plaintiffs proven in these actions, and of the subject matter of these actions, and that this court is entirely without jurisdiction of the claims of the plaintiffs proven in these actions, and of the subject matter of these actions, and that this court is entirely without jurisdiction in the premises; and said motion having been argued by counsel for the respective parties hereto, and submitted to the court, and the court having duly considered the same, and being advised in the premises, and good cause appearing therefor,

"Now, therefore, it is hereby ordered, adjudged and decreed that the motions for nonsuit dismissing said actions, and each of them, be, and the same are hereby granted, and the above entitled actions are, and each of them is, hereby dismissed."

The latter, as so signed and dated, was entered by the clerk on April 10, 1931, in Book U of Judgments, at page 370, and on April 13, 1931, the respondent served upon counsel for the respective plaintiffs its notice in writing, as follows: "You, and each of you, will please take notice that the judgment in the above-entitled cause was signed by Judge S. E. Crow on April 9th, 1931, and was filed on April 10th, 1931, and entered by the clerk of said Superior Court on the 10th day of April, 1931, in Book 'U' of Judgments at page 370."

On the day following each of the plaintiffs filed his notice of appeal "from the judgment herein made and entered in said Superior Court on the 10th day of April, 1931, in favor of the defendant, Montecito County Water District, and against the plaintiff in each of said actions, and from the whole of said judgment." By the instant proceeding the respondent presented a motion to dismiss said appeal upon the ground that said causes were dismissed by the order of April 9, 1931, entered in the minutes of the trial court, and that by such order and entry all proceedings were terminated, that the trial court was thereby deprived of jurisdiction to make any further order or judgment, and that the purported formal judgment entered on April 10th was superfluous, ineffective, and afforded no basis for an appeal.

Section 581 of the Code of Civil Procedure provides that: "An action may be dismissed, or a judgment of nonsuit entered, in the following cases: * * * 5. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury. * * * The dismissals mentioned in subdivisions three, four, and five of this section must be made by orders of the court entered upon the minutes thereof, and are effective for all purposes when so entered." Yet, while effective for all purposes, including that of appeal, it does not follow nor can it be said that such an order when entered is exclusive of other and additional rights of the plaintiff in the trial court prior to appeal. Brown v. Sterling Furniture Co., 175 Cal. 563, 166 P. 322, 323, cited by the respondent, clearly so holds. The Supreme Court there observed that the words of the clause last quoted "direct attention, first, to the fact that in terms our law recognizes 'a judgment of nonsuit' as distinguished from a judgment of dismissal, and further declares that the order of nonsuit entered upon the minutes of the court constitute this judgment of nonsuit, since the law declares that such an order so entered is 'effective for all purposes.' In the present state of the law then it would appear that such a judgment of nonsuit, as distinguished from a judgment of dismissal usually following an order of nonsuit, is appealable." It is in effect conceded by the parties that a formal judgment has in numerous instances been held a sufficient legal basis for appeal. In Estate of Yale, 208 Cal. 102, 280 P. 358, 359, the rule was expressly announced in the following language:

"Without in any manner attempting to minimize the force of the authorities cited and relied on by the respondents in support of their motion, it is our conclusion, founded on a reading of the several minute orders and of that portion of the formal judgment hereinabove quoted, that the minute orders were intended by the trial court, and must have been understood by the parties, to be and to serve merely as memoranda affording data from which a proper final judgment might thereafter be drafted disposing of the entire cause. In such a case an appeal is held to lie from the formal judgment. Ferris v. Baker, 127 Cal. 520, 523, 524, 59 P. 937; Larson v. Larson, 15 Cal. App. 531, 536, 115 P. 340.

"The motion to dismiss the appeals from the several minute orders hereinabove referred to is granted. The motion to dismiss the appeal from a portion of the judgment is denied."

It must be observed in the instant proceeding that the understanding of the court and of the parties as to such distinction, of the steps taken accordingly, and of their reliance upon the necessity of a formal judgment of dismissal from which an appeal might be taken, is not devoid of plain evidence upon the face of the record. The defendant's motion for a "nonsuit dismissing said action" was submitted to the court; by its minute order "defendant's motion for a nonsuit" was granted; thereafter by a formal judgment reciting such facts it was adjudged and decreed that "the above entitled actions are, and each of them is, hereby dismissed." The defendant thereupon served and filed its notice of the entry of the final judgment dismissing said actions. Further, it has already been observed that both such minute order and judgment were obtained from the court on April 9, 1931, and the time for appeal as to each started to run on the same day. Upon similar facts it has been held that an appeal must be held to have been duly taken. In Gullick v. Interstate Drilling Co., 111 Cal. App. 263, 295 P. 549, 550, upon a review of numerous authorities, it was said of an appeal from a minute order of nonsuit, followed by a judgment four days thereafter, from which latter an appeal was perfected: "The notice of appeal which refers only to the judgment of October 19, was filed November 7, 1928, well within the time, even though it started to run on October 15. In view of

the fact that the appeal was well within the sixty-day period, and also that the respondents could not possibly have had any doubt concerning the intention of the appellant to have reviewed the action of the court in granting the nonsuit, the dismissal of the present appeal would be the result of an insistence upon a pure technicality without either rhyme or reason. It would amount to reliance upon the shadow and not the substance. The law, however, does not require us to so act."

The motion to dismiss the appeal is denied.

We concur: IRA F. THOMPSON, J.; STEPHENS, Justice pro tem.

126 Cal.App. 171

HILL v. HESSE et al.*

Civ. 7411.

District Court of Appeal, Second District, Division 1, California.

Sept. 22, 1932.

Rehearing Denied Oct. 21, 1932.

1. Limitation of actions ⇐15.

Realty owner's granting contractor 90 days' extension for foreclosing materialman's lien *held* waiver of statute of limitations for foreclosing such lien (Code Civ. Proc. § 1190).

Granting of such extension upon application therefor by the materialman and relied upon by him as a waiver of the statute of limitations under Code Civ. Proc. § 1190, for foreclosing a materialman's lien, was a waiver of such statute of limitations notwithstanding that such agreement did not constitute an "extension of credit" under such statute so as to extend the limitation period 90 days from expiration of credit.

2. Limitation of actions ⇐15.

Where waiver of statute of limitations was in writing and had been acted upon, objection that waiver was without consideration should not be sustained (Civ. Code, § 1614).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Ed. J. Hill against W. H. Hess and Bertha Mitchel. From a judgment for plaintiff, last-named defendant appeals.

Affirmed.

Porter C. Blackburn, of Los Angeles, for appellant.

Irl D. Brett, of Los Angeles, for respondent.

YORK, J.

At the request of defendant Hesse, as contractor, the plaintiff furnished certain building materials for use upon and actually used in the construction of a building upon a lot of land owned by the defendant Mitchel. Defendant Mitchel had no contractual relation with plaintiff. Said materials so furnished by plaintiff not being paid for, the plaintiff, under date of February 21, 1929, which was within 90 days after actual completion of the building, filed a notice of mechanic's lien against defendant Mitchel's property for the sum of $429.75. Within ninety days thereafter, to wit, on the 21st day of May, 1929, said plaintiff and defendant Mitchel entered into a written agreement whereby it was provided that defendant Mitchel granted to plaintiff "ninety days' extension of time within which to foreclose his said lien." On August 19, 1929, plaintiff filed his complaint for foreclosure of his said lien, and upon trial it was decreed that plaintiff was entitled to a lien for the sum of $411.65 against the premises of defendant Mitchel, and a personal judgment for the sum of $429.75 was entered against defendant Hesse.

In support of her appeal, defendant Mitchel contends that the execution of the purported agreement does not constitute an extension of credit within the meaning of section 1190 of the Code of Civil Procedure; that there is no evidence by the execution of such agreement to show that such extension was at the special instance and request of appellant; and that there was no consideration for the execution of the said agreement.

Section 1190 of the Code of Civil Procedure reads as follows: "No lien provided for in this chapter binds any property for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same; or, if a credit be given and notice of the fact and terms of such credit be filed in the office of the county recorder subsequent to the filing of such lien and prior to the expiration of said ninety day period, then ninety days after the expiration of such credit. * * *"

[1] The agreement entered into between the parties provided as follows: "Now therefore, it is hereby understood and agreed that the said Bertha K. Mitchel hereby grants to Ed. J. Hill Ninety (90) days extension of time within which to foreclose his said lien. It being understood, however, that this extension of time does not admit the validity of the said

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Rehearing denied 15 P.(2d) 528.

claim of lien by the said Ed. J. Hill, but is simply to grant him the privilege of foreclosing his said lien if in fact it be subsequently proven that he has such." There is no evidence of any "extension of credit" by the creditor to the debtor, nor even to appellant. Notwithstanding the terms of this agreement, plaintiff retained the right immediately to commence his action. But he did not forthwith commence the action. He relied upon appellant's agreement as a waiver of the statute of limitations. He was justified in so doing. This appears from the recital in the agreement that appellant had no knowledge concerning the merits of the claim, but did desire to pay all just claims against the property; that the time for foreclosure was about to expire, and the claimant had applied for an extension therefor, which appellant was willing to grant without admitting liability for said claim; "now therefore" appellant granted to the claimant 90 days' extension of time within which to foreclose his said lien.

[2] This was a valid waiver. Section 1190, Code of Civil Procedure, is merely a statute of limitations. Mox, Inc., v. Leventhal, 89 Cal. App. 253, 264 P. 562. The benefit of such statute may be waived. S. L. Jones & Co. v. Davis, 65 Cal. App. 164, 173, 223 P. 560. We think that the waiver having been executed in writing, and respondent having relied and acted thereon for the reasons stated therein, the contention of appellant that there was no consideration for such waiver should not be sustained. A written agreement is presumptive evidence of a consideration. Civ. Code, § 1614. Here we have no evidence to the contrary, nor is there any bill of exceptions or reporter's transcript showing what evidence was produced at the trial.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

126 Cal.App. 61

CITY OF LOS ANGELES et al. v. LOS ANGELES–INYO FARMS CO. et al.

Civ. 802.

District Court of Appeal, Fourth District, California.

Sept. 16, 1932.

1. Appeal and error ⇐801(1).

Ordinarily, in deciding motion to dismiss appeal, appellate court need examine only papers filed on hearing of motion and appellants' opening brief (Rules of Supreme Court and District Courts of Appeal, rule 5, § 3).

2. Appeal and error ⇐801(5).

Where it appeared from appellants' opening brief that objection to hypothetical question propounded by respondents' counsel was improperly overruled, motion to dismiss appeal could not be granted, since examination of entire cause was required (Rules of Supreme Court and District Courts of Appeal, rule 5, § 3; Const. art. 6, § 4½).

3. Appeal and error ⇐801(5).

Determination of whether allowance of $13,200 as attorneys' fees for preparing case for trial, but not trying it, was so excessive as to constitute clear abuse of discretion, required examination of entire record and authorized denial of motion to dismiss appeal (Rules of Supreme Court and District Courts of Appeal, rule 5, § 3).

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by the City of Los Angeles and another against the Los Angeles-Inyo Farms Company and others. From an adverse judgment, plaintiffs appeal. On motion to dismiss appeal or affirm judgment.

Motion denied.

Erwin P. Werner, City Atty., Mark L. Herron, Asst. City Atty., F. M. Bottorff and Carl A. Davis, Deputy City Attys., and T. B. Cosgrove, all of Los Angeles, for appellants.

Chase, Barnes & Chase, of Los Angeles, Swallow & Richards, of Bishop, and H. B. McClure, of Visalia, for respondents.

MARKS, J.

This is a motion to dismiss the appeal or affirm the judgment made under the provisions of section 3, rule 5, Rules of the Supreme Court and District Courts of Appeal, which became effective on July 1, 1932. It is recited in the moving papers that the "motion will be based upon the clerk's transcript on appeal, the reporter's transcript on appeal, upon the appellants' opening brief and respondents' brief." From this statement it would appear that respondents expect this court, in deciding the motion, to examine the same records that it would have to review were the case submitted on its merits. If we should undertake to do this, it would result in a practical advancement of the cause on the calendar by use of this motion. If the motion were denied, we would have to review the same ground a second time, after the submission of the case on its merits, and also write a second opinion. We do not understand the purpose of the rule to be to greatly increase the work and time that the members of this court must devote to cases pending before it

[1] Until a different interpretation of the rule is given us, we have concluded that ordinarily we should examine and carefully consider all papers filed on the hearing of the motion and the appellants' opening brief. If, after so doing, in the ordinary case, we are satisfied that the appeal is without any merit, the motion should be granted; otherwise, it should be denied. The court may then put the case on the "Ready for Submission Docket." The following cases have been decided under this new rule: Dalton v. Los Angeles College of Chiropractic (Cal. App.) 13 P.(2d) 546; Thomas v. Caine (Cal. App.) 13 P.(2d) 548; Sumner v. Edmunds (Cal. App.) 13 P.(2d) 1046.

In examining the appellants' opening brief we find the following three questions presented for consideration: (1) Error of the trial court in overruling appellants' objection to a hypothetical question propounded by respondents' counsel to one of their witnesses. (2) Was the allowance of $13,200 by the trial court as fees for the services of the attorneys for respondents in preparing the case for trial, but not trying it, so unreasonable, excessive, and unjust as to constitute a clear abuse of discretion? (3) Was the expense in the sum of $1,622.64 allowed as fees for two engineers who were to be used as expert witnesses by respondents a necessary expense incurred in preparing the cause for trial?

[2] From a reading of the appellants' opening brief it would seem that the objection made to the hypothetical question should have been sustained. Before we can hold the improper admission of evidence prejudicially erroneous, we are required to make "an examination of the entire cause, including the evidence." Section 4½, art. 6, Const. of Cal.

In Libby v. Kipp, 87 Cal. App. 538, 262 P. 68, 71, it is said: "It is for this reason that the matter of awarding compensation for professional services, when that service is rendered by an attorney, is left, to so great a degree, in the judicial discretion of the trial court, so much so that, unless the sum allowed is plainly and palpably exorbitant and such as shocks the conscience of an appellate court, the determination of the trial court will not be disturbed."

[3] From the considerable portions of the record incorporated in appellants' opening brief, it would seem that the award of $13,200 as attorneys' fees for preparing this case for trial, but not trying it, was quite liberal. Whether or not the amount awarded would shock the judicial conscience of this court could only be determined after a careful study of the entire record.

It is unnecessary to consider the third ground for reversal of the judgment, as it is apparent that we should carefully review the entire record before deciding the two questions already mentioned by us.

If we are correct in our conclusion that we should not be expected to review the entire record in ruling upon motions made under the rule in question, the motion before us should be denied.

Motion denied.

We concur: BARNARD, P. J.; JENNINGS, J.

126 Cal.App. 174

In re SPIRES' ESTATE.

SECURITY-FIRST NAT. BANK OF LOS ANGELES et al. v. FRAZIER.

Civ. 8266.

District Court of Appeal, Second District, Division 1, California.

Sept. 22, 1932.

Rehearing Denied Oct. 21, 1932.

Hearing Denied by Supreme Court Nov. 21, 1932.

1. Executors and administrators ⇐488.

Right of executor to defined standard of compensation first accrues at time when by appropriate order compensation is determined and allowed (Code Civ. Proc. § 1618).

2. Executors and administrators ⇐488.

Amount of compensation allowable to executors for extraordinary services in administration of estate *held* governed by law in force at time of allowance (Code Civ. Proc. § 1618).

At time of decedent's death in January, 1924, Code Civ. Proc. § 1618 contained clause limiting allowance to executors for extraordinary services to an amount not to exceed one-half the amount of the commissions allowed by that section. Between the time of the decedent's death and the application by the executors to the probate court for an allowance for extraordinary services, the limitation on the amount of the allowance was repealed by St. 1925, p. 624. Statutory limitation in effect at decedent's death was inapplicable under the circumstances of the case because the statutory provision for the allowance of expenses of administration is in its nature a matter of procedure and the heirs, devisees, and legatees have no vested right in the benefit of the limitation.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Proceedings in the matter of the estate of Mary H. Spires, deceased. Petition by the Security-First National Bank of Los Angeles and another, as executors, for the allowance of fees for extraordinary serv-

ices rendered in the administration of the estate, opposed by Alice Harrison Frazier. From an order determining the allowance to the petitioners, the petitioners appeal.

Order reversed and the cause remanded, with direction.

Newlin & Ashburn, of Los Angeles, for appellants.

Newby & Newby, of Los Angeles, for respondent.

CONREY, P. J.

The appellants are executors of the last will and testament of Mary H. Spires, deceased. As such executors they filed their "petition as executors for allowance for fees for extraordinary services" rendered by them in the course of administration of the estate. The executors, being dissatisfied with the amount of the allowance made to them by the court, appealed from the order by which the amount of such allowance was determined.

Mrs. Spires died on the 3d day of January, 1924, and her will was admitted to probate on the 23d day of that month. The petition of the executors claiming a fee for extraordinary services was filed on the 17th day of March, 1930. Respondent Frazier, a legatee under the will, objected to the making of an allowance in the sum asked for by the executors, her objection being based upon grounds hereinafter stated. The issue having been tried and submitted, the court made its order, which was filed on the 5th day of February, 1931. Section 1618 of the Code of Civil Procedure, as in force at the time of the death of Mrs. Spires, provided that an executor should be allowed certain stated commissions and in addition thereto provided as follows: "In all cases, such further allowance may be made as the court may deem just and reasonable for any extraordinary service, but the total amount of such extra allowance must not exceed one half the amount of commissions allowed by this section." In the year 1925 said section was amended, and by such amendment the clause limiting the total amount of such extra allowance was omitted, and the limitation was thereby removed.

In its findings of fact recited in the order, the court found that the reasonable value of the extraordinary services rendered by the executors was substantially in excess of the sum of $7,241.26; "but the court, solely for the reason that it is of the opinion that its power to make such allowances for extraordinary services is limited by the terms of section 1618 of the Code of Civil Procedure as the same existed at the time of death of decedent and probate of the will of said decedent, has concluded that it can make to the said executors no award or allowance for the said extraordinary services in excess of the sum of $7,241.26."

There is thus presented on this appeal a single question of law, viz.: In a case where, at the time of the death of the testator, the amount of fees which may be allowed to executors for extraordinary services was subject to a statutory limitation, but where, during the course of the administration and prior to the time when the petition for allowance for extraordinary services was filed, the said statutory limitation upon the amount of allowance which might be made had been repealed, was the power of the court in said matter subject to the limitation of the statute as in force at the time of the death of decedent?

Under the original Probate Code, and under section 1618 of the Code of Civil Procedure until the year 1909, it was the law that in addition to the ordinary commissions of an executor or administrator, such further allowance might be made as the court deemed just and reasonable, for any extraordinary services; but it was provided that "the total amount of such allowance must not exceed the amount of commissions allowed by this section." From 1909 until 1925 the proviso was that "the total amount of such extra allowance must not exceed one half the amount of commissions allowed by this section." It was not until the year 1925 that said section 1618 was so amended (St. 1925, p. 624) that the court, in making allowances for such extraordinary services of an executor or administrator, is left untrammeled, save only by the rule that the allowance must be just and reasonable. See, also, new Probate Code, § 902.

Provision for the expenses of administration of a decedent's estate is in its nature a matter of procedure, dealing with a necessary incident of the business of administration. Such expenses, of which compensation to the executor is a part, are analogous to costs and other chargeable expenses of litigation. The basic principle of the Code provisions to which we have referred has been, at all times, that there shall be a just and reasonable allowance for extraordinary services. In the application of that principle it was for a long time the legislative policy to limit such allowance so as not to exceed a maximum amount measured by the fixed rate of commissions allowed for "ordinary" services. If heirs, devisees, and legatees have a vested right in the benefit of this limitation, effective as of the date of death of a decedent, then the order against which the pending appeal is directed must be affirmed.

[1, 2] But we think that there is no such vested right in the benefit of the limitation. "The right of inheritance and testamentary disposition is entirely the creation

of the statute, and the heirs, devisees, and legatees take the property subject to such burdens as the Legislature has seen fit to impose upon it. * * * While it is true that the descent is cast and the property of the decedent vested in the devisees and legatees, or in the heirs, at the moment of the death of the deceased, it is also true that they take the property subject to the payment of the expenses of administration. * * *" Estate of Bump, 152 Cal. 274, 92 P. 643, 644. On the other hand, the right of the executor to a defined rate or standard of compensation is not vested as of the date of the decedent's death, nor even as of the date when he qualifies as executor, but such right first accrues at the time when by appropriate order the amount of compensation payable to him is determined and allowed. And since the right of an executor to compensation for extraordinary services is not established or vested until allowed by the court in the exercise of its discretion, it follows as a direct consequence that the law in force at the time when the order is made constitutes the only law by which the power of the court is to be governed.

The order is reversed, and the cause remanded, with direction that compensation be awarded to appellants, in such amount as the trial court shall find to be just and reasonable.

We concur: HOUSER, J.; YORK, J.

126 Cal.App. 162

PEOPLE v. MILLER et al.

Cr. No. 2214.

District Court of Appeal, Second District, Division 2, California.

Sept. 21, 1932.

As Modified on Denial of Rehearing Oct. 6, 1932.

Hearing Denied by Supreme Court Oct. 20, 1932.

1. Criminal law ⇐1159(2).

On appeal from conviction of robbery, test which must be applied in appellate tribunal is whether there is substantial testimony to support verdict and not whether court might be inclined to different conclusion from testimony.

2. Robbery ⇐24(1).

Evidence *held* to show accused was in charge of car ready to aid and assist convicted codefendant and another in get-away after holding up drug store, justifying conviction of robbery.

3. Criminal law ⇐765, 815(9).

Instruction on character testimony *held* not erroneous as against contention that instruction commented on evidence and left element of reasonable doubt out of consideration.

Instruction recited that evidence of good character is no excuse for the commission of a crime, if jury believe that, notwithstanding such character, the defendant is the guilty party; but, in determining the question of whether or not he is guilty, it is proper for jury to consider such evidence, along with all other evidence brought out in the case.

4. Criminal law ⇐822(1).

Instructions must be read together.

5. Criminal law ⇐829(8).

Failure to give proffered instruction on character testimony *held* not error, where subject was sufficiently covered by instruction given.

6. Criminal law ⇐814(17).

Tendered instructions relative to circumstantial evidence *held* properly refused, where evidence in robbery prosecution was not wholly circumstantial.

7. Criminal law ⇐1172(7).

Instruction relative to prosecution and punishment as principals of those aiding and abetting in commission of felony *held* not prejudicial.

Instruction recited that all persons concerned in the commission of a felony, whether they directly committed the acts constituting the offense or aided or abetted in its commission, though not present, shall be prosecuted, tried, and punished as principals, and it was contended that instruction was faulty because it left out the words "or not being present have advised and encouraged its commission," but the omission of such words could not have injured accused in robbery prosecution, because it required a higher degree of proof by the prosecution to show that accused, though not present, had aided and abetted in commission of crime than it would have necessitated to show only that he had advised and encouraged its commission.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Joe Stein was convicted of robbery, and he appeals from a judgment and from an order denying his motion for a new trial. Judgment and order affirmed.

Samuel L. Rummel and Kenneth K. Scott, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

IRA F. THOMPSON, J.

Miller and Stein were both charged with robbery. Miller pleaded guilty to one of three counts. When the taking of testimony was

completed, the other two counts were dismissed. Stein was found guilty and sentenced. He appeals from the judgment and from an order denying his motion for a new trial.

One, and the principal, contention advanced by appellant, is that the evidence is insufficient to support the verdict. We therefore proceed to examine that question.

The Thrifty Drug Company, located at 412 South Broadway in Los Angeles, was held up and robbed of approximately $400, about 7:30 o'clock a. m. on December 14, 1931, by two armed bandits. One of the assailants was Stein's codefendant Miller. The other was not identified and it is said that Stein is not as tall as was the man who entered the store with Miller. It must be assumed in our consideration of the case that Stein did not enter the drug store—that, if he was in fact connected with the commission of the crime, that circumstance must be established by testimony outside of the happenings inside of the store. It appears that immediately after the robbery Miller hailed a taxicab at Fourth and Spring streets, saying to the driver that he "wanted to go straight out Temple street," and was in a hurry. He entered the cab on the west side of Spring Street, and it continued south on that street to its intersection with Fifth street, where it turned west and proceeded to Broadway. At the corner of the last-named street and Fifth street Miller directed the driver to turn north, which route would carry him by the store he had aided in robbing. The driver of the cab was compelled to stop behind a street car at Fourth and Broadway, whereupon Miller wanted to alight, but, finding that the door was locked from the inside, instructed the driver to draw over to the curb. The latter could not go forward because he was inside the safety zone, and for that reason, and upon the insistence of Miller, backed up and over to the curb. Miller immediately left the cab, and, without paying his fare went down, or south, on Broadway, with the driver of the cab in pursuit of Miller with the hope of collecting his due. However, a few car lengths south Miller entered an Auburn automobile parked at the curb with the appellant Stein at the wheel, which immediately started north on Broadway, but had not proceeded far until it was stopped by the officers and both Stein and Miller arrested. The cab driver, who related most of this story from the witness stand, testified that he saw no gun. And this fact may become important as we later analyze the testimony. A witness named Maples, who worked about five doors south of the Thrifty Drug Store, testified that he was waiting outside his place of employment for the manager thereof when he noticed an Auburn coupé drive up and park. He thought there were two people in the car; and that one of them left the machine and walked up the street. The next thing he noticed was the car starting, having trouble in getting away from the curb. The driver of the car was Stein and the other occupant, Miller. The witness also observed the arrest by the officers.

The witness Kohl simply related the actions of Miller from the time he left the cab until the arrest, together with the rather important negative testimony that he saw nothing peculiar about the actions of either Stein or Miller as Miller entered the automobile. He also identified Stein as the driver.

Officer Lund saw Miller leave the taxicab, and, in view of the weight attached to his testimony, we quote therefrom as follows: "The cab man was still standing in the street. The defendant Miller had begun to look in my direction, or was looking north, and seeing me whirled on his feet and hurried south. That made me very suspicious, and I hurried. By the time I had got down to the cab, where the cab was standing, he had naturally got about 25 or 30 paces down the street, and without coming to a complete standstill I asked the cab man if he knew that fellow that just got out of his car" (here follows an instruction to the witness not to give the conversation). "I saw the defendant Miller hurry down the street ahead of me.

"Q. Yes. A. And his left hand was in his coat—overcoat pocket. As he reached an Auburn car—I didn't know what kind of car at that time, but as he reached a car I observed a man who must have been sitting behind the wheel lean way over and open the door. I saw his face. This man in the car opened the door and before the defendant Miller had taken his seat I could hear the motor of that car, and it maneuvered back and forth two or three times before it could get away from the curb to get into the street. By this time I had pulled my gun and I went out from the parked cars into the street, running towards them and flagging them down to stop. I ran up to the car and opened the door, the defendant Miller was working frantically with his left hand near his hip pocket. I cautioned him to bring his hands out in front and to make no false move. I also cautioned the man behind the wheel, who I identify as Stein, to keep his hands on the wheel, and I asked them who they were. There was no response. I asked the defendant Stein whose car this was, and he said, 'It belongs to a friend of mine.'

"Q. Who said that? A. Stein. I asked him his name, he answered me but I didn't get his name to write it down. I asked him what he was doing with his friend's car, and he said he just brought his girl to work. I asked him where his girl worked, and he said, 'up the street' indicating north. I heard the siren of a police car coming at this time, and

I didn't make any effort to take the men out. Then the defendant Stein about this time made a statement, he says—'Officer, this man pulled a gun on me.' So in the matter of a few seconds the police car came up and an officer came on my side, and I says 'Take this man,' indicating Miller, 'out,' which he did."

The witness then told of finding a .32 caliber revolver fully loaded behind the cushion where Miller was sitting and also of handcuffing Stein. On cross-examination he stated that Miller did not hesitate as he entered the Auburn car, but that the door flew open as he arrived, and further that Miller did not put his hand on the door at all. He also swore that he did not see Miller make any demonstration toward the driver Stein, but that the car moved almost immediately.

Officer Gibson testified that he talked to appellant on the day of his arrest concerning the ownership of the Auburn automobile, and that Stein told him that he owned it, although it was registered under the name of Charles Green; that he had to have a reference to buy a car on contract, and therefore used his brother's name. Gibson also testified that he took an operator's license from appellant issued in the name of Harry Fields, and that Stein replied to his query concerning the name that the licensed car belonged to him, but had been issued under that name when he had purchased a former car in the name of Fields. (Appellant did not claim that Fields was a brother of his and Green's.) Stein also told the officer that he went to the market about 6 a. m. on the morning of the robbery for the purpose of getting a load to haul to Fresno, but, not being able to obtain one, went to Fourth and Broadway streets, arriving there about 6:30 a. m., in order that he might wait there for his girl, due to go to work at about 9 a. m., for the purpose of getting her to sign some papers for him to get a suit and hat at a clothing store at Eighth and Broadway. When asked by the officer why he waited at the corner for so long a time instead of going back home, Stein made no answer. The officer then testified that he went to 1144 East Twenty-Fourth street, where the appellant was living, and found a box of .32 caliber cartridges fitting the revolver found behind the cushion in the Auburn. They were not of the same make, however, as those found in the gun.

The defendant Miller testified that his partner in the actual robbery was Jack Sherman; and that he opened the door to the Auburn and forced Stein to drive it at the point of the gun which later he hid behind the cushion.

The appellant, Stein, on the stand, told substantially the same story he had previously given Officer Gibson, but added that before he left home that morning he had told his wife to meet him in front of the Thrifty Drug Store, and that he would be parked there, and also added that, after he had been sitting in his car a few minutes in front of 420 South Broadway, he reached over for the electric cigar lighter with the intent to light a cigarette when Miller opened the door of the car, knocked appellant's hand from the dashboard, and at the point of a gun ordered him to get going.

[1, 2] We have detailed the testimony more than is usual because at first blush there appeared to be considerable doubt concerning its sufficiency, but that doubt disappears as the evidence is analyzed—provided, of course, we bear in mind the test which must be applied in the appellate tribunal, which is whether there is substantial testimony to support the verdict and not whether from the printed page we might be inclined to a different conclusion. If the jury believed, and they undoubtedly did, the testimony of the arresting officer Lund they were fully justified in determining that Miller did not enter Stein's car and compel him to drive at the point of a gun. It is hardly conceivable that one trained to observe, as are the officers of the law, would not have seen the threat with the gun. But, more than this, he testified positively that appellant reached over and opened the door—and, even before Miller had taken his seat, had started the motor. Stein's recital of what happened cannot be reconciled with Lund's version. The testimony of the witness Maples, while not as certain or precise as that of the officer, tends to corroborate the latter. Maples thought two men drove up in that Auburn car—giving that, of course, as his best recollection. However, this witness made an affidavit on the motion for a new trial in which he was of a different opinion. So does the testimony of the witness Kohl, who saw Miller enter the automobile, but noticed nothing out of the ordinary in the actions of either Miller or Stein. The jury undoubtedly considered what the ordinary citizen would say at the very first opportunity if he were compelled to drive some one in his car at the point of a gun. A careful reading of the testimony makes it plain that appellant did not complain at the first opportunity, but only after he had had a chance to contemplate the evidence of guilt which was rapidly closing around him. The finding of the .32 caliber cartridges is perhaps of slight weight—yet it is entitled to consideration. The story of the registration certificate and the operator's license fails to carry with it the note of sincerity, and so does the other concerning the unusually long period of waiting by the appellant near the front of the drug store for his wife, although he testified he had planned to get a load for Fresno. We

feel that the jury was fully justified in concluding that Stein was the confederate of Miller and Sherman; and that he was in charge of the car, ready to aid and assist them in their get-away. Had appellant been an innocent friend or acquaintance of Miller, he would undoubtedly have given that version of the affair from the witness stand rather than the one which the jury did not credit with truth.

[3-5] Complaint is made by appellant of the instruction given by the trial judge upon the subject of character testimony and his refusal to give an instruction requested by appellant in regard thereto. The instruction given reads as follows: "Evidence of good character is no excuse for the commission of a crime, if you believe that notwithstanding such character the defendant is the guilty party; but in determining the question of whether or not he is guilty, it is proper for you to consider such evidence, along with all other evidence brought out in the case." Appellant insists that the trial judge by this instruction commented upon the evidence, and in fact made an attack upon the character testimony. He also argues that the instruction leaves out of consideration the element of "reasonable doubt." We find ourselves unable to agree with these assertions. In the case of People v. Kalkman, 72 Cal. 212, 13 P. 500, 503, an instruction was proposed as follows: "Proof of such good character may be sufficient to justify an acquittal, although without it no acquittal would have been had." The trial judge modified the proposal by adding the words: "unless, in spite of such good character, the evidence yet convinces you beyond a reasonable doubt of defendant's guilt." It was held that the instruction as modified was not erroneous, and there was cited by the court in support of its position an instruction given in the case of People v. Samsels, 66 Cal. 99, 4 P. 1061, 1062, as follows: "If you should believe the defendant guilty, you must so find, notwithstanding his good character." In the case of People v. Von Perhacs, 20 Cal. App. 48, 127 P. 1048, 1050, the court modified a proposed instruction regarding character testimony by adding the language: "If you are satisfied to a moral certainty and beyond a reasonable doubt that the defendant is guilty as charged in the information herein, it will be your duty to so find him, notwithstanding such evidence of good character." It was said by the appellate court that: "The instruction, as modified by the court, correctly and without conflict stated the law." To the same effect see: People v. De la Cour Soto, 63 Cal. 165.

We had occasion in the case of People v. Harris, 80 Cal. App. 328, 251 P. 823, to somewhat review the law upon the subject, and, while we reversed that case, a reading of the opinion will demonstrate that the instruction given here does not do violence to the rule which prohibits the court from commenting upon the facts. Nor do we believe that the instruction can reasonably be construed as leaving out of consideration the element of reasonable doubt. The jury was instructed fully upon that question. And it is a familiar rule that the instructions must be read together. Perhaps it would have been better and more in keeping with the suggestions heretofore made to trial courts to give instructions which have become practically standardized (see People v. Heuss, 95 Cal. App. 680, 273 P. 583), had the instruction been couched in the words found either in the case of People v. Perhacs, supra, or in People v. Mitchell, 129 Cal. 584, 62 P. 187, but it is not fatally subject to the criticism leveled against it. The appellant did propose an instruction in the words of the one given in People v. Mitchell, supra, and as follows: "You are instructed that the defendant Joe Stein has introduced before you evidence tending to show his good character for peace and quietness, and for honesty, integrity and truthfulness. If in the present case, the good character of said defendant is proven to your satisfaction, then such fact is to be kept in view by you in all your deliberations, and it is to be considered by you in connection with the other facts in the case; and if after a consideration of all the evidence in the case, including that bearing upon the good character of the defendant Stein, the jury entertain a reasonable doubt as to defendant Stein's guilt, then I charge you it is your duty to acquit him. But if the evidence convinces you beyond a reasonable doubt of defendant's guilt you must so find, notwithstanding his good character." What we have heretofore said concerning the contention that the instruction given upon the subject was erroneous disposes of appellant's argument that the failure to give the proferred one was also error.

[6] Two instructions relative to the subject of circumstantial evidence offered by the defendant were not given by the court, and this is made the basis of appellant's next complaint. It is not possible, however, to support his contention for two reasons, the first of which is that the evidence in this case is not wholly and solely circumstantial (see People v. Raber, 168 Cal. 316, 143 P. 317), and the second is that instructions tendered were not a full and correct statement of the rule of law. This is sufficient to justify the court in refusing to give the tendered instructions.

[7] It is next argued that the court committed error when it instructed the jury as follows: "The court further instructs the jury that it is the law of the state, that all persons concerned in the commission of a felony, whether they directly committed the acts constituting the offense or aided and abetted in its

commission, though not present, shall be prosecuted, tried and punished as principals." It is asserted that this instruction is faulty because it left out the words "or not being present have advised and encouraged its commission." It is difficult to understand how the appellant could have been injured by the omission of the quoted words. It certainly required, if anything, a higher degree of proof by the prosecution to show that the appellant, though not present, had aided and abetted in the commission of the crime than it would have necessitated to show only that he had advised and encouraged its commission.

Complaint is made of the reception of certain of the evidence. We have examined the specifications in this regard and have found no error of which the appellant may properly complain. It would serve no useful purpose for us to lengthen an opinion which has already reached more than ordinary proportions.

Judgment and order affirmed.

We concur: CRAIG, Acting P. J.; STEPHENS, Justice pro tem.

126 Cal.App. 94

SECURITY TRUST & SAVINGS BANK OF SAN DIEGO v. A. H. FROST CO. et al.

Civ. 1011.

District Court of Appeal, Fourth District, California.

Sept. 19, 1932.

Rehearing Denied Oct. 11, 1932.

Hearing Denied by Supreme Court Nov. 17, 1932.

1. Appeal and error ⇐909(5).

Where subsequent trust declaration embodied same terms and sale provisions as former trust, appellate court must conclude subsequent trust incorporated contract incorporated in prior trust and was intended to continue terms of such contract and prior trust.

2. Assignments ⇐52.
Trusts ⇐61(3).

Agreement and settlement, wherein trustor agreed to pay creditor half of proceeds receivable from sale of realty described in trust declaration, constituted equitable assignment of such proceeds, precluding subsequent voluntary termination of trust depriving creditor's assignee without its consent of proceeds of sale.

Facts disclosed that trustor under an agreement and settlement agreed to cause to be paid to a creditor half of the proceeds to be received by the trustor from the sale of real property described in a trust declaration; that creditor's interest under such agreement passed by several assignments to assignee; that before creditor's assignee took assignment of the creditor's interest the original trust declaration was dissolved and another substituted without the assignee's knowledge; and that after assignment to assignee, the trustor, trustee, and beneficiary voluntarily terminated the second trust declaration and deprived the assignee of any possibility of receiving further payment from proceeds of sale.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by the Security Trust & Savings Bank of San Diego against the A. H. Frost Company and another. From a judgment for plaintiff, named defendant appeals.

Affirmed.

Harrison G. Sloane, of San Diego, for appellant.

Hamilton, Lindley & Higgins, of San Diego, for respondent.

MARKS, J.

Since June 1, 1925, when the transactions here involved were first undertaken, the corporate names of two of the corporations before us were changed to the Security Trust & Savings Bank of San Diego and A. H. Frost Company, from the Security Commercial Bank of San Diego and the San Diego Beach Company, respectively. No further reference will be made by us to the earlier names.

Under date of June 1, 1925, appellant entered into a subdivision sales contract with Pickering, Incorporated, whereby this corporation agreed to buy and appellant agreed to sell certain real property in the city of San Diego in the manner and upon the terms to be specified in a declaration of trust to be executed by appellant as trustor, the Union Trust Company of San Diego as trustee, and Pickering, Incorporated, as beneficiary. Early in August, 1925, appellant conveyed the real property described in the contract just mentioned to the Union Trust Company of San Diego. A declaration of trust was executed which by reference incorporated into its terms the Pickering, Incorporated, contract and constituted what is commonly known as a subdivision trust, whereby the legal title to the real estate was to remain in the Union Trust Company of San Diego. Sales of subdivided lots were to be made by Pickering, Incorporated, and the proceeds from such sales so divided that appellant would receive its selling price for the property. Pickering, Incorporated, was designated as the beneficiary under this trust. It was provided in the declaration of trust that in case the beneficiary should make de-

fault in performing any of the terms of the trust on its part to be performed the trust could be terminated and the beneficial interest foreclosed by a trustee's sale of the trust property.

Under date of July 3, 1925, appellant entered into a contract with Earl Taylor, which the parties denominated an "Agreement of Settlement," wherein it was recited that Taylor had made the sale of the real property described in the declaration of trust to Pickering, Incorporated, and after reciting various indebtednesses between the parties, struck a balance of $12,456.09 as due and unpaid from appellant to Taylor. In this contract it was provided: "That said party of the first part (appellant) will cause to be paid from the proceeds of the sale under said Pickering contract with said A. H. Frost Company, the said sum of $12,456.09 from one-half of the net proceeds from sales under said Pickering contract to be paid to said second party (Taylor) as said money is received to the credit of said first party and after first deducting the first twenty per cent (20%) from said sales payable to said Pickering, Incorporated, as provided in said Pickering contract, until the said sum of $12,456.09 has been paid to said second party, and no payment of same is to be made except as derived from said sales." On December 26, 1925, by a written instrument and for a value received Taylor assigned to Birdie Mae Taylor all his rights under this contract and the money to be derived therefrom. On December 29, 1925, Birdie Mae Taylor executed a similar written assignment to the Citizens' Trust & Savings Bank of Los Angeles. By an instrument dated December 23, 1927, the Citizens' Trust & Savings Bank of Los Angeles assigned all its rights under the Taylor "Agreement of Settlement" to respondent, which then became and continued to be the holder thereof. This last assignment was evidently not delivered until January, 1928.

On November 12, 1925, appellant addressed a letter to the Union Trust Company of San Diego, the material parts of which are as follows:

"You are administering a certain trust under which the interested parties are the A. H. Frost Company and Pickering Incorporated, which involves the A. H. Frost Company's holdings at Pacific Beach. Under this trust certain payments into the trust are to be disbursed to the A. H. Frost Company.

"We hereby direct that one-half of the net proceeds from sales of said Pickering Incorporated contract be remitted to the Citizens Trust and Savings Bank, 736 South Hill street, Los Angeles, California, until said remittances to said Citizens Trust and Savings Bank have amounted to the sum of $12,456.09.

"It being understood that the first twenty per cent from said sales are payable to said Pickering Incorporated as provided in said Pickering contract, and that no amounts are to be disbursed to the A. H. Frost Company from said sales until the first twenty per cent thereof have been paid to said Pickering Incorporated."

After the execution of the Pickering, Incorporated, contract of June 1, 1925, and the declaration of trust just mentioned, Pickering, Incorporated, apparently entered upon the performance of its obligations under these instruments. It found purchasers for some of the subdivided property but did not actually consummate any sales. For some reason not disclosed by the record this corporation and appellant decided to dissolve the trust in which Pickering, Incorporated, was named as beneficiary. This last-named corporation was paid $20,000 and consented to a dissolution of the trust, which dissolution was accomplished about February, 1926. While Taylor knew of this action, the Citizens' Trust & Savings Bank of Los Angeles had no notice or knowledge of it.

In March, 1926, a second trust was executed by A. H. Frost Company as trustor, Union Trust Company of San Diego, a trustee, and E. A. Walsh, and A. L. Mitchell, as beneficiaries, whereby the two beneficiaries were substituted to all of the obligations, rights, and benefits of Pickering, Incorporated, under the original trust. Neither declaration of trust is set forth in the record. Very brief summaries of the documents are inserted instead of exact copies. The second declaration of trust, which we will hereafter refer to as the "Walsh Trust," is described in the record as follows: "Declaration of Trust, S-7061, Union Trust Company of San Diego, covering the same property and embodying the same terms and provisions of sale and default as the Declaration in favor of Pickering, Incorporated, being Exhibit No. 6, but being in favor of A. H. Frost Company, as payee, E. A. Walsh and A. L. Mitchell, as beneficiaries, dated March ——, 1926; the same being attached to plaintiff's complaint in this action and referred to therein as Exhibit B."

[1] The Pickering, Incorporated, declaration of trust, by its express terms incorporated within its provisions the contract of June 1, 1925, between appellant and Pickering, Incorporated, which was the original contract of sale between those parties and under the terms of which the rights and obligations of all the parties connected with these transactions seem to have had their origin. As it affirmatively appears from the record that the Walsh trust embodied "the same terms and provisions of sale" as the Pickering, Incorporated, trust, we must conclude that the Walsh trust also incorporated

within its terms the provisions of the agreement of June 1, 1925, between Pickering, Incorporated, and appellant, and that the real effect of the Walsh trust was to continue in operation the terms and conditions of the contract of June 1, 1925, and the Pickering, Incorporated, trust with the substitution of Walsh and Mitchell in the place of Pickering, Incorporated, the beneficiary in the earlier declaration of trust.

About January 3, 1928, the respondent bank was preparing to take from the Citizens' Trust & Savings Bank of Los Angeles an assignment of the interest it had acquired in the proceeds of the sale of the real property described in the declarations of trust and under the original Taylor-A. H. Frost Company contract and the Taylor assignment. Neither of the banks had at that time any notice or knowledge of the cancellation of the Pickering, Incorporated, trust, or the execution of the Walsh trust, which facts were not disclosed to either of them by Taylor, appellant or the Union Trust Company of San Diego until on or about March 27, 1929. Before accepting the assignment from the Citizens' Trust & Savings Bank of Los Angeles, respondent caused to be prepared and delivered to the Union Trust Company of San Diego by appellant, the following letter:

"San Diego, Cal., Jan., 1928.
"Union Trust Co., San Diego, Calif.
"Gentlemen:

"Under date of November 12, 1925, the undersigned company wrote you a letter in which we directed that one-half of the net proceeds from sales of the Pickering Incorporated contract be remitted to the Citizens Trust & Savings Bank, Los Angeles, until remittances to said bank have amounted to the sum of $12,456.09.

"Our letter to you above referred to and bearing date of November 12, 1925, was intended to be an absolute assignment of one-half of the net proceeds from sales of said Pickering Inc. contract until said remittances amounted to the sum of $12,456.09 and was not intended to be subject to revocation by the undersigned company.

"This letter is to advise you that we received a valuable consideration for the execution of said letter of instructions to you, and that we do hereby declare said instructions to be irrevocable, and instruct you to continue said payments to said Citizens Trust & Savings Bank or to their assignees until said sum of $12,456.09 has been paid in full.

"Very truly yours,
"A. H. Frost Company.
"By A. H. Frost, President.
"By Martha M. Frost, Secretary.
"[Seal.]"

As a part of this transaction respondent had prepared and executed by the Citizens' Trust & Savings Bank of Los Angeles and delivered to the Union Trust Company of San Diego a letter which in detail referred to the Taylor-appellant "Agreement of Settlement," the assignment by Earl Taylor to Birdie Mae Taylor and by Birdie Mae Taylor to the Citizens' Trust & Savings Bank of Los Angeles, the letter of appellant to the Union Trust Company of November 12, 1925, and the assignment by the Citizens' Trust & Savings Bank of Los Angeles to respondent, which letter concluded with an order directing the Union Trust Company of San Diego to pay to respondent the moneys accruing under these various documents.

During these negotiations and before the consummation of the assignment to appellant, and on January 13, 1928, the following letter was sent from the then attorneys for appellant to the attorneys for respondent:

"Attorney Gardiner has handed to A. H. Frost Company for execution a letter intended to make irrevocable certain instructions for remittances arising under sales of Pickering, Inc., contract with A. H. Frost Company.

"We understand that you drafted this letter, and that the bank requires its execution before taking the above mentioned order as collateral security.

"We can obtain execution of this letter for you and the officers of the company are willing to deliver it as soon as Mr. Taylor takes care of the claim of San Diego Lumber Company for $316.78.

"We have prepared suit against Taylor for this amount, and contemplate garnishment proceedings against Union Trust Company for payments arising out of the Pickering, Inc., contract which go to the credit of Taylor. The execution of this proposed letter would apparently make the earlier order irrevocable to the extent where such a garnishment would not be effective. For that reason we will be obliged to hold up the letter until we have made secure the claim of San Diego Lumber Company.

"If Mr. Taylor is willing to give us an order on the funds which your bank expects to loan him we can adjust the matter in that way.

"As you doubtless know, the owners of A. H. Frost Company are closely connected with the officials of San Diego Lumber Company, and have authorized us to handle this situation to the protection of the latter. For that reason we will have to withhold delivery of the letter which you request until Mr. Taylor has voluntarily taken care of the bill or until we have secured a sufficient garnishment of the funds."

Without any knowledge of the cancellation of the Pickering trust and the execution of the Walsh agreement and seeming-

ly satisfied from its investigations and the letters of appellant that it would succeed to Taylor's rights under the original Pickering, Incorporated, trust, respondent accepted the assignment from the Citizens' Trust & Savings Bank of Los Angeles as collateral security for a loan of about $7,000 to Taylor. The facts before us would seem to indicate the necessary elements of an estoppel against the defense interposed by appellant in the trial court, but estoppel was neither plead nor were the facts upon which it could be based found in the court below. It does not seem to have been considered at the trial.

After the cancellation of the Pickering, Incorporated, trust and the execution of the Walsh trust the Union Trust Company of San Diego, with the knowledge of appellant, paid to the Citizens' Trust & Savings Bank of Los Angeles and to respondent in various amounts the total sum of $3,941.40, out of the moneys which it received from sales of property under the Walsh trust, which sales were made by Walsh and Mitchell.

Walsh and Mitchell became in default in the performance of their obligations under the Walsh trust, and early in 1929 these beneficiaries with appellant and the Union Trust Company of San Diego, but without the knowledge or consent of respondent, by contract dissolved the Walsh trust, and the trustee, on the request of appellant, deeded the property involved to Martha M. Frost. No foreclosure proceedings or foreclosure of the trust estate were had as required in the declaration of trust in order to terminate the trust upon default of the beneficiaries.

On March 27, 1929, the Union Trust Company of San Diego notified respondent of the termination of the trust and that future payments to it would be discontinued. Respondent thereupon brought this action and was given judgment against appellant for $8,514.69, the amount unpaid on the original A. H. Frost Company indebtedness to Taylor, as determined in their "Agreement of Settlement." This judgment is under attack here on this appeal.

[2] It is the theory of the respondent that an equitable assignment of the proceeds to be received from the sale of the real property described in the declarations of trust to the amount of $12,456.09 was made by appellant and that the right to receive such moneys and the equitable interest in them passed to respondent by the various assignments which have been mentioned. This theory seems to be supported by the record and the decisions of our courts. In the case of Goldman v. Murray, 164 Cal. 419, 129 P. 462, 463, it was said:

"Touching the evidence establishing such an equitable assignment, it is said in McIntyre v. Hauser, 131 Cal. 11, 63 P. 69: 'In order to constitute an equitable assignment of a debt, no express words to that effect are necessary. If from the entire transaction it clearly appears that the intention of the parties was to pass title to the chose in action, then an assignment will be held to have taken place.' We have before us, then, a case where the bona fide creditor of a corporation takes from it promissory notes evidencing its debt to him, in the belief of the validity of the notes, and passes them on in due course of business to his creditor; the notes being given to, and received by the indorsee in payment of the indorser's indebtedness to the indorsee. The assignments of the notes, so far as Bowen and the plaintiff were concerned, carried with them the original indebtedness. Redington v. Cornwell, 90 Cal. 63, 27 P. 40; Knowles v. Sandercock, 107 Cal. 640, 40 P. 1047; 7 Cyc. 816. The intent of the parties—of Bowen on the one hand to assign and of the plaintiff, on the other to accept the assignment of the corporation indebtedness—thus clearly evidenced by the transaction between them, is not affected by the fortuitous circumstance that the notes themselves were invalid as corporation obligations. They still had validity, not as negotiable instruments, but as evidencing the contract between Bowen and the plaintiff, and this contract amounted to a valid equitable assignment. First, since no precise form of words or writing is necessary to the establishment of an equitable assignment, it mattered not whether the notes were or were not the valid obligations of the corporation. They still afforded evidence of what, as between themselves, the plaintiff and the witness Bowen proposed to do and did with the indebtedness owed to the latter by the corporation. Second, as we have seen, the acknowledgment and acceptance by the corporation of the assignment of the debt of Bowen to plaintiff was not essential to the validity of the assignment. And, third, while authority is divided upon the question of the equitable assignability of a portion of a debt or fund before acceptance, the sounder view we take it is that expressed in 1 Daniel on Negotiable Instruments, § 23, and upon this point we cannot do better than to quote the learned author at length:

" 'This doctrine is clearly correct in so far as it applies to legal assignments. The holder of the bill or order cannot sue the drawee-at-law in his own name, as he would thus divide the cause of action and leave a balance due the creditor. He cannot sue in the creditor's name, except by his consent, as, at best, he is only entitled to a part of the debt due him. But it has been held in numerous cases, and we think should now be regarded as law, that a nonnegotiable order for part of a fund operates as an eq-

uitable assignment pro tanto. Clearly this is the case when it has been accepted or assented to by the drawee. And when it has not been accepted, our own view is this: That a nonnegotiable order for part of a fund does operate as an equitable assignment pro tanto as between the drawer and payee, because obviously so intended. But as between drawer and payee on the one side, and the drawee on the other, it creates no obligation on the latter to pay it, as he has a right to insist on an integral discharge of his debt. And, if the creditor give a subsequent order for the whole amount, he may pay it with impunity, as he thus discharges his debt in its entirety at once. But if the payee or indorsee goes into equity, or the parties are brought therein by any proceeding, so that all of them are before the court, the holder of the order may enforce it as an equitable assignment as against all subsequent claimants, whether by assignment from the drawer or by legal process served upon the drawee.

" 'Mr. Justice Story has stated the principle, as we conceive it, more correctly in his treatise on Equity Jurisprudence than in the cases hitherto cited, and he there declares that, while a draft for part of a fund operates no assignment at law, the same principle applies in equity to a draft for part of a fund that applies to a draft for the whole, and that "in each case a trust would be created in favor of the equitable assignee of the fund, and would constitute an equitable lien upon it." We can perceive no sufficient reason for excluding a bill for a part of a fund, whether it be negotiable or not, from operating as an equitable assignment within the limitations of the text. It would only carry out to its legitimate sequence the theory of the bill.' "

See, also, the cases of McGown v. Dalzell, 72 Cal. App. 197, 236 P. 941, and Bridge v. Kedon, 163 Cal. 493, 126 P. 149, 43 L. R. A. (N. S.) 404.

It is also self-evident that appellant regarded the Walsh trust as a continuation of the terms of the Taylor "Agreement of Settlement," the appellant-Pickering, Incorporated, contract, and the Pickering, Incorporated, trust, in so far as the rights of Taylor and his assignees to participate in the proceeds derived from the sale of the real property are concerned. No other view could reasonably explain the letters written by appellant and its acquiescence in the payment to the Citizens' Trust & Savings Bank of Los Angeles and to respondent of $3,941.40 derived from the sales of the trust property after the cancellation of the Pickering, Incorporated, trust and the execution of the Walsh trust.

The construction which the parties to a contract place upon its terms is often taken as the best evidence of what they intended by its provisions. In Mitau v. Roddan, 149 Cal. 1, 84 P. 145, 150, 6 L. R. A. (N. S.) 275, it was said: "Parties to a contract have a right to place such an interpretation upon its terms as they see fit, even when such an interpretation is apparently contrary to the ordinary meaning of its provisions. And in all cases where the terms of their contract, or the language they employ, raises a question of doubtful construction, and it appears that the parties themselves have practically interpreted their contract, the courts will follow that practical construction. It is to be assumed that parties to a contract best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to his own interests, and to insistence on his rights, and that whatever is done by the parties contemporaneously with the execution of the contract is done under its terms as they understood and intended it should be. Parties are far less liable to have been mistaken as to the intention of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to law, and one of them then seeks a construction at variance with the practical construction they have placed upon it. The law, however, recognizes the practical construction of a contract as the best evidence of what was intended by its provisions. In its execution, every executory contract requires more or less of a practical construction to be given it by the parties, and when this has been given, the law, in any subsequent litigation which involves the construction of the contract, adopts the practical construction of the parties as the true construction, and as the safest rule to be applied in the solution of the difficulty. Mayberry v. Alhambra, etc., Co., 125 Cal. 446, 54 P. 530, 58 P. 68; Keith v. Electrical Engineering Co., 136 Cal. 181, 68 P. 598."

By the voluntary termination of the trust in a manner not authorized by and contrary to its terms and the conveyance of the real property to Martha M. Frost, any possibility of respondent receiving further payments from the proceeds of the sale of the trust property was removed. Appellant cannot be permitted to thus defeat its own contract and avoid the payment of its indebtedness.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

MALMGREN v. SOUTHWESTERN AUTOMOBILE INS. CO.

Civ. 8417.

District Court of Appeal, First District, Division 2, California.

Sept. 21, 1932.

Rehearing Denied Oct. 21, 1932. Hearing Denied by Supreme Court Nov. 18, 1932.

Insurance ⊂=598.

Where insurer satisfied judgment recovered by injured wife against assured and equal to limit of its liability under policy providing that insurer would also pay interest on judgment and costs, irrespective of limited liability, husband *held* not entitled to recover from insurer interest and costs on outlawed judgment he recovered against assured for consequential damages (St. 1919, p. 776; Code Civ. Proc. § 337, subd. 1; Civ. Code, § 1915).

Word "interest" as used in provision that interest on any judgment against insured would be paid by company, irrespective of limits expressed in policy, meant interest accruing on principal sum of judgment for which company was liable under policy.

[Ed. Note.—For other definitions of "Interest," see Words and Phrases.]

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by E. J. Malmgren against the Southwestern Automobile Insurance Company. From a judgement for defendant, plaintiff appeals.

Affirmed.

Ford & Johnson and Fletcher A. Cutler, all of San Francisco, for appellant.

W. W. Middlecoff, of Los Angeles, for respondent.

SPENCE, J.

Plaintiff recovered a judgment against one J. A. Eddy for damages sustained by him in consequence of personal injuries to plaintiff's wife cause by the negligent operation of an automobile by said J. A. Eddy. Plaintiff subsequently brought this action against the defendant insurance company which had issued a policy of insurance to said J. A. Eddy. The parties entered into a stipulation concerning the facts and a further stipulation that either party might move "for judgment upon the pleadings and the facts stipulated." The cause was tried upon the motions, and judgment was entered in favor of defendant. From this judgment plaintiff appeals.

Before discussing the facts appearing from the pleadings and stipulation, we shall first consider the theory upon which plaintiff based his alleged right to recover from the defendant company. The policy upon which this action was brought contained the following provisions: "The insolvency or bankruptcy of the assured shall not release the company from any payment for which it would otherwise be liable under this policy and if such insolvency or bankruptcy shall occur and an execution on a judgment recovered in a suit against the assured covered by this policy shall be returned unsatisfied the judgment creditor shall have a right of action to recover the amount of such judgment against the company to the same extent that the assured would have had to recover against the company had the assured paid the said judgment; but in no event shall the company's liability exceed the limits expressed in this policy." There was neither allegation nor proof in the present action of insolvency or bankruptcy of the assured; nor was there any allegation or proof that execution had been returned unsatisfied. We therefore conclude that plaintiff as judgment creditor had not attempted to plead and prove a cause of action under the above-mentioned provision of the policy. In this connection the pleading and proof merely showed that plaintiff's judgment against the assured had become final and that no part thereof had been paid.

This action was filed following the decision in Malmgren v. Southwestern Automobile Insurance Company, 201 Cal. 29, 255 P. 512, 513, and plaintiff's pleadings were no doubt drawn in the light of that decision. It was there pointed out that the policy involved in the present case failed to embody the provisions required by the act of 1919 (Stats. 1919, p. 776), but contained the language found in a somewhat similar New York statute. The Supreme Court held that the provisions of the statutes of this state "are part of every policy," and that the California statute in question "does not make the return of the execution unsatisfied a prerequisite to the commencement of an action upon the policy." The statute referred to provides that, "in case judgment shall be secured against the insured in an action brought by the injured person or his heirs or personal representatives, in case death resulted from the accident, then an action may be brought against the company, on the policy and subject to its terms and limitations, by such injured person, his heirs or personal representatives as the case may be, to recover on said judgment." It is therefore apparent from the pleadings and proof that plaintiff was attempting to state a cause of action upon the policy as supplemented by the provisions of the statute which were embodied into the policy as a matter of law.

From the pleadings and stipulation it appears that the policy of insurance was in effect on August 11, 1923, when plaintiff's wife

sustained the bodily injuries; that plaintiff's wife was the only person who suffered bodily injuries in the accident; that plaintiff and his wife each brought separate actions against said J. A. Eddy; that the action brought by plaintiff's wife was for said bodily injuries suffered by her, in which action she recovered a judgment on May 3, 1924, for $5,000 and $19.75 costs; that the action brought by plaintiff was for consequential damages sustained by him as the result of said injuries to his wife, in which action plaintiff recovered judgment on February 10, 1925, in the sum of $2,411.95 and $13 costs; that no appeal was taken from said judgment in favor of plaintiff and against said J. A. Eddy, and that said judgment became final on April 10, 1925; that the judgment in favor of plaintiff's wife and against said J. A. Eddy was satisfied in full by the defendant herein on March 20, 1927, by the payment of the sum of $5,367.50 as the principal sum and interest, together with the sum of $19.75 as costs; that no part of the judgment in favor of plaintiff and against said J. A. Eddy had been paid; and that the present action was filed on April 8, 1930, being more than four years after said judgment in favor of plaintiff and against said J. A. Eddy became final.

It was stipulated in the trial court, for the purposes of the motions for judgment, "that the defendant's liability, if any, is for the interest on the judgment alone and the costs." It is not altogether clear whether plaintiff abandoned his effort to collect the principal sum of the judgment upon the theory that defendant's plea of the statute of limitations was good (Code Civ. Proc. § 337, subd. 1), or upon the theory that plaintiff had no cause of action against the defendant company for the principal sum of a judgment for consequential damages rather than damages for personal injuries or upon the theory that the defendant was not liable for said principal sum by reason of the payment of the judgment in favor of plaintiff's wife, as the policy provided that "the company's liability for loss from an accident resulting in bodily injuries to or in the death of one person is limited to $5,000. * * *"

The policy, however, provided that: "The expenses incurred by the company in defending any suit, including the interest on any verdict or judgment and any costs taxed against the insured, will be paid by the company irrespective of the limits expressed above." It is by virtue of this last-mentioned provision of the policy that appellant contends that he was entitled to judgment against the respondent company for interest and costs on the judgment which appellant recovered against said J. A. Eddy. In our opinion, appellant's contention cannot be sustained.

[1, 2] The policy upon which appellant seeks to recover against respondent was primarily a contract between the respondent and the assured. Any right of action which appellant may have had as a judgment creditor of the assured to recover anything from respondent under the policy arose either by virtue of the express provisions of the policy or by virtue of the provisions of the statute embodied into the policy as a matter of law. Appellant failed to plead or prove a cause of action under the express terms of the policy first above set forth, and his right of action, if any, upon the policy arose by virtue of the provisions of the statute. It is unnecessary for us to determine whether appellant was the "injured person" within the meaning of the statute, for, even assuming that he was, his right of action, if any, against respondent for the principal sum of the judgment and costs arose as soon as the judgment became final. It was therefore barred by the statute of limitations. Code Civ. Proc. § 337, subd. 1. But appellant takes the position that his right of action for interest on the judgment did not accrue until the installments of interest became due, and that therefore his right of action for such interest was not barred. No authority has been called to our attention holding that an independent action may be maintained for accruing installments of interest upon an obligation when the right of action to recover the principal sum is barred by the statute of limitations. We have been unable to find any support in the authorities for appellant's position, and believe that to sustain it would defeat the very purpose of such statutes of limitations. We are of the opinion, however, that appellant's position is untenable for a further and entirely different reason. Respondent paid a sum in excess of $5,000 to satisfy the judgment recovered against the assured by appellant's wife. The principal sum of that judgment was equal to the $5,000 limit provided in the policy, and respondent was not liable under the policy for the principal sum of any other judgment. Respondent further paid the interest on said judgment in favor of appellant's wife and the costs, "irrespective of the limits" of the policy. Appellant would have us construe the clause of the policy relating to interest to mean that, despite such payment in full to appellant's wife, respondent was also liable for interest on appellant's judgment against the assured, "irrespective of the limits" of the policy. We cannot agree with this construction, for we are of the opinion that the "interest on any verdict or judgment" which the company agreed to pay, "irrespective of the limits expressed above," had no reference to interest on the principal sum of any judgment for which principal sum the company was not in any manner liable. "Interest is the compensation allowed by law or fixed by the parties for the use, or forbearance, or detention of money." Civ. Code, § 1915. The only logical construction to place upon the word "interest," as used in the above-mentioned policy, is that it referred only to in-

terest accruing on the principal sum of a judgment for which respondent was liable under the terms of the policy. To interpret the policy in accordance with the contention of appellant would lead to the absurd result of rendering respondent liable indefinitely for the payment of the accruing installments of interest upon an obligation of a third person for which obligation respondent was not in any manner liable. We do not believe that the rule of strict construction against the insurer may be invoked to sustain such an unreasonable construction.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

WEIDNER v. ZIEGLAR et al.*

SAME v. UNION TRUST CO. OF SAN DIEGO.

Civ. 1013.

District Court of Appeal, Fourth District, California.

Sept. 20, 1932.

Rehearing Denied Oct. 14, 1932.

Hearing Granted by Supreme Court Nov. 17, 1932.

1. Assignments ⇐109.

Assignee assuming obligations imposed by contract upon assignor is liable for performance of obligations assumed.

2. Mortgages ⇐375.

Where assignment of beneficiaries' interests was subject to terms of trust declaration imposing personal liability upon beneficiaries for deficiency on sale of interest, assignee accepting such assignment *held* beneficiary under trust declaration and liable for deficiency upon principal indebtedness after sale of interests.

Assignee of beneficial interests under trust declaration was liable for such deficiency where terms of trust declaration imposed personal liability upon beneficiaries for deficiency in principal indebtedness remaining after application of proceeds from sale of beneficial interest, assignment of part of beneficial interests to assignee was expressly made subject to all terms and conditions of declaration of trust, and assignee's acceptance of assignment stated that assignee accepted assignment, approved, ratified, and confirmed trust agreement; the words "approved," "ratified," "confirmed," and "agreed" importing an intention on the part of the user of them to perform the duties imposed by the contract the provisions of which are thus expressly confirmed.

[Ed. Note.—For other definitions of "Agreed," "Approved," "Confirm; Confirmation," and "Ratify," see Words and Phrases.]

3. Mortgages ⇐375.

Assignee of beneficial interests under trust declaration, assuming liability for deficiency on indebtedness, and payment of taxes, could not recover from proceeds of sale amounts he advanced for payment of taxes on trust property.

4. Mortgages ⇐375.

Where assignee of beneficial interests under trust declaration was liable for payment of taxes, agreement that such assignee should be reimbursed for his advances for taxes *held* without consideration.

Appeals from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Separate actions by L. G. Weidner against Frank B. Zieglar and another, and against the Union Trust Company of San Diego. From the judgment plaintiff and defendants Frank B. Zieglar and another appeal.

Affirmed in part, and reversed in part.

Harrison G. Sloane, of San Diego, for Weidner.

Hamilton, Lindley & Higgins, of San Diego, for Zieglar and Carling.

Albert J. Lee, Charles H. Forward, and Harold R. Conklin, all of San Diego, for Union Trust Co. of San Diego.

JENNINGS, J.

The appeals herein are taken from judgments rendered in two actions which were consolidated and tried together. By stipulation entered into between counsel for the respective parties a single bill of exceptions has been prepared and the appeals are to be considered as though presented in a single case. Inasmuch, however, as the two actions instituted by plaintiff proceeded upon different theories and different relief was sought in each action, some preliminary explanation of them is required in order that there shall be a clearer understanding of the various points involved in the appeals. For the sake of convenience, the action instituted by plaintiff against Frank B. Zieglar, Harry F. Carling, and Union Trust Company of San Diego will be referred to as action No. 1, and the action instituted by plaintiff against Union Trust Company of San Diego alone will be referred to as action No. 2.

In his complaint in action No. 1 plaintiff sought the aid of a court of equity in declaring the meaning of a certain assignment made in his favor to be in accordance with his expressed understanding of its terms or that if

such understanding were not expressed by the assignment that it be revised in conformity therewith. Further equitable relief was also sought in the form of an injunction pendente lite restraining a threatened sale by the Union Trust Company of San Diego of beneficial interests created by a certain declaration of trust. This injunctive relief was denied. The declaration of trust was executed by the Union Trust Company of San Diego as trustee on August 2, 1926. In it defendants Carling and Zieglar were denominated "Payees" and five individuals therein named were styled "class B" beneficiaries. The payees and class B beneficiaries in writing jointly and severally ratified, approved, and confirmed the said declaration in all particulars and expressly assented and agreed to its provisions. The circumstances under which the declaration was executed and certain of its provisions involved herein have received the attention of this court in an opinion in the case of Davies v. Union Trust Company of San Diego, decided on August 29, 1932, reported in 13 P.(2d) 961. The plaintiff Weidner was not originally a party to the trust created by the declaration of trust executed on August 2, 1926. It appears, however, that during the month of March, 1928, he acquired by assignment three-fifths of the class B beneficial interests in the trust, and subsequently on August 29, 1928, he received by assignment an additional one-fifth of the class B beneficial interests. It appears further that during the month of May, 1928, certain taxes which had been assessed against the property with respect to which the trust had been created were unpaid and had become delinquent. Defendant Zieglar had theretofore advanced the sum of $7,800 for the purpose of paying certain taxes, but an additional sum of $18,239.47 was required to avoid the penalties that were about to be imposed by reason of the aforesaid delinquency. In this state of affairs, plaintiff Weidner proposed to advance the amount thus required. The record shows that, at first, he was willing to advance the required amount as a class B beneficiary, but that, after a conference with the trust officer of the Union Trust Company, he arrived at the conclusion that repayment of the sum thus to be advanced by him might be accelerated and rendered more certain if he could make the advance from the more advantageous position of a "payee." A certain instrument was thereupon "devised by the Trustee and was signed by the plaintiff L. G. Weidner, and the defendant Frank B. Zieglar," as the court found. This instrument is entitled "Limited Assignment of 2d Payee's Interest" and is the instrument whose meaning and effect the plaintiff sought to have declared as being in accordance with his expressed understanding that, by its terms, until repayment of the advance made by him, he became a payee occupying the superior position and possessing the rights originally vested in the defendant Zieglar as "2d Payee" under the provisions of the trust declaration. In action No. 1 defendants Carling and Zieglar filed separate answers to plaintiff's complaint denying that plaintiff had made the advance as a payee or that the terms of the limited assignment of the second payee's interest had operated to make him a payee under the trust declaration until the advance should be repaid to him. These defendants also filed jointly a cross-complaint in which it is alleged that plaintiff had purchased a beneficial interest under the declaration of trust in March, 1928, and had accepted an assignment of such beneficial interest whereby he became a class B beneficiary under said trust declaration and thereby assumed the obligations of a class B beneficiary; that thereafter said plaintiff had failed to make payments of principal and interest and taxes as required by the provisions of the trust declaration, thereby causing a default to exist under the terms of said trust declaration because of which default the trustee had caused all beneficial interests to be sold at public sale and the proceeds to be applied as provided by the declaration of trust; that by such sale all of the security for the payment of the principal indebtedness was exhausted and there remained due and owing from plaintiff an unpaid balance amounting to $117,940.26, with interest from the date of said sale.

In action No. 2 brought against Union Trust Company as trustee under the aforementioned declaration of trust plaintiff sought to recover the sum advanced by him upon the theory that at the sale of all beneficial interests by the trustee the sum of $150,000 was realized, out of which fund the plaintiff was entitled to be reimbursed for the aforesaid advance.

At the conclusion of the trial of the two actions, consolidated as above stated, the court denied to plaintiff the relief sought by him in both actions. The court also denied to defendants Carling and Zieglar a judgment for the unpaid balance of the principal indebtedness. From the judgments thus rendered plaintiff and defendants Carling and Zieglar have prosecuted separate appeals. It is, first of all, apparent that if plaintiff Wiedner is unsuccessful in his appeal in action No. 1 his appeal in action No. 2 must fail. This must be true because, if the trial court was correct in its conclusion that the plaintiff became a class B beneficiary by virtue of the assignments of fractional parts of the class B beneficial interests, the sale by the trustee of all beneficial interests under the trust for defaults caused by the failure of the class B beneficiaries to make payments on the principal indebtedness and interest as required by the provisions of the trust declaration destroyed all class B beneficial interests, and

plaintiff as an owner of such an interest could not claim reimbursement from the proceeds of a sale which was made by reason of his failure to perform obligations imposed upon him as a class B beneficiary.

In considering the appeals taken by the various parties from the court's judgment in action No. 1, we shall first give attention to the appeal of defendants Carling and Zieglar for, if as is conceded by counsel for plaintiff Weidner, we conclude that the appeal of these defendants is well taken, it follows necessarily that the plaintiff's appeal must fail. It is the contention of these defendants that the court erred in refusing to render judgment in their favor for the unpaid balance of the principal indebtedness remaining after application thereon of the sum of $150,000 realized by the trustee from the sale of all beneficial interests. This unpaid balance is stated in defendant's cross-complaint to amount to the sum of $117,940.26, together with interest thereon at the rate of 6 per cent. from the date of the sale. In opposition to the contention thus advanced the plaintiff urges, first, that the declaration of trust imposed no personal liability upon class B beneficiaries and that, therefore, assuming that plaintiff by assignment became such a class B beneficiary burdened with the various duties and obligations of such a beneficiary, nevertheless he could not be held liable for any deficiency, since personal liability is a prerequisite to the existence of any liability for such deficiency. It must be conceded that if no personal liability rested upon the original class B beneficiaries none could possibly attach to plaintiff who later acquired four-fifths of the class B beneficial interests by assignment. The contention that no personal liability attached to the original class B beneficiaries received our attention in the case of Davies v. Union Trust Company, above referred to, and was decided adversely to the contention now advanced by plaintiff. The second and more important contention advanced by plaintiff is that, even assuming that there was a personal liability on the part of the original class B beneficiaries and that they might be held for a deficiency of the principal indebtedness after default on their part and a sale of their interests, nevertheless plaintiff did not, by the provisions of the assignment of such interests to him and by the terms of his written acceptance of such assignment, assume the obligations imposed upon the original class B beneficiaries by the provisions of the declaration of trust. The solution of the problem thus presented depends, in the final analysis, on the interpretation to be placed upon the language of the assignment by virtue of which plaintiff acquired fractional parts of the entire class B beneficial interest and more particularly upon the interpretation of the language of the acceptance of such assignment by plaintiff. The assignment is entitled "Assignment of Beneficial Interest" and is in the following language:

"For Value Received, Kathryn Hoetzel does hereby grant, assign, transfer, convey and warrant unto L. G. Weidner, subject however, to certain attachments filed with Union Trust Company of San Diego, an undivided two-fifths (2/5th) Class B Beneficial Interest in and to the Trust evidenced by that certain Declaration of Trust, or Trust Agreement, dated August 2nd, 1926 and issued by Union Trust Company of San Diego, as Trustee, under its Trust No. S-7528, together with a like interest in and to the proceeds and avails arising or growing out of said Declaration of Trust; said Trustee being hereby authorized to pay and turn over unto said assignee, all moneys and benefits growing out of the interests assigned herein.

"This assignment is subject to all of the terms and conditions of said Declaration of Trust.

"Dated, this 5th day of March, 1928.

"Kathryn Hoetzel."

Immediately below the above-quoted assignment is to be found the following language:

"Assignee's Acceptance.

"The undersigned assignee in the foregoing assignment, does hereby accept said Assignment and does hereby approve, warrant, ratify, confirm and agree to the Declaration of Trust referred to in said Assignment and all the terms and conditions thereof, hereby acknowledging that the same has been read by the undersigned.

"Dated this twenty-second day of March, 1928.

"L. G. Weidner."

Appended to the instrument containing the assignment and the assignee's acceptance and presumably forming a part of it is the following:

"Trustee's Certificate of Filing.

"A duplicate of this Assignment has been filed in the office of the undersigned, this 2nd day of April, 1928.

"Union Trust Company of San Diego, Trustee under its Declaration of Trust No. S-7528.

"By S. G. Ingle.

"Assistant Trust Officer."

[1] It is to be observed that the last clause of the assignment recites that it is "subject to all of the terms and conditions of said Declaration of Trust." Among the various terms of the document to which reference is thus made is: First, an unequivocal acknowledgment of indebtedness owing by designated class B beneficiaries; second, an unmistakable covenant on the part of the beneficiaries to protect and preserve the trust property from loss, damage, liability, and expense, to keep said property in good condition and to

permit no waste or deterioration and to pay for any and all improvements that may be made on the property outside the purview of the Road District Improvement Act of 1909; third, a covenant on the part of all beneficiaries that, if proceeds from the sale of lots and parcels of the trust property, together with other payments made to the trustee, do not equal the installments of the principal indebtedness as the same become due, all such beneficiaries will pay such additional sums as may be necessary to enable the payment of such installment to be made; fourth, a covenant by beneficiaries to pay any tax, lien, or assessment levied against the trust property or any part thereof five days before delinquency. The presence in the declaration of trust of the aforesaid covenants together with the unqualified acknowledgment of the indebtedness of the purchase price due from class B beneficiaries to be paid to Carling and Zieglar, designated as "Payees," caused this court to decide, in the case of Davies v. Union Trust Company, supra, that a personal liability was imposed by the provisions of the trust declaration upon the class B beneficiaries and to affirm the judgment of the trial court holding such beneficiaries liable for whatever deficiency in the amount of the principal indebtedness as should remain after application thereto of the proceeds resulting from the sale of all beneficial interests for the purpose of exhausting the sole security provided for the payment of such principal indebtedness. It may be conceded that the general rule with respect to the liability of assignees of contracts is as stated in 2 Ruling Case Law, 625, viz., that such assignees may not be held for liabilities imposed by the provisions of contracts assigned to them in the absence of an assumption by such assignees of the liabilities of their assignors. Nevertheless, it is equally well settled that, when the assignee of a contract does assume the obligations imposed by the contract upon his assignor, he may be held liable for the performance of such obligations. Barberich v. Pooshichian, 59 Cal. App. 507, 211 P. 236.

[2] We come, then, to a consideration of the language of the assignment of the beneficial interest of class B beneficiaries and of plaintiff's written acceptance of such assignment. As heretofore noted, the assignment was expressly stated to be made subject to all of the terms and conditions of the declaration of trust. It was an assignment of an undivided fractional part of the class B beneficial interest "together with a like interest in and to the proceeds and avails arising or growing out of said Declaration of Trust." In the written acceptance of the assignment, plaintiff assignee specifically states that he "does hereby accept said assignment." Bearing in mind the language of the assignment which contained the express declaration that it was made subject to all terms and conditions of the trust declaration, it might well be argued that the language of the acceptance, viz., "does hereby accept said assignment," evidenced an intention on the part of plaintiff to accept the burdens and obligations of the contract as well as its benefits. The trial court found that at all times from March 5, 1928, to October 29, 1928, the plaintiff was a class B beneficiary under the declaration of trust. Plaintiff's counsel in his opening brief concedes that plaintiff has succeeded to the interest of the original class B beneficiaries under the trust. Furthermore, written acceptance of the assignment states that plaintiff "does hereby approve, warrant, ratify, confirm and agree to said Declaration of Trust and all the terms and conditions thereof." Since, therefore, as heretofore indicated, the declaration of trust imposed a personal liability upon the original class B beneficiaries rendering them liable for any deficiency that might result upon a sale of the beneficial interests, and the court has found that, by virtue of the assignment of a fractional part of the class B beneficial interests to plaintiff and his acceptance thereof, plaintiff became a class B beneficiary, it is difficult to escape the conclusion that the court erred in finding that plaintiff did not, by the purchase of a beneficial interest under the declaration of trust and his acceptance of the assignment, assume any of the obligations or responsibilities of the class B beneficiaries under the trust instrument so as to become liable for a deficiency judgment upon the obligation of the class B beneficiaries to pay the principal indebtedness. It is not open to doubt that if plaintiff had executed an acceptance of the assignment which had said "I accept the assignment and assume the obligations imposed by the provisions of the declaration of trust upon my assignors," plaintiff could be held liable for a deficiency assuming that his assignors could be held therefor. When therefore he stated in his acceptance of the assignment that he accepted the assignment and that he approved, ratified, confirmed, and agreed to the trust agreement and all its terms and conditions and by virtue of such assignment and his acceptance became, as the court found, a class B beneficiary, his express approval, ratification, confirmation, and agreement thereto fastened upon him whatever liability attached to his assignors under the instrument. The words "approve," "ratify," "confirm," and "agree" are not words of doubtful meaning. They are words that are often employed in agreements made by third persons who accept assignments of contractual rights. They are words that are positive in character and import an intention on the part of the user of them to perform the duties imposed by the contract whose provisions are thus expressly confirmed. We therefore find ourselves unable to agree with the finding of the court

that plaintiff did not assume the obligations imposed upon his assignors by the provisions of the declaration of trust.

[3, 4] Since we are of the opinion that plaintiff, by virtue of the assignment and acceptance heretofore discussed, did assume the obligations resting upon his assignors and thereby became liable for the deficiency, as contended by defendants Carling and Zieglar, it necessarily follows that we are in accord with the court's judgment denying recovery to plaintiff for the amount advanced by him for the payment of taxes. One of the obligations imposed upon the original class B beneficiaries was the payment of the taxes. This duty is imposed in the following language contained in the trust agreement: "Should said property, or any part thereof, or the proceeds from any sale made become liable for payment of any inheritance, income or other tax, lien, or assessment, which Beneficiaries hereby jointly and severally agree to pay five (5) days before delinquency, Trustee is authorized to withhold and pay said tax, lien, or assessment out of any moneys in its possession for account of the person whose interests hereunder are so liable, unless the same has been paid." In spite of the evasiveness of the phraseology therein employed and the studious effort obviously apparent to avoid the making of a direct, simple covenant by the beneficiaries to pay taxes, it is evident that, in the language, "which Beneficiaries hereby jointly and severally agree to pay five (5) days before delinquency," there is contained a promise and a covenant to pay taxes. The court found that no consideration was given or received for the execution of the instrument entitled "Limited Assignment of Payee's Interest," which is the instrument that forms the basis for plaintiff's claim that he is entitled to be reimbursed for the money advanced by him for the payment of taxes. In this finding the court was correct. Since the duty rested upon plaintiff to pay taxes that were then delinquent, the performance of this duty by plaintiff could furnish no consideration for the execution of an instrument by one of the payees assigning to plaintiff his interest under the trust agreement to the extent of the amount thus advanced by plaintiff. This is in accordance with the rule announced in Sullivan v. Sullivan, 99 Cal. 187, 193, 33 P. 862, 864, in the following language: "It is well settled that neither a promise to perform a duty, nor the performance of a duty, constitutes a consideration of a contract." This obviously correct legal principle has received judicial approval in subsequent decisions, among which are to be noted the following: Marinovich v. Kilburn, 153 Cal. 638, 642, 96 P. 303, and Shipley Co. v. Rosemead Co., 100 Cal. App. 706, 714, 280 P. 1017.

It follows likewise that the judgment of the trial court in the action brought by plaintiff against the trustee, Union Trust Company of San Diego, alone was correct. The complaint in this action is framed upon the theory that when the payees under the trust agreement foreclosed all beneficial interests under such agreement and at the sale of such interests purchased them for the sum of $150,000 which was thereupon applied to the amount due payees on the principal indebtedness and interest thereon and for unpaid and delinquent taxes, a fund thereupon came into existence for the payees from which plaintiff was entitled to be reimbursed for the advance made by him for the purpose of paying taxes. Plaintiff's claim to such reimbursement rests again upon the assignment by the payee, Zieglar, of his interest under the trust agreement. Since as hereinabove noted no consideration was given by plaintiff for the execution of this instrument, it may not serve as the basis for his claim against the trustee for reimbursement.

The court's judgment in the two actions which were consolidated and tried together is therefore affirmed in so far as it denies any relief to plaintiff in either action. That portion of the judgment which holds that plaintiff L. G. Weidner is not liable for a deficiency judgment in favor of cross-plaintiffs Frank B. Zieglar and Harry F. Carling and that said cross-plaintiffs take nothing by reason of their cross-complaint, is reversed.

We concur: BARNARD, P. J.; MARKS, J.

126 Cal.App. 90

In re LEWIS' ESTATE.

AYLMORE v. LEWIS.

Civ. 655.

District Court of Appeal, Fourth District, California.

Sept. 19, 1932.

1. Wills ⇐440.

In interpretation of wills, testator's intention is to be discovered primarily from language used (Probate Code, §§ 102, 103).

2. Executors and administrators ⇐490.

Paragraph in will fixing executor's compensation at 5% of moneys "received and paid out," meant 5% on total value of estate in executor's hands, and not 5% of moneys received and 5% of moneys paid out (Probate Code, §§ 102, 103).

[Ed. Note.—For other definitions of "Receive," see Words and Phrases.]

3. Wills ⇐488.

Ambiguity created by phrase in will fixing executor's compensation at "5% of moneys received and paid out" *held* not latent ambiguity; hence testator's oral declarations as to what he intended compensation should be, were inadmissible (Probate Code, § 105).

4. Appeal and error ⇐1033(1).

Appellant cannot complain of error in his favor.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

On hearing of the final account and petition of Reeves Aylmore, executor, for distribution under the will of Otto S. Lewis, also sometimes known as O. S. Lewis, deceased, to which Truman Lewis objected. From an adverse order, the executor appeals.

Affirmed.

West & McKinney, of Santa Ana, for appellant.

Forgy, Reinhaus & Forgy, of Santa Ana, for respondent.

MORTON, Justice pro tem.

The appeal in this matter concerns solely the interpretation of a clause in the will of Otto S. Lewis, also known as O. S. Lewis, deceased, who died November 18, 1926. His will and the two codicils supplementary thereto were admitted to probate and the estate administered in Orange county, Cal. It involved properties in New Mexico, Arizona, Oregon, Washington, and California, and required four years to administer. The Orange County Trust & Savings Bank, a corporation, was named executor in the original will, but this appointment was changed by the codicil. Reeves Aylmore was appointed executor under the terms of the second codicil. He duly qualified and carried through a very successful and beneficial administration of the estate.

Paragraph 13 of the will provided for the compensation of the executor in the following phraseology: "And hereby fix its compensation as such Executor at five per cent. (5%) of the moneys received and paid out by it." At the hearing of the final account and petition for distribution, the court in its order determined the fees of the executor to be as follows: "That the Executor's fees, by the terms of the will, are 5% of the moneys received and paid out. The term 'moneys received and paid out' used in the will being construed by the Court as meaning 5% on the total value of said estate in the hands of said Executor; the 5% to be figured on this basis and not 5% on the moneys received and again 5% on the moneys paid out." The court decreed that the word "moneys" under the terms of the will of decedent meant the whole of said estate as received and accounted for by the executor. This portion of the order was not attacked by either side and is not before us for interpretation. Therefore the only question involved on this appeal is whether the fees of the executor should be 5 per cent. or 10 per cent. of the whole estate.

Appellant contends that he is entitled to 5 per cent. of all moneys received and 5 per cent. of all moneys paid out, thus giving him as executor 10 per cent. of the entire value of the estate as his fee. In support of his interpretation of the paragraph of the will which is in question, appellant relies chiefly upon Demarest v. Inhabitants of New Barbadoes Tp., 40 N. J. Law (11 Vroom) 604, 606. By an act of the Legislature of New Jersey the township collector was given three-fourths of one per cent. of all school funds *received and paid out by him* for school purposes during the year to be paid out by the township committee from the funds of the township. In construing this phrase the court said: "The three-fourths of one per cent. given by the above act (March, 1867) were held below to be allowable on the funds received by the collector for school purposes; and again, also, on the funds paid out by him for such purposes, for the reason that the words 'funds received and paid out' would, on the opposite construction, be the same as if the word 'received' had been omitted, inasmuch as the collector would not pay out funds not received. To give the word 'received' its proper meaning and effect, the percentage was allowed on each of the funds named."

Respondent, in opposition to appellant's contention, cites the case of In re Roberts, 3 Johns. Ch. (N. Y.) 43. In granting an allowance for guardian's compensation on a petition for caring for the estate of a lunatic Chancellor Kent made the following provision: "Five per cent. on all sums received and paid out, not exceeding 1,000 dollars—(i. e. two and one-half per cent. for such sums received, and 2½ per cent. for such sums paid out). Two and a half per cent. on any excess, between 1,000 dollars and 5,000 dollars. One per cent. for all above 5,000 dollars." We therefore come to the point of determining whether, from an interpretation of the language employed in the will, it shall be held that the intention of the testator was in accordance with the construction drawn by the New Jersey decision or with that of Chancellor Kent.

[1] In the interpretation of wills the testator's intention is to be discovered primarily from the language used. Many times the examination of the entire instrument will furnish a clue as to the testamentary scheme. Referring to decedent's will we find that although it disposed of a large estate he limited his funeral and burial expenses to $200.

In paragraph 7 of the will he stated: "It is my desire and I so direct that unless absolutely necessary, my executor be relieved from all forms and proceedings required by the laws of California or of other states where any of my property may be situated, in reference to the settlement or administration of estates of deceased persons. * * *" Evidently realizing that his properties were widely scattered and somewhat difficult to manage, he advised his executor to consult certain parties whose names and addresses he incorporated in his will. It is thus apparent that he endeavored in every way to conserve expense and avoid unnecessary procedure in the administration of his estate.

[2] As a guide for the interpretation of wills we have section 102 of the Probate Code, which reads as follows: "The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative; and of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy." Also section 103: "Where the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference thereto, or recital thereof, in another part of the will. All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail." In 26 California Jurisprudence, p. 887, § 203, it is stated: "If a disputed word or phrase has a well-defined legal or popular meaning, the presumption is that the testator intended the expression to have this meaning; and this presumption will be given effect, unless an intention to use the term in another sense is disclosed by the context of the will. * * *" We find in the case of In re Willets' Estate, 112 N. Y. 289, 665, 19 N. E. 690, at page 694, that a New York statute provided in probate matters for the following commission to executors: "For receiving and paying out all sums of money, not exceeding one thousand dollars, at the rate of five dollars per cent.; for receiving and paying out any sums exceeding one thousand dollars, and not amounting to ten thousand dollars, at the rate of two dollars and fifty cents per cent.; for all sums of above ten thousand dollars, at the rate of one dollar per cent." In its opinion the court said: "This language received at a very early date construction in the courts, and it was held that executors, administrators, and trustees were entitled to one-half of their commissions for the receipt of the funds, and the other half for paying out the same." A Kentucky statute authorizing a maximum allowance to executors of 5 per cent. "on all the amounts received and distributed" was interpreted in the same manner in the case of Renick's Executor v. Renick et al., 92 Ky. 335, 17 S. W. 1018. Therefore, considering the entire contents of the will, the surrounding circumstances, and the legal interpretation that has been given to the phrase "received and paid out" in connection with the administration of estates, we believe that the trial court correctly interpreted this compensatory paragraph of the will in its finding.

[3, 4] Over the objection of respondent evidence was admitted concerning oral declarations of the decedent to the executor as to what he intended should be the compensation of the executor of his estate. The ambiguity created by his phrase "5% of the moneys received and paid out" we feel is not a latent ambiguity and therefore the oral declarations of decedent were not admissible. Civ. Code, §§ 1318 and 1340, now covered in section 105, Probate Code; 26 Cal. Jur. 890, § 206. This error, however, was in favor of appellant and he cannot be heard to complain.

The order appealed from is hereby affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

216 Cal. 440

DIXON v. DIXON.

L. A. 13564.

Supreme Court of California.

Sept. 27, 1932.

1. Parent and child ⇐17(1).

Father's failure to support minor child is criminal offense, regardless of agreements, property settlements, divorce decrees, or decrees respecting custody or maintenance of minor (Pen. Code, § 270).

2. Parent and child ⇐17(1).

Age of majority in another state where wife obtained divorce and provisions of divorce decree *held* immaterial on issue of husband's liability for support of minor child (Pen. Code, § 270).

3. Divorce ⇐330.

Oklahoma divorce decree, decreeing legal adoption of minor by parties, *held* to justify finding adoption was consummated.

4. Divorce ⇐312½.

Statute authorizes allowance of counsel fees in wife's action against divorced husband for maintenance of minor daughter, notwithstanding divorce has already been granted in another state (Civ. Code, § 137).

5. Divorce ⇐312½.

Allowance of counsel fees is unauthorized, where services have already been performed (Civ. Code, § 137).

In Bank.

Appeal from Superior Court, Los Angeles County; Harry W. Falk, Judge.

Action by Nellie C. Dixon against Winfield Eugene Dixon, also known as W. Eugene Dixon. From an adverse judgment, defendant appeals.

Affirmed as modified.

See, also, 14 P.(2d) 498.

West & McKinney, of Santa Ana, for appellant.

Hugh A. McNary, of Los Angeles, for respondent.

PRESTON, J.

Plaintiff, alleging her indigence, as well as that of her adopted daughter, in this action sued her former husband for the support of said daughter, a minor, born on February 24, 1912. Defendant resisted the action, denying adoption of the daughter, and further pleading that in the year 1919 plaintiff secured from him in the state of Oklahoma a divorce upon grounds of cruelty, by which decree the custody of said daughter was awarded to plaintiff, and defendant was required to pay plaintiff certain sums for the support and maintenance of said daughter until she reached the age of eighteen years, which is a majority in that state, that she reached that age prior to the filing of this action, and that he faithfully observed the order of the court of Oklahoma with respect to such maintenance, thus being relieved from any further liability for her support.

The facts are that about the year 1922 plaintiff and the daughter removed to California, and subsequent to that date defendant also took up his residence in this state. The indigence of the mother and daughter is conceded, and the ability of the defendant to respond to the order of the court is also apparent.

Upon trial of the cause, the court found against the defendant on all issues, and ordered payment by him of the sum of $75 per month for the support and maintenance of said daughter, to which was added the sum of $150 as counsel fees and $23.15 as costs. From the judgment so entered, defendant has appealed.

[1, 2] Since the recasting of section 270 of the Penal Code by the act of 1923 (St. 1923, p. 592), the failure of a father to provide necessary support and maintenance for his minor child has been a criminal offense. This is true, regardless of agreements, property settlements, decree of divorce, or decrees respecting custody or maintenance of the minor, affecting the husband and wife. All doubt or confusion on this subject has also been settled by recent decisions of this court. Federal Mutual, etc., Co. v. Industrial Accident Com., 195 Cal. 283, 233 P. 335; Southern California Edison Co. v. Industrial Accident Commission, 92 Cal. App. 355, 268 P. 415. Neither the age of majority in Oklahoma nor the provisions of a decree of divorce in that jurisdiction have any bearing whatsoever on this issue.

[3] The Oklahoma judgment of divorce, however, which decreed the legal adoption of the minor by plaintiff and defendant, furnished ample evidence to justify the finding of the court below in this action that the legal adoption of the minor was in fact consummated in 1916. This is true, notwithstanding the production of only fragmentary portions of the adoption record now existing in that state.

[4] The further contention is made that there is no legal sanction for the allowance of suit money or counsel fees in a case of this character. We think, however, that section 137 of the Civil Code, when fairly construed, authorizes such allowance. This section authorizes the wife, where a cause for divorce exists, to sue for her support and that of the minor children, and in such an action the

court may allow the money necessary for the prosecution of the suit. The fact that the complaint in the present action alleged and the evidence showed that a divorce had already been granted upon a ground allowed by our statutes did not preclude the maintenance of this suit by the wife under said section for support of the child. However, the allowance of attorney's fees in this case was not for future services, but for services already performed, and such an allowance is not authorized. Loveren v. Loveren, 100 Cal. 494, 35 P. 87; San Diego v. Southern Pacific R. R., 108 Cal. 46, 40 P. 1052.

The judgment is modified by striking from it the allowance of $150 for counsel fees, and, as so modified, it is affirmed, without costs on appeal to either party

We concur: WASTE, C. J.; SHENK, J.; TYLER, Justice pro tem.; LANGDON, J.; CURTIS, J.

216 Cal. 443, 445

DIXON v. DIXON.

L. A. 13590.

Supreme Court of California.

Sept. 27, 1932.

Divorce ⇐312.

Order directing divorced husband to make monthly payments for maintenance of minor child pending appeal from judgment in main action *held* proper.

In Bank.

Appeal from Superior Court, Los Angeles County; Dudley G. Valentine, Judge.

Action by Nellie C. Dixon against Winfield Eugene Dixon, also known as W. Eugene Dixon. From an order granting plaintiff's motion for support and maintenance of minor child pending appeal, defendant appeals.

Affirmed.

See, also, 14 P.(2d) 497.

West & McKinney, of Santa Ana, for appellant.

Hugh A. McNary, of Los Angeles, for respondent.

PRESTON, J.

Plaintiff, on January 5, 1932, secured judgment in Dixon v. Dixon (Cal. Sup.) 14 P.(2d) 497, ordering defendant to pay the sum of $75 per month for the maintenance and support of the minor adopted daughter of these parties, together with $150 counsel fees and costs, from which defendant appealed. Plaintiff thereupon instituted this proceeding on motion to secure support and maintenance for the minor child pending appeal from said judgment, together with further counsel fees and costs. Defendant resisted the motion; the matter was heard, and on January 26, 1932, the court gave its order directing defendant to pay, pending said appeal, the sum of $75 per month for the support of said child and $300 counsel fees, all monthly payments so made to be credited upon said judgment in the event of its affirmance. Defendant thereupon appealed from said order.

The action of the court below in so providing for the support and maintenance of the minor pending determination of the appeal from the judgment in the main case was proper. Sheppard v. Sheppard, 161 Cal. 348, 119 P. 492.

The order is therefore affirmed.

We concur: WASTE, C. J.; SHENK, J.; TYLER, Justice pro tem.; LANGDON, J.; CURTIS, J.

On Petition for Supersedeas.

PER CURIAM.

Order denying petition.

The petition for supersedeas herein is denied. The basis for the order is that the cause on its merits has been determined. See Dixon v. Dixon (Cal. Sup.) 14 P.(2d) 497, this day decided.

216 Cal. 445

DIXON v. DIXON.

L. A. 13685.

Supreme Court of California.

Sept. 27, 1932.

Divorce ⇐312.

Order directing divorced husband to make monthly payments for maintenance of minor child pending appeal from judgment in main action *held* proper.

In Bank.

Appeal from Superior Court, Los Angeles County; Dudley G. Valentine, Judge.

Action by Nellie Dixon against Winfield Eugene Dixon, also known as W. Eugene Dixon. From an order granting support and maintenance of minor child pending appeal, and for counsel fees and costs, defendant appeals.

Affirmed.

West & McKinney, of Santa Ana, for appellant.

Hugh A. McNary, of Los Angeles, for respondent.

PRESTON, J.

Plaintiff, on January 5, 1932, secured judgment in Dixon v. Dixon (Cal. Sup.) 14 P.(2d) 497, ordering defendant to pay the sum of $75 per month for the maintenance and support of the minor adopted daughter of these parties, together with $150 counsel fees and costs, from which judgment defendant appealed. Plaintiff thereafter moved the court for an order requiring defendant to pay for the support and maintenance of said child and for counsel fees and costs, pending the appeal from said judgment. The motion was heard, and on January 26, 1932, the court duly ordered defendant to pay $75 per month, commencing February 1, 1932, and, pending his appeal from said judgment, all payments so made to be credited as payments on account of the judgment in the event defendant is unsuccessful on said appeal, and the court further ordered defendant to pay to plaintiff $300 for and on account of counsel fees on said appeal and costs. Said order, from which defendant appealed, we have this day affirmed. Dixon v. Dixon (Cal. Sup.) 14 P.(2d) 498.

Thereafter, and on February 26, 1932, plaintiff instituted this proceeding to secure support and maintenance for the minor child pending defendant's appeal from said judgment and also his appeal from said order of January 26, 1932, and to secure further counsel fees and costs to prosecute the defense to said appeal from the order of January 26, 1932. Defendant resisted the motion. The matter was heard, and on March 24, 1932, the court made its order directing defendant to pay to plaintiff $75 per month as and for support and maintenance of said minor child pending the appeal from the judgment of January 5, 1932, and also the appeal from the order of January 26, 1932, said payments to be made on the 1st day of each month commencing April 1, 1932, and, in the event of the denial of either of said appeals, to be credited upon said judgment; further directing defendant to pay all necessary costs of plaintiff in perfecting her appeal and the sum of $150 as counsel fees in this matter. Defendant thereupon appealed from said order.

The action of the court below, however, in so providing for the support and maintenance of the minor pending determination of the appeal from the judgment in the main case and from said later order, was proper. Sheppard v. Sheppard, 161 Cal. 348, 119 P. 492.

The order is therefore affirmed.

We concur: WASTE, C. J.; SHENK, J.; TYLER, Justice pro tem.; LANGDON, J.; CURTIS, J.

216 Cal. 503

BARTON v. EL ENCANTO APARTMENTS, Inc., et al.

L. A. 11862.

Supreme Court of California.

Sept. 28, 1932.

Rehearing Denied Oct. 28, 1932.

1. Contracts ⇐332(2).

Complaint, in architect's action to recover for services in connection with proposed construction of apartment house, *held* insufficient to state cause of action as against demurrer.

2. Pleading ⇐212.

Want of prosecution does not authorize dismissal of demurrer to complaint.

Want of prosecution does not authorize dismissal of demurrer, since, whether or not a defendant appears to urge it, demurrer raises issue of law which must be decided.

In Bank.

Appeal from Superior Court, Los Angeles County; Dailey S. Stafford, Judge.

Action by E. E. Barton against the El Encanto Apartments, Inc., Catherine Bayne Stephens, and others. Judgment for plaintiff, and defendant last named and certain other defendants appeal.

Reversed.

For prior opinion, see 6 P.(2d) 1009.

See, also, 14 P.(2d) 501.

C. M. Booth, Welburn Mayock, and Ralph C. Curren, all of Los Angeles, for appellants.

Kimball Fletcher, of Los Angeles, for respondent.

PRESTON, J.

Upon this appeal, in an action to recover for alleged personal services rendered by plaintiff, as an architect, in connection with the proposed construction of an apartment house, a question arises as to the propriety of the court's action in overruling, for lack of prosecution, the demurrer of certain defendants and thereafter permitting the entry against them of judgment by default.

The complaint alleges that defendant corporation proposed to construct an apartment house in Hollywood at a cost of $4,600,000, later raised to $6,000,000, and on October 14, 1924, entered into an agreement to employ plaintiff, as its architect and engineer, to perform various services, for which he was to receive as compensation 3 per cent. "of the actual final total cost of said apartment building," 1 per cent. thereof being payable as follows: $2,000 on November 1, 1924, to be placed in a special bank account, which was to be kept subject to plaintiff's check at ap-

proximately that figure, for the purpose of furnishing a drawing account for expenses; the remainder of said 1 per cent. to be paid upon completion of the working plans and specifications for said building; the other 2 per cent. compensation to be applied "upon the subscription" by plaintiff to $162,700 worth of capital stock of the corporation, carrying with it ninety-nine-year leases upon eight specified apartments, which stock had a par value of $100 per share, and, it is alleged, would be worth that sum, had the building plans been carried out.

The pleading further alleges that on November 1, 1924, plaintiff was ready to perform under said contract and did for nine months thereafter perform all things required of him, but that defendant corporation did not build the building or otherwise keep any of its promises, aside from giving preliminary instructions and depositing $1,450 to plaintiff's credit; that plaintiff expended $713.60 in performing said contract; that the cost of office space, assistants, and all other expenses, in performing it to completion, would have been $29,800; that there is due, owing, and unpaid to plaintiff from said defendant $150,200. The complaint further alleges, upon information and belief, that all subscribed and outstanding stock of the corporation, totaling 8,251 shares, is owned by the various stockholder defendants in the respective proportions alleged. The prayer is for judgment against the corporation in the sum of $150,200 as well as for judgment against each of the other defendants for "the portion of said $150,200 which the number of shares of said corporation set opposite the names of said defendants, respectively, in said schedule, bears to the total number of shares * * * subscribed, issued or outstanding," and for costs or other or further relief.

The defendant stockholders here appealing filed a demurrer to said complaint upon the ground that it did not state a cause of action or show how plaintiff had been damaged in said sum, or what, if any, services he performed or what judgment was prayed against each demurring defendant and that the damage alleged was purely speculative and unascertainable. On June 21, 1927, the court made a minute order stating: "* * * for lack of prosecution, said demurrer is overruled." Almost two years later, to wit, on June 12, 1929, a judgment by default was entered awarding plaintiff judgment against defendant Dudley for $1,383.49; against defendant Stephens for $131,941.53; against defendant Smith for $2,330.09; and against defendant Bollman for $1,274.27. The three latter defendants appealed upon the ground that their demurrer should have been sustained for the reasons therein stated.

[1] We must agree with them that the complaint offered no sound basis for a judgment in favor of plaintiff. It cannot be told therefrom whether the $6,000,000, proposed increased cost, or the $4,600,000, original proposed cost, or either of them, should serve as a basis for computing plaintiff's compensation, which was to be 3 per cent. of the "actual final total cost" of the building. The figure named in the prayer of the complaint, $150,200, is evidently computed at 3 per cent. of $6,000,000, less estimated expenses, $29,800. Yet it does not appear whether the $713.60 actually expended by plaintiff is included in said $29,800 estimate or whether it should be charged against the $1,450 already paid nor can it be told whether the $1,450 has been duly credited. Furthermore, plaintiff has not included himself in the list of stockholders of the corporation, although he alleges that 2 per cent. of his compensation was to be applied upon his "subscription" to "$162,700 par value of shares of capital stock" of the corporation. The par value of the stock is alleged at $100 per share, but it does not appear whether plaintiff was to pay that sum for it; hence it cannot be told how many shares he subscribed for or what his proportionate liability as a stockholder would be. Moreover, the complaint fails to plead the existence of a permit from the commissioner of corporations authorizing a sale of corporate stock, upon terms providing that plaintiff subscribe to a portion thereof; hence his contract may have been wholly void.

[2] It is unnecessary to discuss the above and other uncertainties of the pleading at greater length. Enough has been said to show that the court's action in overruling the demurrer must have been predicated solely upon the ground stated in its order, to wit: "lack of prosecution." But want of prosecution will not authorize the dismissal of a demurrer, which, whether or not a defendant appears to urge it, raises an issue of law and that issue of law must be decided. Philip v. Durkee, 108 Cal. 300, 41 P. 407; Winchester v. Black, 134 Cal. 125, 66 P. 197. The action of the court was, therefore, erroneous, and the judgment entered for plaintiff must be reversed. It is so ordered.

We concur: WASTE, C. J.; TYLER, Justice pro tem.; SHENK, J.; LANGDON, J.; CURTIS, J.

216 Cal. 500

BARTON v. EL ENCANTO APARTMENTS, Inc., et al.

L. A. 12143.

Supreme Court of California.

Sept. 28, 1932.

Licenses ⇐39.

Alleged agreement that two-thirds of compensation for architect's services to corporation should be credited on stock subscription *held* invalid (St. 1917, p. 673, as amended).

The purported agreement was to effect that corporation should pay architect 3 per cent. of cost of erecting building, 1 per cent. to be paid in cash, and the remaining 2 per cent. to be credited on architect's subscription to $162,700 worth of capital stock of corporation. The permit authorizing issuance of stock authorized only sales thereof for not less than 40 per cent. in cash, with remainder to be paid within a specified period, and no exchange, such as contemplated by the alleged agreement, was sanctioned.

In Bank.

Appeal from Superior Court, Los Angeles County; Dailey S. Stafford, Judge.

Action by E. E. Barton against the El Encanto Apartments, Inc., and others. From an adverse judgment, plaintiff appeals.

Affirmed.

See, also, 14 P.(2d) 499.

Kimball Fletcher, of Los Angeles, for appellant.

Thomas A. Sanson, of Los Angeles, for respondent Julia M. Porter.

Greenberg & Beilenson, of Los Angeles, for respondent Mrs. Garfield R. Jones.

PRESTON, J.

In this cause two of the defendants answered and were given judgment, from which plaintiff appealed. Later the appeal as to respondent Mrs. Garfield R. Jones was dismissed and defendant Porter is now the only respondent.

The complaint alleged that defendant corporation proposed to construct an apartment house in Hollywood at a cost of $4,600,000, later raised to $6,000,000, and on October 14, 1924, entered into an agreement to employ plaintiff, as its architect and engineer, to perform various services, for which he was to receive as compensation 3 per cent. "of the actual final total cost of said apartment building," portions of 1 per cent. thereof being payable from time to time, the remainder of said 1 per cent. to be paid upon completion of the working plans and specifications for the building, and the other 2 per cent. to be applied upon the subscription by plaintiff to $162,700 worth of capital stock of the corporation, carrying with it ninety-nine year leases upon eight specified apartments, which stock had a par value of $100 per share, and, it is alleged, would be worth that sum, had the building plans been carried out.

The pleading further alleges that on November 1, 1924, plaintiff was ready to perform under said contract and did for nine months thereafter perform all things required of him, but that defendant corporation kept none of its promises, aside from giving preliminary instructions and depositing $1,450 to plaintiff's credit; that plaintiff expended $713.60 in performing said contract; that his total expenses in performing it to completion would have been $29,800; that there was due, owing, and unpaid to plaintiff from said defendant $150,200. The complaint further alleges, upon information and belief, that all subscribed and outstanding stock of the corporation, totaling 8,251 shares, is owned by the various stockholder defendants, in the respective proportions alleged, respondent being the holder of 166 shares thereof. The prayer is for judgment against the corporation in the sum of $150,200 as well as for judgment against each of the other defendants for "the portion of said $150,200 which the number of shares of said corporation set opposite the names of said defendants, respectively, in said schedule, bears to the total number of shares * * * subscribed, issued or outstanding" and for costs or other or further relief.

The answer of respondent contained a denial of all of the allegations of the complaint and urged, as a second defense, that plaintiff was not, at the time of the making of said alleged contract, licensed to practice the profession of architecture, and, as a third defense, that said alleged contract was void because, if made at all, it was made without the approval of the commissioner of corporations and in violation of the permit issued for the subscription and sale of the capital stock of said corporation.

At the conclusion of the trial two sets of findings and two judgments were made and filed on the same day, one set relating solely to respondent Porter and the other to both said respondent and defendant Jones. The conclusion reached in these documents is identical and their language is similar. Not the slightest inconsistency appears in either the findings or the judgments; hence the two sets will be considered as forming together the findings and judgment of the court below. The court found, in substance, that the various allegations of the complaint were untrue; that the alleged contract, upon which the cause of action is based, was void as in contravention of the Corporate Securities Act (St.

1917, p. 673, as amended); and that appellant was not a duly certified architect.

The case does not merit extended consideration. No prejudicial error appears in the record with respect to the admission or rejection of testimony and all essential findings and the judgments have ample support in the evidence, notwithstanding the claims of appellant to the contrary; particularly, the record shows the stock subscription of respondent to have been conditional, depending upon contingencies which did not arise.

The purported agreement, in substance as alleged in the complaint, between appellant and the corporation, was clearly violative of the terms of the said permit in that it provided mainly for an exchange of services in return for a credit on a subscription by appellant to $162,700 worth of capital stock of said corporation. The provisions of the permit authorized only sales for not less than 40 per cent. in cash, with the balance to be paid within a specified period. No exchange such as contemplated by the above agreement was sanctioned; hence said agreement was void. Domenigoni v. Imperial Live Stock & Mortgage Co., 189 Cal. 467, 209 P. 36; Imperial Livestock Co. v. Tracy, 208 Cal. 205, 281 P. 50; Gridley v. Tilson, 202 Cal. 748, 262 P. 322. It is evident that the court below reached the only conclusion proper in this cause.

The judgment is affirmed.

We concur: WASTE, C. J.; TYLER, Justice pro tem.; SHENK, J.; LANGDON, J.; CURTIS, J.

216 Cal. 362

BRITTON v. BRYSON et al.

L. A. 11598.

Supreme Court of California.

Sept. 22, 1932.

Rehearing Denied Oct. 21, 1932.

1. Judgment ⇐818(3).

Full faith and credit clause and statutes enacted thereunder do not apply to judgments by court having no jurisdiction of parties or subject-matter, or of res in proceeding in rem (Const. U. S. art. 4, § 1).

2. Judgment ⇐818(3).

Jurisdiction of court rendering judgment may be questioned in collateral proceeding in another state, notwithstanding full faith and credit clause and averments in record of judgment itself (Const. U. S. art. 4, § 1).

3. Divorce ⇐167.

Colorado court had jurisdiction to vacate fraudulent divorce decree husband obtained in such court without service on wife, though husband had died when decree was vacated.

Court could vacate such decree notwithstanding that husband had died and the res or matrimonial status ceased to exist, since the power to vacate such a decree is not based on the continued existence of the marital status, but on the court's control of its own records, and its inherent power to purge its records of judgments obtained by fraud, and since the wife did not seek to relitigate question of whether husband was entitled to divorce, but simply sought the power of the court to wipe from its records a judgment fraudulently obtained against her, which if not wiped out would seriously affect her property rights.

4. Divorce ⇐167.

One party to divorce action may, subsequent to death of other, have divorce decree set aside on proof that such decree was procured by extrinsic fraud.

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Sophie Britton against Frank Bryson, as administrator of the estate of John Henry Britton, deceased, and another. From an adverse judgment, plaintiff appeals.

Reversed.

For prior opinion, see 6 P.(2d) 1016.

Leland J. Allen, of Los Angeles, for appellant.

Dana R. Weller, of Los Angeles, for respondent D. C. Hammell.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for Public Administrator.

PER CURIAM.

Action to quiet title to certain lots situated in the county of Los Angeles was commenced by plaintiff, Sophie Britton, against John Henry Britton, as her husband, and one D. C. Hammell. Immediately prior to the institution of this action John Henry Britton had conveyed said property to said D. C. Hammell by a gift deed, and plaintiff sought, as the wife of John Henry Britton, to have said property declared to be the community property of herself and John Henry Britton, and a judgment that D. C. Hammell owned no interest therein. During the pendency of the action John Henry Britton died, and the administrator of his estate, Frank Bryson, was substituted in his place and stead. It appears that Sophie Britton and John Henry Britton were married in the year 1873. Five children were born as the result of that union. In

March, 1891, while the parties were both domiciled in Colorado, John Henry Britton secured a decree of divorce from his wife in the county of Bent, state of Colorado. This decree dissolved the marriage relation, and in addition awarded to the wife the care, custody, and control of the five children, alimony of $40 per month, and required the plaintiff in said action, John Henry Britton, to deed to defendant therein, Sophie Britton, certain real property situated in Arapahoe county, Colo. It is the claim of Sophie Britton that this decree was fraudulently obtained by John Henry Britton, as they were both residents of Arapahoe county, not Bent county, Colo., at that time; that she was never served with summons; and that although an attorney, one W. B. Lourance, purported to act for her in the matter, she knew nothing of the matter and, in fact, knew nothing of the procurement of the decree until after the death of her husband, John Henry Britton, during the pendency of this action. She further claims that the terms of the decree were never carried out by John Henry Britton, either as to the deeding of the Colorado property to her or the payment of the alimony, and that there were no circumstances to indicate to her or to arouse her suspicions that any divorce had been procured by her husband. The next month following the procurement of the divorce, in April, 1891, John Henry Britton married Rose E. Dixter in the state of Texas. Thereafter by deed dated May 13, 1916, he acquired in his own name the property which is the subject of this action. On March 2, 1923, John Henry Britton executed a deed conveying his interest in this and other described property to Rose E. Britton. This deed was recorded on May 31, 1923. Subsequently on June 2, 1924, John Henry Britton executed another deed conveying this particular property to Rose Britton as her sole and separate property. This deed was recorded on July 29, 1924. On June 26, 1924, Rose Britton reconveyed said property to John Henry Britton as his separate property. This deed was recorded January 2, 1926. On April 19, 1926, John Henry Britton executed a deed of gift of said property to D. C. Hammell, reserving to himself the "exclusive possession, use and enjoyment in his own right, of the rents, issues and profits thereof," and further reserving the right to revoke said deed and sell and convey said property. Subsequently on May 12, 1926, he executed another deed of said property to D. C. Hammell. This was the usual form of gift deed and contained no reservations. This deed was recorded May 14, 1926. When this suit was instituted on August 6, 1926, John Henry Britton appeared first by demurrer and then by answer. An inspection of his pleadings shows that there was no mention therein of the divorce procured by him in 1891, and it was not until the answer of the administrator of his estate had been filed that this decree of divorce was set up as a defense. During the pendency of this action, plaintiff instituted in Colorado a suit in equity in which Frank Bryson, as administrator of the estate of John Henry Britton, and the five children of said couple, as the heirs at law of said John Henry Britton, were named as defendants. By this action, which was commenced in Bent county, Colo., she sought to have set aside the former decree of divorce granted by said court upon the ground that it had been fraudulently procured by her husband without service upon her. Substituted service was procured upon Frank Bryson, administrator of his estate, in California, and the five children accepted service. In that action she proved to the satisfaction of the court and the court specifically found that fraud had been perpetrated by John Henry Britton upon the "County Court of Bent County, State of Colorado" by the filing of a purported service of summons and a representation that the said W. B. Lourance, an attorney, represented the said Sophie Britton, when in fact no service had been made upon Sophie Britton and W. B. Lourance did not in fact represent Sophie Britton, and had no authority to represent her. Judgment was entered on July 16, 1928, in favor of the plaintiff that "the purported decree of divorce entered in Judgment Book 2, page 272 of the County Court of Bent County, State of Colorado, is set aside and decreed void and of no force and effect whatsoever; that the relationship of husband and wife between John H. Britton and Sophie Britton be decreed as if the said purported decree had not been entered."

At the trial of the instant action there were introduced by stipulation of both parties a copy of the decree of divorce procured by John Henry Britton from plaintiff in 1891, and likewise a copy of the decree of the county court of Bent county, Colo., of July 16, 1928, setting aside the former decree of divorce secured by John Henry Britton from Sophie Britton in 1891. There were also introduced in evidence the depositions of Sophie Britton and her daughter, Pearl Britton. The deposition of the former contained a statement that she had never been served with a summons in a divorce action at any time; that she had never secured a divorce; and that continuously from December 4, 1873, until the death of John Henry Britton on June 29, 1927, she was his wife. It was also stipulated that a claim for $17,000, arrearage of alimony had been filed by plaintiff against the estate of John Henry Britton, which claim was to be dismissed if the judgment in this action were favorable to the plaintiff.

Upon the submission of the case herein, which was tried without a jury, the court, apparently upon the theory that the judgment in the divorce suit was binding upon it by

virtue of the full faith and credit clause of the United States Constitution (article 4), and that the judgment in the later suit setting aside said former decree was an idle act—an absolute nullity—gave judgment for the defendants. From this judgment plaintiff prosecutes this appeal.

[1, 2] It is at once apparent that the answer to the question of whether or not the property in controversy ever was the community property of the plaintiff and the defendant John Henry Britton depends upon the binding effect upon the courts of this state of the two decrees of the Colorado court introduced in evidence by stipulation. At the outset it should be stated that as we understand the record the stipulation with reference to the introduction of each of these decrees in evidence went only to the authenticity of the decrees as judgments of the county court of Bent county, Colo., and no further. The stipulation did not concede the jurisdiction of the court in either action, nor the validity and binding effect of either judgment. It is obvious that plaintiff did not intend by the stipulation to concede the jurisdiction of the Colorado court to render the judgment therein procured, since by the same stipulation she was introducing in evidence a subsequent decree the very purpose of which was to conclusively prove that the court in the former case was without jurisdiction. Neither did the defendants intend to concede jurisdiction to the court to enter the later decree declaring void the former divorce decree, since their sole contention upon this appeal is that said decree is powerless to affect said former decree by reason of the fact that the court in the later action never obtained proper jurisdiction, inasmuch as no personal jurisdiction was obtained of Frank Bryson, administrator of the estate of John Henry Britton, he having been served by substituted service in California.

Although it is well established that each of the judgments rendered by the county court of Bent county, Colo., if a valid judgment, is binding upon the courts of this state by virtue of the oft-quoted provision of article 4 of the Constitution of the United States that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State," it is also well established by a long line of decisions of the United States Supreme Court "that the full faith and credit clause and the statutes enacted thereunder, do not apply to judgments rendered by a court having no jurisdiction of the parties or subject-matter, or of the res in a proceeding in rem." D'Arcy v. Ketchum, 11 How. 165, 13 L. Ed. 648; Thompson v. Whitman, 18 Wall. 457, 469, 21 L. Ed. 897; Reynolds v. Stockton, 140 U. S. 254, 11 S. Ct. 773, 35 L. Ed. 464; Bigelow v. Old Dominion Copper Co., 225 U. S. 111, 134, 32 S. Ct. 641, 56 L. Ed. 1009, Ann. Cas. 1913E, 875. And it is equally well established that "the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provision of the fourth article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself." Thompson v. Whitman, supra; National Exchange Bank v. Wiley, 195 U. S. 257, 270, 25 S. Ct. 70, 49 L. Ed. 184.

The determination of the controversy herein therefore depends upon the answers to the questions: Did the county court of Bent county, Colo., have jurisdiction to make and enter the judgment of July 16, 1928, setting aside and declaring void the decree of divorce granted by it in 1891? Did the county court of Bent county, Colo., have jurisdiction to make and enter the judgment of divorce granted by it to John Henry Britton in 1891? It is obvious that, if the answer to the first question be in the affirmative, it will not be necessary for us to consider the second question by reason of the fact that the judgment of July 16, 1928, if valid and of binding effect, wiped out and completely nullified the effect of the decree of divorce of 1891. We will, therefore, address ourselves to a consideration of the question of whether or not the Colorado court had jurisdiction to render the judgment of July 16, 1928, annulling the decree of divorce.

[3, 4] It is argued that the action in the Colorado court to set aside the decree of divorce formerly granted by the same court was an action in personam; that jurisdiction could only be obtained by personal service within the state of Colorado; that jurisdiction was attempted to be obtained by substituted service upon the administrator of the estate of John Henry Britton in California, but that such service was not sufficient to give jurisdiction inasmuch as substituted service in a personal action is not permitted to extend to persons beyond the state and the administrator could not, even by consent, confer jurisdiction upon the Colorado court by accepting service or by voluntary appearance outside the state. If the action be a personal action, it is, of course, necessary that personal service upon the proper parties be made within the state of Colorado and service by publication or substituted service in another state will not suffice to confer jurisdiction upon the court. Pennoyer v. Neff, 95 U. S. 714, 727, 24 L. Ed. 565. On the other hand, if the action be one in rem, personal jurisdiction of all parties litigant is not necessary, it being sufficient if the courts have jurisdiction of the moving parties and of the res in controversy. In cases involving the marital status of parties in which that status is sought to be destroyed, it has been

held that jurisdiction to render a valid judgment by the court of the matrimonial domicile of the parties having jurisdiction of the moving party was gained by service by publication upon the defendant, a resident of another state, upon the theory that the court had jurisdiction of the moving party and the res—the marital status—and that the judgment so obtained was entitled in all other states to full faith and credit. Atherton v. Atherton, 181 U. S. 155, 21 S. Ct. 544, 45 L. Ed. 794; Thompson v. Thompson, 226 U. S. 551, 33 S. Ct. 129, 57 L. Ed. 347. It is argued in the instant case that by virtue of the death of the husband, the res—that is to say, the marital status—ceased to exist, and any action involving the marital status of the parties must necessarily cease to be an action in rem and becomes one in personam. We do not think this necessarily follows. It is now well settled in California that subsequent to the death of one of the parties, the other may have said decree set aside upon proof that the judgment of divorce was procured by extrinsic fraud. McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A. L. R. 1110; Citizens N. T. & Savings Bank v. Tomb (Cal. App.) 7 P.(2d) 1104. It is evident, therefore, that regardless of the existence of the res—that is to say, the marital status—the court had sufficient jurisdiction to render a valid judgment with reference thereto. It would seem, therefore, that the power to render such a judgment is based not upon the continued existence of the marital status, but upon the court's control of its own records, and its inherent power to purge its records of judgments obtained by fraud. In other words, in such an action the res is not the marital status, which has ceased to exist, but the former judgment itself over which the court continues to retain power. That this is so is, we think, indicated by the language of Mr. Justice Richards in the case of McGuinness v. Superior Court, supra, 196 Cal. 222, 237 P. 42, 47, 40 A. L. R. 1110. In that case the wife, after the death of her husband, sought and secured a decree setting aside a final decree of divorce entered by her husband without her knowledge and without her consent subsequent to their reconciliation following the entry of an interlocutory decree of divorce. It was there urged that the divorce action being one brought solely to sever the marriage relation between the parties thereto, the said action abated upon the death of the party defendant subsequent to the entry of the final decree, and the trial court thereby lost jurisdiction to take any action whatever in said case. Mr. Justice Richards, speaking for the court, said: "The plaintiff by her own motion made in the divorce action is not seeking to reopen said action for the purpose of further litigating the question as to whether she, or the defendant either, is entitled to a divorce. That question has been settled by the defendant's death, and as to it or any further litigation regarding it in said action it has been abated. But the plaintiff, notwithstanding the abatement of the action in so far as the issues therein are involved, is seeking to invoke the power of the court over its own records, by suggesting and offering to show to the court that it has been imposed upon by the extrinsically fraudulent acts and concealments of the defendant. * * * This is the principal purpose of her said motion. * * * To such a purpose the death of the defendant in said action is merely incidental, and is in no wise controlling upon the power of the court to purge its records of orders and decrees which the court has been wrongfully misled into making through the fraudulent imposition of a party to an action pending, at the time of such imposition, before it. To hold that the party having accomplished such imposition could be dying deprive the court of the right when properly advised to so purge its own records would be to abridge to the point of denial one of the most salutary of the inherent powers of the court." This case involved no question of substitution of service, but we are of the opinion that, if in that case the court retained jurisdiction to purge its records of a judgment fraudulently procured despite the death of the defendant, the Colorado court retained jurisdiction to purge its records of a judgment fraudulently procured despite the death of the defendant while domiciled in another jurisdiction. In the instant case, the plaintiff herein did not seek in the Colorado court to relitigate the question of whether or not her husband was entitled to a decree of divorce, she simply sought to invoke the power of the court to wipe from its records a judgment fraudulently obtained against her, which, if not wiped out, would seriously affect her property rights. As said in the McGuinness v. Superior Court Case, supra, 196 Cal. 222, 237 P. 42, 47, 40 A. L. R. 1110, "to such a purpose the death of the defendant in said action is merely incidental." Had her husband been alive at the time of the institution of the suit in equity in the Colorado court, she could not have secured personal service upon him in Colorado, but would have had to seek service by publication. If, as was said in the McGuinness v. Superior Court Case, supra, the defendant could not deprive the court of jurisdiction by dying, we do not think he could deprive the court of jurisdiction by moving to another state.

If it be conceded, and there can in fact be no question about it for both text-books and reports are replete with examples thereof, that the court has the inherent power to correct its records and purge them of judgments fraudulently obtained, it follows, we think, that such power must of necessity be plenary

and not limited either by the nature of the subject-matter of the controversy, or the presence or absence of the guilty party from the territorial jurisdiction of the court. In fact, it has been held that such a judgment is not a real judgment and the court could set aside its own judgment of its own motion for lack of jurisdiction to enter it in the first instance. May v. Roberts, 133 Or. 643, 286 P. 546.

It is admitted that substituted service by personal service upon the administrator of the estate of John Henry Britton was obtained. This service is equivalent to service by publication. Section 413, Code Civ. Proc. It is also admitted that each of the five children of John Henry Britton as his heirs at law accepted service. It, therefore, appears that all who were entitled to notice did, in fact, have such notice.

Our conclusion, therefore, is that the county court of Bent county, Colo., had sufficient jurisdiction to render the judgment which it did render on July 16, 1928, setting aside and expunging from its records the decree of divorce obtained in March, 1891, by John Henry Britton from Sophie Britton. And it follows, as a consequence, that the marital status of John Henry Britton and Sophie Britton was in fact never destroyed, and that, in the absence of evidence to the contrary, the property thereafter acquired by John Henry Britton in his own name in the state of California became upon such acquisition the community property of both John Henry Britton and Sophie Britton.

Judgment is reversed.

216 Cal. 384

In re PENDELL'S ESTATE.

L. A. 13059.

Supreme Court of California.

Sept. 23, 1932.

1. Trial ⇐388(2).

Probate court's failure to make and sign findings on trial of issues to remove executors *held* reversible error (Code Civ. Proc. §§ 632–634; Probate Code, § 1230).

2. Trial ⇐405(2).

Where appellant in motion for new trial directed probate court's attention to statute requiring findings, there was no waiver (Code Civ. Proc. §§ 632–634; Probate Code, § 1230).

3. Appeal and error ⇐1122(2).

Where probate court erroneously failed to make any findings, reviewing court will reverse rather than make findings (Code Civ. Proc. §§ 632–634, 956a; Probate Code, § 1230).

In Bank.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

In the matter of the estate of Rose Pendell, deceased. Petition for removal of executors and appointment of administrator with will annexed. From order denying petition, petitioner appeals.

Reversed.

For prior opinion, see 8 P.(2d) 234.

Davis & Thorne and Phil Jacobson, all of Los Angeles, for appellant.

Wm. Ellis Lady, of Los Angeles, for respondent.

WASTE, C. J.

This is an appeal from an order denying a petition for the removal of executors.

Appellant, the son of the decedent, filed a petition asking the removal of the executors and the appointment of an administrator with the will annexed. As a basis for such request, appellant alleged, among other things, that the executors failed to file a proper inventory of the decedent's properties; that certain properties were omitted from such inventory; that taxes on some of the properties had not been paid; that there was a failure to rent certain properties; that the executors neglected to recover certain jewelry taken by a third person after the decedent's death; that a certain claim against the estate was paid by the executors without the necessary preliminary investigation to determine its propriety; that there was dissension between the executors; and that the attorney for the executors, to their knowledge, was acting adversely to the best interests of the estate in certain designated particulars.

The executors filed an answer to the petition. Upon the issues joined, the court received evidence and thereafter made the order denying the relief prayed for, from which order this appeal is taken. At no time did the court below make and sign written findings of fact upon the issues presented. Appellant assigns this as error.

Sections 632 and 633 of the Code of Civil Procedure require that, "upon the trial of a question of fact by the court, its decision must be given in writing," that in such decision "the facts found and the conclusions of law must be separately stated," and that judgment "upon the decision must be entered accordingly." At the time of the hearing upon the petition for removal of executors and at the time of entry of the order here appealed from, sections 1716 and 1717 of the Code of Civil Procedure (now section 1230 of the Probate Code) made the above-quoted sections providing for written findings appli-

cable to the determination of issues of fact in probate proceedings.

In the Estate of Ingram, 99 Cal. App. 660, 279 P. 208, 209, which presented an appeal from an order sustaining an opposition to the appointment of an administrator, it is declared that "sections 1716 and 1717 of the Code of Civil Procedure by reference make sections 632 and 633 of the same Code applicable to the trial and determination of issues of fact in probate proceedings as in ordinary civil actions. These latter sections render it necessary for the court to make its decision in writing, i. e., to sign findings. It has been said by this court that 'the right to findings is a substantial right, as inviolate, under the statute, as that of trial by jury under the Constitution. * * * "The right to have a material issue presented by the pleadings in a cause determined by a finding of the court is one important to the parties to a suit, and the failure to make such a finding results in prejudicial error entitling the complaining suitor to reversal." (Huntington v. Vavra, 36 Cal. App. 355, 172 P. 168. See, also, Tucker v. United Railroads, 171 Cal. 704, 154 P. 835.)' Frascona v. Los Angeles Ry. Corp., 48 Cal. App. 135, 191 P. 968."

In the Estate of Burton, 63 Cal. 36, 37, the probate court, upon opposition being offered thereto, declined to set apart a probate homestead. No findings were there made. Upon appeal this court said: "We think the petitioner was entitled to findings. The rules of pleading and practice in civil cases are applicable to proceedings in the Probate Courts. Issues joined in such proceedings are to be tried and determined by that court as in civil cases (§§ 1312, 1713, 632, 633, 634, Code Civ. Proc.); and upon trial by the court, without a jury, parties to the proceedings were entitled to findings, unless they were waived. (§ 634, supra; Haffenegger v. Bruce, 54 Cal. 416.) As findings were not waived, it was error to enter judgment without them."

[1, 2] It thus appears that the court below erred to the prejudice of the appellant when it failed to make and sign findings upon the issues of fact presented to it for adjudication. There had been no waiver of findings within the meaning of section 634 of the Code of Civil Procedure. Examination of the reporter's transcript discloses that appellant by his motion for new trial directed the attention of the court below to the Code sections, supra, necessitating findings of fact in probate proceedings. Appellant is not, therefore, precluded from now urging the point.

Respondents can derive but little comfort from the Estate of Bauer, 199 Cal. 98, 248 P. 507. The point as to the necessity of findings in probate proceedings was neither presented nor considered in that case. It cannot therefore be cited as an authority on the proposition.

[3] Respondents suggest that, if written findings be required, this court may make such findings under section 956a of the Code of Civil Procedure. That section authorizes the appellate courts of the state to make "findings of fact contrary to, or in addition to, those made by the trial court." We are not now inclined to extend the scope of the quoted Code section to include a case in which the trial court erroneously fails to make any findings. The express language of the section tends to negative such inclusion.

The order appealed from is therefore reversed.

We concur: SHENK, J.; CURTIS, J.; TYLER, Justice pro tem.; LANGDON, J.

PRESTON, J.

I concur in the judgment, but I expressly withhold my approval of the construction placed upon section 956a of the Code of Civil Procedure.

If we should suppose a case where the evidence was without conflict in support of the order made, we would, under the construction of this section by the majority opinion, be compelled to reverse and remand the cause.

This would be in plain antagonism of the spirit of the said section which is by its own terms to be "liberally construed to the end, among others, that wherever possible causes may be finally disposed of by a single appeal and without further proceedings in the trial court, except where the interest of justice requires a new trial."

216 Cal. 415

CONNESS et al. v. McCARTY.

L. A. 13518.

Supreme Court of California.

Sept. 27, 1932.

1. Automobiles ⇐216.

Pedestrian on highway must exercise reasonable care for his own safety.

2. Automobiles ⇐245(72).

Contributory negligence of pedestrian struck by automobile approaching from rear, while walking at night on right-hand side of road, *held* for jury.

In Bank.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Action by Mrs. William Conness, Jr., and another, against William E. McCarty. From a judgment for defendant, plaintiffs appeal.

Affirmed. For prior opinion see 6 P.(2d) 971.

John A. Gilligan and W. A. Alderson, both of Los Angeles, for appellants.

George H. Moore, and Gerald O'C. Egan, both of Los Angeles, for respondent.

SEAWELL, J.

Plaintiffs appeal from a judgment for defendant in an action for wrongful death. Plaintiffs are the widow and infant daughter of William S. Conness, Jr., who died of injuries received when he was struck by defendant's automobile while walking on a public road in the county of Los Angeles known as the Culver boulevard on the morning of November 1, 1928, at about 12:10 a. m. The case is before this court upon transfer from the District Court of Appeal. We granted defendant's petition for transfer to this court after decision by the Appellate Court reversing the judgment in his favor, for the reason that we were unable to agree with the conclusion that the decedent, as a matter of law, was free from contributory negligence, and therefore the lower court erred in instructing the jury fully on the doctrine of contributory negligence. In our opinion the jury was plainly authorized, upon the evidence before it, to find decedent guilty of contributory negligence.

[1, 2] The facts of the tragic accident are as follows: The decedent, aged twenty-three years, in company with one Bradley and two young women, was returning from the beach towns of Ocean Park and Venice to Los Angeles, via the Culver boulevard, in a Chrysler roadster with a rumble seat. Bradley was employed by decedent's mother as her chauffeur. At about 7:30 o'clock the two men had observed the young women, with whom they were unacquainted, waiting to board a street car bound for the beaches, and had invited them to drive. The night was Halloween, October 31, 1928. After a pleasure tour of the beaches they were returning to Los Angeles about midnight, Bradley driving with one of the young women in the front seat, and decedent and the other young woman occupying the rumble seat. A short distance west of Culver City, Conness requested Bradley to stop the car, as he wished to put on his overcoat. Bradley stopped and parked his automobile on the south side of the road, his right side, headed easterly, with its headlights burning. He testified that the left wheels of his automobile might have been on the improved portion of the road. Both Conness and his young woman companion climbed out of the rumble seat. Conness said to Bradley that they would run up the road a way "to warm up." They started running up the road, hand in hand, in the same direction in which the Chrysler roadster was facing, on their right or the south side of the road. When they had gone a distance of between fifty and seventy-five feet from their automobile, they turned to walk back in a westerly direction. After turning back they were struck from the rear by defendant, who was traveling westerly at a speed estimated by him to be thirty-five miles an hour, on the north or his right side of the road. Defendant's brother-in-law was in the front seat with him. Defendant testified that he did not see Conness and the young woman until just as he hit them. He immediately brought his automobile, which was a Lincoln sedan, to a stop within a short distance. After the impact Conness and his companion were lying unconscious, at an angle across the road, at the extreme north edge, or with their heads and shoulders beyond the edge of the gravel-macadam pavement. The right headlight of the defendant's car was bent back against the radiator and the right front fender was dented. The skid marks upon the road showed that defendant had swerved somewhat to his left as he put on his brakes to avoid hitting the couple. Conness died shortly after reaching the hospital and the young woman received serious injuries.

The improved portion of Culver boulevard at the place where the accident occurred was between twenty to twenty-two feet in width and of gravel-macadam. The district is sparsely settled. There are no sidewalks. The tracks of the Pacific Electric Railway parallel the road immediately to the north. Defendant had passed a west bound electric train as it stopped to discharge passengers at the Centinella avenue station, a short distance east of the scene of the accident, and said train was moving close behind him as he approached the point of collision. He ascribed his failure to observe Conness and the young woman to the fact that the glare from the train headlight, his own headlights, and the headlights of the Chrysler roadster on the other side of the road combined to produce a shadow or blind spot. Defendant had traveled the road daily for a long period prior to the accident. The night was dark and there were no road lights. According to the testimony of two deputy sheriffs of Los Angeles county who inspected the defendant's car when he reported to the Culver City police station immediately after the accident, the windshield of his car was very dusty. This he denied. He testified that he had observed the headlights of the Chrysler. However, we are not primarily concerned on this appeal with the question of defendant's negligence. For the purpose of this appeal and by way of argument, it may be conceded that defendant was negligent, yet, if Conness was also guilty

of negligence which proximately caused his death, his wife and child cannot recover.

The accident occurred before the enactment of section 150½ of the Motor Vehicle Act (St. 1929, p. 546, § 66), which provides: "It shall be unlawful for any pedestrian to walk along and upon any highway outside of a business or residence district otherwise than close to his left-hand edge of the highway."

The road on which the accident herein took place is straight for some distance, and it would appear that there were no other cars on it in the immediate vicinity until another Lincoln automobile arrived a few minutes later, in which Conness was taken to the hospital. The testimony given by Bradley, the driver of the Chrysler roadster in which decedent was a passenger, by the young woman in the front seat with him, and by decedent's companion on the highway, was to the effect that as the couple ran and walked away from the Chrysler in an easterly direction they were on the south or their right side of the road. At the time they were hit, after having reversed their direction, they were on the other side of the road, close to the north edge, as indicated by the position in which they were found after the collision, and alleged in the complaint. Bradley and the young lady in the front seat with him testified that they did not keep their eyes on their companions every minute as they walked down the road. They did not know that the pair on the road had been hit until defendant's brother-in-law came hurrying to their car to make inquiries. Bradley testified that he had a faint recollection of seeing the headlights of the defendant's automobile.

As Conness and the young woman ran down the road they were facing in an easterly direction, from which defendant's automobile was approaching along the straight road with its headlights burning, yet said young woman testified that she did not remember seeing the electric railway car approaching, and that she did not see defendant's car. The jury was warranted in concluding from decedent's conduct that he also failed to observe it. The young woman testified that he "swung her around, holding hands," to go back to the Chrysler roadster, and that was the last thing she remembered. There is no testimony to indicate that the two had gone easterly a greater distance than seventy-five feet from the Chrysler roadster. Bradley and the young woman in the front seat with him estimated the distance as between fifty and seventy-five feet, while the injured girl gave the distance as seventy feet. Upon the coroner's inquest Bradley testified that the impact occurred about fifty or sixty feet from the place where the Chrysler was parked. Defendant testified that, after he applied his brakes and stopped, he let the brakes up and moved over to the side of the road to get out of the line of traffic, and then, after having moved forward between twenty and twenty-five feet, he was not west of the parked Chrysler, although he might have been opposite it. References made by Bradley in his testimony to the Lincoln "flashing past" him, serve only to create a conflict in the evidence. Upon the evidence before it, the jury was plainly authorized to find that decedent and his companion, without observing defendant's oncoming automobile, moved from their position on the south side of the narrow road, out of the path of said westbound automobile, onto the north side just as it was close upon them. The exercise of the most ordinary prudence required that they wait momentarily to permit said oncoming automobile to pass, rather than step directly into its line. The equal right of pedestrians with motor vehicles to the use of public streets and roads does not relieve pedestrians from their duty to exercise reasonable care for their own safety.

Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 41 A. L. R. 1027, and other cases of like tenor are distinguishable from the instant case on the facts.

It follows that the state of the evidence required the court to give instructions on contributory negligence of the decedent. It may be that certain of the instructions given are technically subject to criticism, but considering the charge as a whole, we are of the view that it does not embody reversible error. It may be that the proof is susceptible of inferences contrary to those drawn by the jury. But our inquiry is limited to determining whether the judgment, based on the jury verdict, finds support in the evidence. That it does is clear without further discussion or citation of authority.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; TYLER, Justice pro tem; CURTIS, J.; SHENK, J.; PRESTON, J.

216 Cal. 447

PACIFIC READY CUT HOMES, Inc., v. TITLE INS. & TRUST CO. et al.

L. A. 12429.

Supreme Court of California.

Sept. 27, 1932.

Rehearing Denied Oct. 27, 1932.

Liens ⇐7.

Materialman *held* entitled to equitable lien on unexpended balance of building loan under evidence that mortgage company's representative promised payment for materials.

The evidence disclosed that the materialman had refused to take contract on finding that owner was insolvent and that property was heavily incumbered, but that materialman was told of the building loan, and thereupon obtained assurance from mortgage company's representative that proceeds of loan would be used to pay for materials and labor.

In Bank.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by the Pacific Ready Cut Homes, Inc., doing business under the fictitious firm name and style of the Construction Supply Company, against the Title Insurance & Trust Company. Judgment for defendants, and plaintiff appeals.

Reversed, with directions.

Andrew J. Copp, Jr., of Los Angeles, for appellant.

Walter H. Hewicker, of Los Angeles, for respondent Meline Bond & Mortgage Co.

Louis, Quillian & Pool, of Los Angeles, for respondent Hipolito Co.

A. W. Staples, of Los Angeles, for respondents Archibald & Williams.

Walter L. Case, of Los Angeles, in pro. per.

Howard B. Henshey and Louis E. Kearney, both of Los Angeles, for respondent Title Ins. & Trust Co.

PER CURIAM.

This is an action to subject the unexpended balance of a building loan to an equitable lien in favor of a materialman. Defendants A. W. Menkins and Violet Menkins, his wife, were owners of a lot, upon which they desired to erect an apartment house. They secured a loan of $16,000 from defendant Meline Bond & Mortgage Company, secured by a first deed of trust on the property, recorded June 26, 1928. Two other trust deeds in the amount of $6,000 each were also recorded in favor of other persons, on July 23, 1928. These instruments were all recorded prior to the commencement of the work, and were therefore prior to mechanics' liens. During the period of construction, a number of payments were made to laborers and materialmen, including plaintiff. In March, 1929, the building was completed. The amount then due plaintiff was $2,705.04. Further sums for labor and materials were owing to other parties. The balance of the loan, $3,535.63, was insufficient to cover them all. Plaintiff and other claimants filed liens against the building. The defendant mortgage company thereupon, as permitted by its loan contract with the owners, kept the said balance, using it to reduce the amount of the principal and interest due on the loan. Thereafter the owners defaulted, and defendant Title Insurance & Trust Company, trustee under the first deed of trust, elected to sell the property. Plaintiff then commenced this action to enjoin the sale and to subject the unexpended balance in the loan fund to a lien in its favor. Other mechanics' lien claimants were joined as defendants.

The incumbrances, i. e., the first, second, and third deeds of trust, were greater than the value of the property, with the result that the mechanics' liens were worthless.

The theory of plaintiff was that it had relied upon the loan in extending credit to the owners, and that the facts of the case were such as to justify the imposition of the lien under the rule of Smith v. Anglo-California Trust Co., 205 Cal. 496, 271 P. 898. In this latter case, Smith, the owner of certain land, was given a building loan of $20,000 by Anglo-California Securities Company, secured by a deed of trust. An account was opened in Smith's name, and the necessary sums were paid to him as the work progressed. Shortly after completion of the building, Smith died. A balance of $4,090 remained undisbursed in the account. Smith's administratrix brought suit to recover this sum, and claimants of mechanics' liens totaling $5,633.30 also demanded the money; their liens being valueless because of the priority of deeds of trust. This court held that the said sum should be charged in equity with a lien and distributed pro rata among the lien claimants. We there said (page 502 of 205 Cal., 271 P. 898, 901): "That the lien claimants must have relied upon the fund to be advanced to Smith by the securities company, and not alone upon the individual capacity of Smith or their right to a last lien upon the premises, as a means of obtaining payment for their labor and materials, is supported by every reasonable inference deducible from the surrounding circumstances. Smith was engaged in building upon land for which he had not paid the purchase price and which was charged with and subject to the several deeds of trust executed and delivered to secure the entire purchase-money.

The incapacity of Smith to build without a prearranged loan was emphasized by the existence of these purchase-money incumbrances and attested by the agreement with the securities company for a loan to be used expressly for building purposes. It is also reasonably apparent from the record herein that this loan could not have been obtained without giving the deed of trust for its security priority over the purchase-money deeds of trust. Moreover, the record tends to show that the houses for the construction of which the building loan account was opened have been completed in substantial compliance with the plans and specifications submitted to the securities company in connection with the application for the loan. It requires very little showing, therefore, to produce the conclusion that, without confidence in the payment to Smith of the full amount of the loan contracted for, the lien claimants would not have extended credit for their labor and materials. The reasonableness of such expectations on the part of the lien claimants must naturally have suggested itself both to Smith and the securities company. They should have known that the consummated agreement for the money to be advanced to or on behalf of Smith as the buildings progressed, under a deed of trust taking priority over the statutory liens available to those contracting with him or the general contractor, would constitute a material inducement to them in supplying labor and materials. As if in express recognition of the reasonableness of these expectations, the practice was to make payments from, or withdrawals upon, the building loan account only as the work progressed and after the appraiser for the securities company had, in the line of his duty, reported progress warranting a payment. * * * Smith and the securities company by their conduct may be said to have induced, or contributed to induce, the lien claimants to enhance the value of the real property by their labors and materials, and it would be inequitable and unjust, it seems to us, to permit Smith or his personal representative to withhold, at this time, any part of the fund upon which the lien claimants must surely have relied for reimbursement. The fact that the real property itself has proved of but little value upon sale under the purchase-money deeds of trust lends added support to this conclusion."

The Smith Case, as appears from the foregoing quotation, was decided upon the dual grounds that the owner and the lender were estopped by their conduct to withhold the fund, and that the claimants had an equitable lien thereon. The essential basis of the opinion is the justifiable reliance upon the fund by the lien claimants. If similar reliance appears in the instant case, the former decision is controlling.

The trial court found, in substance, that plaintiff, in supplying its materials, relied solely upon the personal credit of defendant owners, and not upon any representations or conduct of defendant mortgage company; and that the latter defendant made no representations and did nothing to influence the furnishing of the materials. We are of the opinion that these findings are not supported by the record. Witnesses for plaintiff included H. F. Hopkins, credit manager, B. R. Simms, the salesman who solicited the contract, and H. W. Simmons, collector. The sole witness for defendant mortgage company was J. T. Zeeman, in charge of its escrow department. Defendant suggests that the court believed its witness and disbelieved contrary statements of plaintiff's witnesses. However, disregarding all evidence upon which there is conflict, the following facts appear from the testimony: The defendant owner requested plaintiff to furnish materials for the job, and plaintiff proceeded to investigate, first, the credit of said defendant, and, second, the incumbrances on the property. Discovering that the owner was insolvent and that the property was burdened with an indebtedness in excess of its value, plaintiff refused to take the contract. The defendant owner then informed plaintiff that a building loan had been obtained from the mortgage company, and that materials and labor would be paid for out of the fund derived from said loan. Witnesses for plaintiff testified that they checked this fact by several conversations with Zeeman, and the latter admitted having one phone conversation with Hopkins to this effect. The deed of trust evidencing the loan was on record, and this was checked by Hopkins. During the progress of the work, several payments were received by plaintiff from Zeeman; i. e., from the escrow. Zeeman himself testified that in a conversation with Simms and the owner he said that the mortgage company would pay plaintiff after satisfactory completion if there remained enough money to cover the other claims; and that in another conversation with Simms just after completion of the building he said that the company would pay all claims against the job if the various laborers and subcontractors would prorate their claims.

Despite the denial of Zeeman that any promise was made, prior to completion of the building, to pay any of the claims, the evidence set forth above brings this case clearly within the rule of Smith v. Anglo-California Trust Co. There was in that case no greater evidence of justifiable reliance upon the fund than appears herein. The distinguishing facts of the two cases are not, in our opinion, significant. The principal difference urged by defendant is that in the Smith Case the conflict was between the administratrix of the borrower and the lien claimants, while in the instant case the borrower, Menkins, makes no claim to the bal-

ance. It may be noted that here, by the application of the balance to the reduction of the loan, the borrower profited. However, the equitable considerations are identical with those presented in the former case. The defendant mortgage company, having received the benefit of plaintiff's performance in the form of a completed building, and therefore a more valuable security for its note, is not justified in withholding or appropriating to any other use money originally intended to be used to pay for such performance, and relied upon by plaintiff in rendering its performance. The theory of equitable lien, as laid down in the Smith Case, is quite broad (see 17 Cal. L. Rev. 411), and it is fully applicable to the instant case. See, also, Community Lbr. Co. v. Chute (Cal. Sup.) 10 P.(2d) 57; Community Lbr. Co. v. California Pub. Co. (Cal. Sup.) 10 P.(2d) 60.

The judgment is reversed, with directions to the lower court to make findings and enter judgment in favor of plaintiff in accordance with the views expressed in this opinion.

216 Cal. 474

L. W. BLINN LUMBER CO. v. LOS ANGELES COUNTY et al.

L. A. 11514.

Supreme Court of California.

Sept. 28, 1932.

Rehearing Denied Oct. 28, 1932.

1. Taxation ⇐421(1).

Assessment was not void because description was defective where all parties considered and acted on understanding that property involved was property intended (Pol. Code, §§ 3650, 3884).

2. Taxation ⇐348.

In determining value of lease for taxation, improvements reverting to lessor and capital employed should be amortized over life of lease, and other fixed charges should be considered.

3. Taxation ⇐348.

Determining value of lease for tax purposes by appraising fee title interest and subtracting therefrom capitalized rental and taking one-half the product, *held* erroneous.

4. Taxation ⇐348.

For taxation purposes, combined net earnings of lease over entire term is its ultimate value and present value as of any date on any assumed rate of interest should be computed from that basis.

5. Taxation ⇐494(1).

Where it appears that assessor and board of equalization both adopted manifestly erroneous methods showing gross overvaluation of property, such acts amount to constructive fraud warranting court's interference.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by the L. W. Blinn Lumber Company against Los Angeles County and another. From a judgment for defendants, plaintiff appeals.

Reversed.

See, also, 14 P.(2d) 516.

E. S. Williams, of Los Angeles, for appellant.

Jess E. Stephens, City Atty., Arthur Loveland, Deputy City Atty., Erwin P. Werner, City Atty., Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, all of Los Angeles, for respondents.

PRESTON, J.

Appeal by plaintiff from judgment for defendants in an action to recover taxes for the year 1924, paid under protest (section 3819, Pol. Code), upon a possessory or leasehold interest in tide lands owned by the city of Los Angeles. Said judgment rests upon findings of fact and conclusions of law, the substance of which will now be set forth:

The court found that in 1917, as the result of the settlement and compromise of litigation between the city of Los Angeles and the Southern Pacific Railroad, the city leased certain tide lands to the railroad without the specification of rental, the lease to terminate in 1947; that in 1918 said railroad assigned to Consolidated Lumber Company, a corporation, all of its interest in and to a portion of said tide lands, comprising some 27.56 acres, more or less; that in 1920 the latter company in turn contracted with plaintiff to sublet or assign to it the estate in said lease at an annual payment of $300 per acre for the first five years, increasing materially at the commencement of the second, third, fourth, and fifth respective five-year periods thereafter, then to be at the rate of $600 per acre per annum for the balance of the term of the lease, expiring July 23, 1947; that since January 1, 1920, plaintiff had possessed, occupied, and used said territory.

The court further found that in 1924, the Los Angeles county assessor entered against plaintiff an assessment upon the following described property: "Unsecured personal property as follows: The leasehold int and all other rights of L W Blinn Lbr Co in and to lands described under L A City Ord H ⊃ O 883 or otherwise;" that by said description the assessor had in mind and intended to describe plaintiff's said leasehold interest above

referred to, although said description failed to describe said interest sufficiently to identify it, "L A City Ord H C O 883" being an order of the board of harbor commissioners and not an ordinance; that, however, plaintiff was not misled or prejudiced by said defective description, and, on March 27, 1924, rendered to said assessor a statement under oath setting forth specifically its leasehold or possessory interest, which is the estate here under consideration.

The court further found that the annual payments mentioned did not represent the full value of the occupancy and use or the full rental value of said premises; that said assessor placed a valuation of $110,240 upon plaintiff's said interest, pursuant to which a tax of $4,133.99 was levied for the year 1924 and paid under protest in writing by plaintiff.

The court further found that the full cash value of plaintiff's said leasehold and possessory interest on the first Monday in March, 1924, was $114,058 and stated that "in determining the value of said property the court considered the payments to be made by plaintiff to the Consolidated Lumber Company pursuant to the written agreement set forth in paragraph V of these findings, as installments of a purchase price and not as rental."

The court then found that the sum of $110,240 set forth in said assessment was ascertained and fixed by the assessor as follows: That said assessor valued the fee-simple title of the lands within the exterior boundaries of said portion of tide lands at $13,000 per acre; that said assessor next capitalized at 6 per cent. the amount per acre per annum then being paid by plaintiff to Consolidated Lumber Company under said agreement of 1920, to wit, the sum of $300, and by such capitalization derived the figure of $5,000; that said assessor thereupon deducted said $5,000 from said fee value of $13,000 per acre and thereby derived an amount of $8,000 per acre, of which he took 50 per cent., viz., $4,000, multiplied said sum of $4,000 by 27.56, being the number of acres, thereby deriving said assessment figure of $110,240.

The court also found that said assessment was made without any purpose or intent of requiring plaintiff to pay an excessive or unlawful tax or to bear a burden unequal to that of other taxpayers, although it was true that, in the case of a few small isolated parcels of real property within said county, leased to private individuals for a short term, the leasehold or possessory interests escaped assessment and taxes for the year 1924. The court then found that at the hearing before the board of equalization plaintiff had an opportunity to offer all the evidence it desired in reference to said alleged overvaluation of said possessory right and leasehold interest, and that the conclusion of said board and s refusal to lower said assessed valuation was the result of its honest judgment, free from discrimination or arbitrary action.

As a matter of law the court concluded that the determination of the board of equalization that the sum of $110,240 was the full cash value of said possessory or leasehold interest was conclusive; that solely because of said defective description the assessment and tax was invalid; that, however, the tax was morally and equitably due and plaintiff, in good conscience, should pay it and defendants should retain it; hence that plaintiff was not entitled to a judgment refunding to it said tax. Accordingly, judgment followed for defendants, awarding them their costs of suit, and plaintiff appealed.

[1] The contentions of appellant are: That the assessment of 1924 was grossly excessive because of adoption by the county assessor of a wrong theory and plan of assessment and particularly because of the admitted failure to take into consideration, as a proper deduction, plaintiff's obligation to pay the annual amounts or rentals due under said contract with the Consolidated Lumber Company; that allowing a grossly excessive assessment is constructive fraud on the part of a county assessor and board of equalization approving it, which will be relieved against by the courts; also that the assessment was void in that it failed to comply with the requirements of the Political Code, §§ 3650, 3884.

The latter point we deem to be without merit, inasmuch as all parties considered and acted upon the understanding that the property here in question was the property intended to be assessed and plaintiff also returned these premises for assessment. The first two questions, however, undoubtedly possess merit and will now be discussed.

[2-4] The system employed by the assessor and confirmed by the board of equalization is manifestly unsound, for at most it is a doubtful plan to appraise the present reversionary interest and not the leasehold interest in the property. The system, as we understand it, was to appraise the fee title interest per acre and subtract therefrom the capitalized rental per acre paid by the lessee; then to multiply the result by the number of acres involved and take one-half the product in accordance with the rule of assessment applicable to all property in Los Angeles county.

This system, however, takes no account of the duration of the leasehold estate; hence, it would ordinarily carry the same valuation on the last year of the term as on the first. It ignores the fact that the estate of the lessee is a limited one and that the excess of annual benefits over burdens must of necessity be the important factor in such an appraisal. The capital employed, whether in making an outright purchase of the lease or

in assuming the payment of rentals periodically, must, with interest, be amortized during the life of the lease in order to prevent the waste of capital and to reflect the true worth of the premises. Improvements placed upon the property which revert to the lessor should also be taken into account and amortized over the same period. Taxes and other fixed charges must also be considered. The combined net earnings of the lease over the entire term is its ultimate value and its present value as of any date upon any assumed rate of interest should be computed from this basis. For example, under the lease here in question, the average yearly rental per acre is $443.617. This sum capitalized at 6 per cent. is $7,393.61. Subtracting this sum from $13,000, the fee value placed on said property by the assessor, leaves $5,606.39, one-half of which is $2,803.19. If it be assumed that the gross earnings on said lease are the equivalent of 6 per cent. upon $13,000, we will then have as the net annual return per acre the sum of $168.19 ($2,803.19x.06). Treating this last-mentioned sum as an annuity payable annually over the period of 23 years, its present worth would be $2,069.24 ($168.19x12.303). Multiplying this sum by the acreage involved would give $57,028.25 (27.56x$2,069.24), which is an approximation of the present value of the leasehold estate.

That substantially such a method is the proper one has already been determined in the case of Hammond Lumber Co. v. County of Los Angeles, 104 Cal. App. 235, 285 P. 896, 900. The method there used was suggested by one Milton Moore, upon whose testimony the present findings were rested by the court. In the case cited, the court, in approving substantially the above system, said: "This witness fixed the value of the leasehold interest of plaintiff for purpose of assessment on the first Monday of March, 1924, at $204,650, taking into consideration the limitation of use to plaintiff's lumber business. He described his method of procedure in detail, stating that he first determined what he called a base value representing the present worth of a right in perpetuity to the lands, subject to the privileges and limitations of the lease. He then calculated the annual return that an owner might reasonably expect from property so valued at the rate of 7 per cent., and the difference between such amount and the annual rent represented the annual benefit or saving to the lessee. To ascertain, however, the savings or bonus value on the first Monday of March, 1924, the savings of future years had to be reduced to present worth. So by a process which need not be followed here with particularity, the witness figured the full market value of the leasehold interest at $409,313, one-half of which amount, or roughly $204,650, was taken as the 'full cash value' for taxation purposes. The witness in his testimony thus demonstrated the application of the capitalization method, which in Birch v. County of Orange, 59 Cal. App. 133, 138, 139, 210 P. 57, was pronounced to be a fair and reasonable method of valuing a beneficial interest. See, also, Graciosa Oil Co. v. County of Santa Barbara, 155 Cal. 140, 143, 144, 20 L. R. A. (N. S.) 211, 99 P. 483." This authority also quotes at length from McMichael's "Long and Short Term Leaseholds" (2d Ed.) pages 90, 91, and from Zangerle's "Principles of Real Estate Appraising" pages 31 and 148.

In Klein on "Federal Income Taxation" page 782, paragraph 24:15, the following appears: "The value of a leasehold is ordinarily the present worth of the excess of the rental value of the property for the unexpired term over the contractual rent. Thus, where a lease had an unexpired term of fifteen years, the rent reserved thereunder being $53,000 per annum and fair rental value being $57,400 per annum, the value of the leasehold was held to be the present worth of an annuity of $4,400 for fifteen years."

Mr. E. A. Saliers, on page 334, section 2, of "Accountants' Handbook" states: "Value of Leaseholds. This depends directly upon the life of the lease. Ordinarily, improvements on leased land become the property of lessor on expiration of the lease; therefore all costs should be amortized during life of the lease. In valuing leaseholds it is necessary to deduct annual costs from annual income. The remainder is an annuity for the number of years the lease runs. Its present worth can be found by finding present worth of an annuity of $1 for the given number of years, and multiplying same by the amount of the annuity. If any sum is recoverable from lessor at expiration of lease, as is sometimes agreed upon in case of extraordinary improvements made by tenant, its present worth can be found by use of compound interest tables. This, added to present worth of the annuity, gives present worth of leasehold."

The contention is made by respondent that under the instrument here involved the plaintiff became the purchaser of the lease and not merely a subtenant thereunder. We regard this contention as injecting an immaterial factor into the case. Whether the lease be purchased outright, or whether it be purchased by installments or whether the installments paid be considered as rentals, in any event the outlay of capital thus involved must be amortized over the period of the lease in order to prevent a waste of capital assets.

Speaking on this subject, Mr. Saliers, in Accountants' Handbook, supra, page 466, part of section 10, again says: "When a lease is bought outright or a bonus is paid, it appears on the books at a valuation. In case the

balance sheet is to be used for credit purposes and, owing to great appreciation in property values, the lease is worth much more than its book value, it is proper to indicate this in a footnote, or else to incorporate it in the balance sheet with an offsetting reserve. The amount at which the lease is carried on the books must be amortized over the period of the lease, the periodic charge being to Rent. If title to the building constructed on the leased land is to pass to the owner of the land upon expiration of the lease the cost of the building must be written off over the life of the lease." Again, at page 541, section 11, in part: "Leaseholds which terminate at a fixed future date, as well as other assets having a definitely fixed time of expiration, must be systematically amortized or written down if capital is to be preserved. These may not depreciate in the strictly material sense of the word, yet the deterioration which takes place is analogous to that which occurs in case of depreciation of other forms of wasting assets. In the case of leaseholds, as in case of patents, the period over which the cost must be written off is definitely prescribed. Leaseholds may be paid for in annual sums, or there may be an initial bonus in addition to the annual sums. Such a bonus should be considered a deferred charge to be distributed over the period covered by the lease."

Clearly, therefore, the method employed by the assessor and confirmed by the board of equalization was erroneous and worked greatly to the injury of appellant for a proper valuation would undoubtedly be not more than one-half the figure at which the leasehold was assessed. The fact that the property is cut off from the water front by intervening lands and may not be valuable except in connection therewith may likewise serve to lessen its value.

But, as shown by the finding above quoted, the court itself did not rely upon the action of the assessor. It placed its sole reliance upon the testimony of the witness Moore, the same witness who testified in the case of Hammond Lumber Co. v. County of Los Angeles, supra. However, it appears that in the present instance said witness altered his viewpoint and method of valuation and appraisals. Here he assumed the value of the right to the full use and occupation of the land in perpetuity to be the market value of the fee and deducted from this its present value to the city due to the deferred enjoyment thereof. This latter sum he subtracted from said present market value of the whole of the land in perpetuity. This remainder he then divided by two and arrived at the figure of $114,058 (slightly in excess of the figure given by the assessor), which he declared to be the present value of the leasehold estate. But manifestly this system entirely ignores the factor of annual earnings and the existence of burdens thereon. Likewise it recognizes neither rent nor amortization of improvements. It ignores capital invested, fixed charges, and other outlay. It is predicated solely upon the theory that the value of the use and occupation of the property is the present value of the fee-simple title thereto, lessened only by the present worth of that estate in fee simple to the owner of the reversion. The market value of the fee might serve as a basis for assuming an annual return, but where earnings are known the market value can shed only a dim light upon the subject of leasehold value. Furthermore, this system is also contrary to that approved by all the text-writers above cited as well as that announced in the case of Hammond Lumber Co. v. County of Los Angeles, supra, which rule this court refused to disturb when a hearing of the cause was sought. The principle here contended for was also approved in the case of In re Metropolitan Building Co., 144 Wash. 469, 470, 258 P. 473, from the syllabus of which we take the following: "In assessing the value of a leasehold, the worth of the lease from year to year, and considering the term, fixes the criterion; and in case of the tenant's improvements, with bonded indebtedness, profits must be figured after some plan of amortization for return of the money invested, whether reimbursing stockholders or bondholders for the money advanced or loaned."

[5] This brings us to the last step: Will the court interfere to prevent such a gross overvaluation as appears in this case? We are not without authority upon this proposition. Article 13, § 1, of the Constitution, requires that "all property in the state * * shall be taxed in proportion to its value," and in this connection this court, in the case of Birch v. County of Orange, 186 Cal. 736, 742, 200 P. 647, 649, stated: "'A grossly inequitable and palpably excessive overvaluation' of property for taxation may be held constructively fraudulent." Citing many cases. In other words where, as here, it appears that the assessor and board of equalization both adopted a manifestly erroneous method, showing a gross overvaluation of the property to be assessed, such an act, although, of course, unintentional, amounts to a constructive fraud or the equivalent of a fraud on the rights of plaintiff. On this subject the case of Hammond Lumber Co. v. County of Los Angeles, supra, states, at page 240 of 104 Cal. App., 285 P. 896, 898:

"To invalidate the assessment there must be a conscious failure to exercise a fair and impartial judgment, or a resort to arbitrary methods varying from those employed in assessing other property of like character and situation, and resulting in the imposition designedly of an unequal burden on the property of the complainant. Los Angeles G. &

E. Co. v. County of Los Angeles, 162 Cal. 164, 166, 121 P. 384, 9 A. L. R. 1277; Miller & Lux, Inc., v. Richardson, 182 Cal. 115, 128, 187 P. 411; Pacific Coast S. S. Co. v. Richardson, 186 Cal. 70, 72, 198 P. 1034; Pierce v. County of Santa Barbara, 40 Cal. App. 302, 305, 180 P. 641; Birch v. County of Orange, 59 Cal. App. 134, 136, 210 P. 57; Wild Goose Country Club v. County of Butte, 60 Cal. App. 339, 342, 212 P. 711; Ambassador Hotel Corp. v. Los Angeles County, 94 Cal. App. 143, 270 P. 726."

In the case of Mahoney v. City of San Diego, 198 Cal. 388, 402, 403, 245 P. 189, 195, where the plaintiff sought the recovery of taxes paid under protest and both the assessor and the board of equalization failed to recognize certain well-known factors which relate to valuation, the court said: "We do not say that in assessing improvements upon real estate the elements of age, state of repair, location, cost of construction, or of replacement are or that any one of them is controlling upon the assessor in the exercise of his judgment and discretion as to what valuations he shall place upon assessable improvements upon real estate; but what we do hold is that an assessment, made by an assessor in accordance with a systematic and intentionally adopted theory for the arrival at valuations to be placed upon that form of property, which omits to take into consideration any of the foregoing elements which in common experience ordinarily determine values, and in place thereof substitutes an arbitrary basis for the fixation of values upon the several classes of such form of property for purposes of assessment upon a percentage plan, from which the foregoing elements for determining values are expressly excluded, will not be upheld when it sufficiently appears that actual discrimination has resulted from an assessment thus arrived at. When the determining principles leading to uniformity in distributing the burdens of taxation have been lost sight of or willfully abandoned in the making of the assessment complained of, the asseveration of the assessor that he assessed the form of property 'at its full cash value' will not avail him in the presence of the actual and admitted facts supplied from his own lips; nor will his assertion, even though it be admitted to be true, that he acted honestly and in good faith in making the assessment in question, suffice to compel the upholding of an assessment when the assessor making it, however honest and well-intentioned, has willfully adopted and deliberately pursued a plan of assessment which is violative of the fundamental principles which should be his guide in the performance of his official duty; and when such an assessment is sufficiently shown to be replete with discrimination and lacking in uniformity in the burdens it imposes upon the owners of assessable property, such assessment will be invalidated at the instance of those property owners who shall pursue the proper statutory method to recover the taxes thus improperly imposed."

The judgment is reversed.

We concur: WASTE, C. J.; TYLER, Justice pro tem.; LANGDON, J.; CURTIS, J.

216 Cal. 468

L. W. BLINN LUMBER CO. v. LOS ANGELES COUNTY et al.

L. A. 11234.

Supreme Court of California.

Sept. 28, 1932.

1. Taxation ⇐348.

In determining value of lease for taxation purposes, capital employed and improvements reverting to lessor must be amortized over life of lease and taxes and other fixed charges must be considered.

2. Taxation ⇐348.

Combined net earnings of lease over entire term is ultimate value and present value as of any date on any assumed rate of interest may be computed from this basis and result is approximate value of leasehold for tax purposes.

3. Taxation ⇐543(7).

In action for taxes paid under protest, record before board of equalization showed that lessor failed to employ legal methods of valuation, and that plaintiff was required to pay exorbitant and arbitrarily fixed tax.

In Bank.

Appeal from Superior Court, Los Angeles County; Louis P. Russill, Judge.

Action by the L. W. Blinn Lumber Company against the County of Los Angeles and another. From a judgment for defendants, plaintiff appeals.

Reversed.

See, also, 14 P.(2d) 512.

E. S. Williams, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, Gordon Boller, J. A. Tucker, W. Sumner Holbrook, Jr., and Fred M. Cross, Deputies Co. Counsel, Erwin P. Werner, City Atty., Jess E. Stephens, City Atty., Cecil A. Borden and Frederick Von Schrader, Deputies City Atty., all of Los Angeles, for respondents.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

PRESTON, J.

Appeal by plaintiff from judgment of nonsuit entered in an action to recover taxes paid by it under protest (section 3819, Pol. Code) upon a possessory, or leasehold interest in tide lands owned by the city of Los Angeles.

The complaint first alleged the creation of the leasehold interest, in substance as follows: In 1917, as the result of the settlement and compromise of litigation between the city of Los Angeles and the Southern Pacific Railroad, the city leased certain tide lands to the railroad. In 1918 said railroad assigned to Consolidated Lumber Company, a corporation, all of its interest in and to a portion of said tide lands, which portion, comprising some 27.56 acres, more or less, the latter company leased to plaintiff in the year 1920, at an annual payment of $300 per acre for the first five years, increasing materially at the commencement of the second, third, fourth, and fifth respective five-year periods thereafter, then to be at the rate of $600 per acre per annum for the balance of the term of the lease, extending to July 23, 1947.

The complaint further alleged that said rentals to be paid by plaintiff represented the full value of its occupancy and use of the premises; that, however, in 1925, the county assessor of Los Angeles county assessed its leasehold interest, denominated "Possessory interest in land under ordinance numoer 37036 N. S.," upon a valuation of $210,840 and levied a tax thereon of $7,569.14 for said year; that plaintiff thereupon protested the assessment upon numerous grounds, claiming that said valuation was fixed in a purely arbitrary way, without reference to the true value of the leasehold interest itself as distinguished from the value of the fee title to the land, and that the tax was so excessively high and arbitrary as to amount to fraud. Plaintiff further alleged that it paid the tax under protest and petitioned for a hearing before the board of equalization, which hearing was duly had and evidence received and heard, and that said board then sustained the assessor's valuation of said possessory right as being fair, equitable, and not discriminatory, all to the injury of plaintiff for the various reasons set forth in its protest and in said pleading, wherefore plaintiff prayed judgment against defendants for the full amount of said tax so paid under protest, to wit, $7,569.14, together with interest, costs, and other general relief. By a second count of the complaint plaintiff also sought to recover upon similar facts and like grounds, a tax in the sum of $323.10 paid by it under protest, pursuant to an assessment levied against its right to occupy, and maintain and operate a private wharf upon, certain other tide lands owned by the city of Los Angeles, adjoining and used with the previously mentioned tract, plaintiff's interest therein being denominated "Possessory interest in land under order number 563, Parcel number 4."

Defendants answered, asserting that said assessments were honestly arrived at and were made after a full and complete examination of plaintiff's properties, by the adoption and use of the same method used in all other cases involving property of the same character, similarly situated, without any discrimination or inequality whatsoever.

The case went to trial, and, after testimony, more or less preliminary, had been given, plaintiff offered to prove that the full cash value of its said interests was not more than one-half or possibly one-third or one-fourth of what the county had assessed them for. The court thereupon refused to entertain any further evidence other than the record of proceedings had in the matter before the board of equalization and thereafter in effect affirmed the action of said board, granting in favor of defendants here the judgment of nonsuit from which plaintiff now prosecutes this appeal.

A further explanation of the situation of plaintiff with reference to these lands is advisable. Plaintiff has assembled in a contiguous body some 40 acres of land located on San Pedro harbor, using it for an industrial plant for its lumber and kindred business, and has constructed a private wharf and other valuable improvements thereon. Some fifteen acres of this combined area consists of a tract owned in fee simple by plaintiff, fronting on said harbor and adjoining the land in controversy on its northerly side. For convenience, we shall designate this area as tract A. The larger acreage leased by plaintiff from Consolidated Lumber Company consists of some 27.56 acres, which we shall designate tract B. A third tract, known as the wharf tract, is a strip of land about 40 feet in width and 1,000 feet in length lying immediately in front of tract B and forming the area between the pier head line and the bulkhead line, which tract we shall call, for convenience, tract C. Tract B is also cut by the tracks of the municipal belt railway and also by a sewerage plant. These two last-mentioned ownerships occupy in the aggregate some 2½ acres of the tract.

Tract B was assessed in the year 1925 at $210,840. In 1924, the same area was assessed at $110,240, and for the year 1923, the assessment was reduced to $55,000. Tract C was assessed for the year 1925 at $9,000. Tract A, the land owned in fee by plaintiff, was zoned and assessed at 24 cents a square foot for a large portion thereof and at 16 cents a square foot for the remainder.

The proceedings before the board of equalization disclose that in the assessment here under review tracts A, B, and C were con-

sidered as a unit and as constituting one ownership. They were likewise zoned in the same way, tract A being assessed as above described at 24 cents and 16 cents per square foot and tract B in identically the same way and at the same figure, while tract C was assessed throughout at 24 cents a square foot; on such assessments the figures above noted were derived. In other words, on the face of the proceedings, it is clear that the assessor and board of equalization made little, if any, distinction between the property owned in fee simple by plaintiff and the property held by it merely under a term lease. Both counts of the complaint allege willful and arbitrary overvaluation of said areas to such an extent as to constitute fraudulent conduct on the part of said officials. An examination of the proceedings discloses without controversy that in valuing the smaller area, for example, no account whatsoever was taken of the purchase price or consideration paid by plaintiff for its lease. Likewise no account was taken of the cost of valuable improvements placed upon said area by plaintiff. The same statement is substantially true of tract B. The annual payments made by plaintiff to Consolidated Lumber Company were given little or no place in the calculation of the assessor. In fact, there was no effort whatsoever to ascertain the gross or net annual earnings of plaintiff on the property, as a whole or in separate parcels. Neither was any allowance made for fixed charges or for depreciation or for the amortization of other capital outlay. Nor was there any definite differentiation arrived at between the waterfront or wharf tract and the back area. On the whole the record before the board of equalization shows clearly that the assessor and said board disregarded practically every factor that should have been considered in arriving at a just valuation. Mahoney v. City of San Diego, 198 Cal. 388, 402, 403, 245 P. 189.

Plaintiff introduced testimony tending to show that the rent paid for the property was the full value of the leasehold interest in tract B and that as to tract C the value was not to exceed $1,000; yet it was willing to accept an assessment of $55,000 on tract B, as made in 1923. In support of the valuation fixed by the assessor only one witness was called, whose testimony was so unsatisfactory as to amount to a confession of employing a purely arbitrary and erroneous method of appraisal.

[1, 2] In the case of Blinn Lumber Co. v. County of Los Angeles et al. (Cal. Sup.) 14 P.(2d) 512, this day decided, we have set forth substantially the system which should be employed in the valuation of leasehold estates, that is, the duration of the leasehold estate must be taken into account as well as the fact that the estate of the lessee is a limited one and the excess of annual benefits over burdens must of necessity be the important factor in such an appraisal. The capital employed, whether in making an outright purchase of the lease or in assuming the payment of rentals periodically, must, with interest, be amortized during the life of the lease in order to prevent the waste of capital and to reflect the true worth of the premises. Improvements placed upon the property which revert to the lessor must also be taken into account and amortized over the same period. Taxes and other fixed charges must also be considered. The combined net earnings of the lease over the entire term is its ultimate value and its present value as of any date upon any assumed rate of interest can be computed from this basis and the result so obtained is the approximate present value of the leasehold.

[3] In the case last cited we condemned an assessment on the identical property here denominated tract B, of $110,240, as being so excessive as to amount to constructive fraud. Without any evidence of a substantial change in conditions we are here called upon to endorse an assessment on said property of nearly twice that amount. Manifestly this cannot be done. The record before the board of equalization itself is sufficient to show that the assessor failed to employ a legal and proper method of valuation of plaintiff's property rights and as a result plaintiff has been assessed and required to pay an exorbitant and arbitrarily fixed tax. These views make it unnecessary to discuss the propriety of the action of the lower court in refusing to allow plaintiff to support its allegations of constructive fraud aliunde the record before the board of equalization.

The judgment is reversed.

We concur: WASTE, C. J.; TYLER, Justice pro tem.; LANGDON, J.; CURTIS, J.

216 Cal. 406

HOHN et al. v. PETERS.

L. A. 12188.

Supreme Court of California.

Sept. 23, 1932.

1. Corporations ⇐76.

Stock subscription made in Arizona, where foreign corporation had no permit to issue shares, was void, notwithstanding subscribers exercised option to cancel portion of subscription by letter mailed in California.

Facts disclosed that defendant, when he took the subscription, knew that permit to issue the stock had been secured only in California and not in Arizona.

2. Corporations ⇐106.

Defendant having knowingly obtained money under void stock subscription contract was liable for return thereof (Civ. Code, § 2343).

In Bank.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by J. H. Hohn and another against E. A. Peters. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Janeway, Beach & Pratt, of Los Angeles (S. T. Hankey, of Los Angeles, of counsel), for appellant.

William W. Bearman and A. Feldman, both of Los Angeles, for respondents.

LANGDON, J.

This is an action to recover money paid under a contract for the purchase of shares of stock, after notice of recission and tender of consideration received. Defendant Peters, vice president and agent for stock sales of Lincoln Holding Corporation, went from Los Angeles to Winslow, Ariz., to sell shares to plaintiffs. Defendant then knew that a permit to issue shares had been secured only in California, and not in Arizona. A subscription agreement was signed at Winslow, for 252 shares at $10 per share, with the privilege on the part of plaintiffs of cancellation of 100 shares. At the time of execution, plaintiffs paid $920 cash and certain bank stock valued at $600, leaving a balance of $1,000. About one month later plaintiffs wrote to defendant at Los Angeles to cancel the remaining 100 shares, and on receipt of this letter the corporation forwarded a certificate for 152 shares. Some time later, plaintiffs discovered that the corporation had no permit for Arizona, and this proceeding was commenced. Judgment was rendered for plaintiffs, and defendant appealed.

[1] It is obvious that, if the contract was made in Arizona, it was void, and plaintiffs were entitled to recover. Defendant contends that the letter requesting cancellation of the 100 shares, and the reply, constituted a new contract which was made in California, the place of mailing the acceptance. The facts, however, show clearly that the subscription contract was made in Arizona, and that the consideration passed there. The exercise of the option to cancel the shares was not the making of an entirely new subscription contract.

[2] Defendant having knowingly obtained money from plaintiffs under a void contract, he is liable for its return. Cal. Civ. Code, § 2343; Stirnus v. Adams, 50 Cal. App. 730, 195 P. 955.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; TYLER, Justice pro tem.; SHENK, J.

216 Cal. 391

MILLER v. SOUTHERN CALIFORNIA TELEPHONE CO. et al.

L. A. 13502.

Supreme Court of California.

Sept. 23, 1932.

Rehearing Denied Oct. 21, 1932.

1. Appeal and error ⇐1002.

Jury's finding on conflicting evidence will not be disturbed on appeal.

2. Automobiles ⇐244(5).

Evidence *held* to support jury's finding that motorist who struck pedestrian off paved portion of road failed to exercise ordinary care when confronted with emergency.

3. Appeal and error ⇐1004(1).

Damages awarded by jury will not be disturbed on appeal where not so grossly excessive as to shock sense of justice and raise presumption of passion, prejudice, or corruption.

4. Damages ⇐132(6).

$6,000 *held* not excessive where woman of 50 was knocked some 10 feet by automobile and sustained broken left knee, which resulted in permanently sensitive joint.

5. Appeal and error ⇐200.

Alleged prejudice of exonerated juror against appellants' witness merely giving cumulative testimony and who charged misconduct cannot be claimed on appeal where no objection was made to court's investigation.

6. Appeal and error ⇐1045(1).

Where appellant suffered no apparent injury from court's investigation of charge of

misconduct made against juror by appellants' witness, verdict sanctioned by trial court will not be disturbed.

In Bank.

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by Louise F. Miller against the Southern California Telephone Company and J. C. Adams. From judgment for plaintiff, defendants appeal.

Affirmed.

For prior opinion, see 6 P.(2d) 553.

Lawler & Degnan, of Los Angeles, for appellants.

Paul Blackwood, of Los Angeles, for respondent.

PRESTON, J.

Appeal by defendants from judgment entered upon a verdict awarding plaintiff damages in the sum of $6,000 for injuries sustained as a result of being hit by an automobile driven by defendant Adams, an employee of defendant Southern California Telephone Company, a corporation. The several contentions made by appellants relate to the alleged insufficiency of the evidence to support the verdict and judgment, the alleged award of excessive damages, and alleged misconduct of a juror.

The accident occurred on February 15, 1928, about 7:15 p. m., where a crossroad intersects the Los Angeles-San Diego state highway at Del Mar, Cal. The highway was paved to a width of about twenty feet and on each side was a fifteen-foot dirt or gravel strip. Respondent was standing back on the graveled portion of the road, awaiting an opportunity to cross from the west to the east side thereof, when appellant Adams from the north, and a limousine and a smaller car from the south, approached the intersection. Unexpectedly the smaller car swerved to the middle of the road and passed the limousine at a point in front or nearly in front of respondent. Appellant Adams, fearing a collision and feeling that his car had been forced off the pavement, turned it on to the gravel; then, suddenly seeing respondent, he turned still further to the right to avoid striking her. This effort, however, was unsuccessful. His car hit respondent on the left knee, threw her forward some distance, turned in a semicircle, and finally came to a stop about thirty feet from where she lay.

[1, 2] Practically all of the evidence bearing upon the issues of negligence and contributory negligence is to be found in the detailed accounts of the accident given by respondent and by appellant Adams. Their testimony is not free from conflict. From it the jury could have believed that said appellant exercised ordinary care in that, confronted by imminent peril, he took the only course which seemed possible if an accident were to be avoided. However, the jury chose to base its verdict upon that evidence supporting the allegations of negligence on the part of the driver of the car. This conclusion, reached under conflicting evidence upon an issue of fact, of course, will not be disturbed upon appeal. The record contains evidence to the effect that respondent was standing fifteen feet from the paved portion of the highway, in a place of apparent safety, waiting for the three cars to pass, when appellants' car turned or was forced off the pavement and that the driver thus had a space of fifteen feet in which to travel without hitting her or colliding with either of the northbound cars. It is true that he was suddenly confronted with the peril caused by one of the northbound cars attempting to pass the other but in this stress of circumstances he was obliged to use only ordinary care to avoid an accident and it was for the jury to decide under the evidence whether he used such care. They decided adversely to him, evidently drawing the conclusion or inference that, by the use of ordinary care, he could have passed between respondent and the approaching cars without striking her. This court has no right on appeal to draw an opposite inference where, as here, the inference of the jury finds reasonable support in the evidence. It may be added that respondent also testified that the two northbound cars had already passed each other before she was struck and that she was so far off the road that it "didn't enter her head" that appellants' car would come near her. She also claimed, although flatly contradicted by witnesses for appellants, that she was in an area which was or had been marked as a pedestrian zone and that she was carrying a flashlight.

[3, 4] Appellants contend that the evidence was insufficient to show damage from any source to the extent of the $6,000 award. On this issue also the evidence was contradictory and might well have served as the basis for a smaller verdict. However, as said in the case of Kelley v. Hodge Transportation System, 197 Cal. 598, 610, 242 P. 76, 81: "Unless we are able to say that the award of damages made by the jury * * * were grossly disproportionate to any compensation reasonably warranted by the facts as presented to us on appeal as to shock the sense of justice and raise at once a presumption that it was the result of passion, prejudice, or corruption, rather than an honest and sober judgment, this court may not exercise the power of revision." Citing many cases. Here competent and sufficient evidence was received

to support the award made by the jury. In substance, it showed that respondent, a woman over fifty years of age, was thrown some ten feet, her hat and shoe were knocked off and she found herself with her head on the paved part of the highway and her body on the gravel; that she was in the hospital from February 16th to April 2d, suffering severely, with her left knee broken, her leg cut and bruised and her side black, blue and swollen; that her leg was kept in a basket for nearly three weeks; then in a cast, after which she removed to a hotel where she was around on crutches for several weeks, thereafter using a cane until the healing was complete. She testified that the use of her right leg, to save her left, caused her right knee to swell and pain. Medical witnesses for appellants testified that she was suffering from hyperthropic arthritis in both knee joints, a process of slow growth which could neither have been caused nor contributed to by the fracture, but the physician who attended her testified: "In my opinion that * * * abnormal deposit of bone in the joint was the result of an inflammation in the joint which was undoubtedly caused by the primary fracture. * * * Those bony spurs are there, and they always will be there. * * * I am of the opinion that that joint will always be sensitive; that there will always be a limitation of motion and that the normal function of the joint will always be impaired." Asked whether it was not common for a person of respondent's age to have arthritis, he replied: "I would say it was not unusual; but also, I would say this: To—not to have it to the extent of presenting the objective bony malformation that is apparent in this case."

Lastly, appellants complain of alleged misconduct of a juror and prejudicial error arising from the following incident: Near the close of the trial, at the request of appellants' attorney, the court and counsel retired to the judge's chambers and the attorney stated that at the close of the previous day's session, while R. W. Scott, who was to be a witness for appellants, Mr. Blackwood, respondent's attorney, and others were waiting for the elevator, an elderly lady, later identified as juror Mrs. Katherine D. Jackson, approached Mr. Blackwood and asked what part of the south he came from; that Mr. Blackwood answered and the juror then said in substance: "My husband was a judge in that part of the country at one time. * * * I expected you to charge the jury more than you did and to furnish us with some wonderful oratory at the beginning of the trial," whereupon Mr. Blackwood, in substance, replied that he would save that until later. Because of this incident, said attorney requested the court to declare a mistrial and dismiss the jury. The court replied that he would first consider the matter and interrogate the parties concerned. Court and counsel then re-entered the courtroom and requested Mrs. Jackson and Mr. Scott to step into the judge's chambers. This was done and Mr. Scott, in the presence of the court and counsel, then confirmed the occurrence substantially as above related. Mrs. Jackson, however, claimed that all she said to Mr. Blackwood was, in substance: "We hope we will hear some good old Kentucky oratory," to which he replied: "That will come later on." The court thereupon conferred with Mr. Davis, another juror, in the courtroom; then returned once more to his chambers with counsel, where the motion for dismissal was renewed upon the ground that Mrs. Jackson had evidenced an interest in the case favorable to respondent, was guilty of misconduct, and, in any event, the effect upon her of having been confronted with Mr. Scott's charges would be for her to discredit, if not entirely disbelieve, any testimony subsequently given by him. The court denied the motion and the trial proceeded. Thereafter affidavits on the subject were filed by both parties on motion for new trial but they contained no additional matter.

[5, 6] Appellants do not rely so much upon the contention that the statements of the juror were improper as upon the claim that the necessary effect of the conference in chambers was that the juror would be prejudiced against Mr. Scott when he was called as a witness. But appellants are in no position to urge this complaint as there is no showing whatsoever that they made any objection when the court proposed to investigate the matter. Neither is there any showing that ill will or prejudice toward the witness resulted from the court's action. When called Mr. Scott merely testified to the effect that the portion of the road where respondent stood was traveled continually by automobiles going to the stores and by the bus and that, when he examined the highway about February 18, he found no pedestrian markings on it. His testimony was at most cumulative. Furthermore, from a review of the record it is apparent that appellants suffered no injury from the occurrence. This also is a matter upon which the conclusion of the trial court, unless plainly wrong, will not be disturbed on appeal.

The judgment is affirmed.

We concur: SHENK, J., WASTE, C. J., LANGDON, J., TYLER, J. pro tem.

216 Cal. 485

WEBSTER v. WEBSTER.

L. A. 12248.

Supreme Court of California.

Sept. 28, 1932.

Rehearing Denied Oct. 28, 1932.

1. Divorce ⇐254.

Interlocutory divorce decree awarding wife certain sum represented by husband's note secured by mortgage for maintenance and support awarded wife portion of community property.

2. Divorce ⇐252.

Award to divorced husband of community property in kind, and to wife fixed sum represented by husband's note secured by mortgage and also support money payable monthly until remarriage, *held* proper (Civ. Code, § 139).

3. Appeal and error ⇐907(3).

On appeal on judgment roll alone, presumption is in favor of regularity of lower court's proceedings.

4. Divorce ⇐286.

On appeal on judgment roll alone, appellate court would presume trial court properly determined that best interests of parties to divorce suit required disposition of property provided for (Civ. Code, § 146).

5. Stipulations ⇐18(3).

Parties' stipulation in open court that allegations of supplemental complaint would be deemed denied *held* binding (Code Civ. Proc. § 2d3).

6. Appeal and error ⇐643(4).

Appellate court may direct diminution of record any time during pendency of appeal.

7. Appeal and error ⇐659(1).

Appellate courts favor amendment enabling them to review lower court's decision with facts lower court had before it.

8. Appeal and error ⇐176.

Parties having proceeded to trial without objecting to failure to file written answer to supplemental complaint in accordance with stipulation, plaintiff could not urge on appeal that allegations stood admitted.

9. Divorce ⇐254.

Interlocutory divorce decree, properly construed, did not attempt to dispose of community property, and any language purporting to do so could be disregarded as surplusage.

The decree, after decreeing that plaintiff should be entitled to divorce upon expiration of one year from date thereof, declared that at that time court should grant such other and further relief as might be necessary to complete disposition of action. The decree also awarded community property in kind to husband and, in lieu of awarding portion of property in kind to wife, granted to her a lump sum represented by husband's note and secured by mortgage on real property awarded to husband, and also awarded wife $40 per month for her support and maintenance, and charged husband with expense incidental to maintenance, support, and education of minor child.

10. Divorce ⇐254.

Court in divorce case may determine, in interlocutory decree, status of property and disposition to be made.

11. Divorce ⇐284.

Statute precludes entry of final divorce decree pending appeal from that portion of interlocutory decree determining property rights (Civ. Code, § 132).

12. Divorce ⇐182.

That Supreme Court had dismissed, because not taken within time allowed, appeal from purported final divorce decree, made pending appeal from interlocutory decree, did not make final decree valid.

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Divorce suit by Melvina M. Webster against William M. Webster, in which defendant filed a cross-complaint. From that portion of an interlocutory decree of divorce for plaintiff determining property rights, plaintiff appeals.

Affirmed.

Porter C. Blackburn and John L. Bland, both of Los Angeles, for appellant.

E. R. Simon, H. D. Allison, and C. B. Conlin, all of Los Angeles, for respondent.

WASTE, C. J.

Plaintiff appeals from that portion of an interlocutory decree of divorce which fixes and determines the property rights of the parties. The appeal is on the judgment roll alone.

On January 14, 1929, the plaintiff instituted an action for separate maintenance to which the defendant in due time filed an answer. Defendant also cross-complained for a divorce. Thereafter, and in the early stages of the trial, plaintiff was granted leave to file a supplemental complaint for divorce upon the ground of extreme cruelty. Defendant did not file a written answer thereto, it being stipulated in open court that the allegations of the supplemental complaint should be deemed denied. At the conclusion of the trial findings of fact were waived and the court below entered its interlocutory decree granting a divorce to plaintiff upon the ground of extreme cruelty. This decree

awarded the community property in kind to the defendant husband. In lieu of awarding a portion of the property in kind to the plaintiff wife, the interlocutory decree granted to her a lump sum of money, represented by a promissory note in the sum of $3,500 to be executed by the defendant husband and to be secured by a mortgage on the real property awarded to the defendant husband. Plaintiff was also awarded $40 a month for her support and maintenance, to be paid by the defendant until such time as the plaintiff remarried. The defendant was also charged with the expense incidental to the maintenance, support, and education of the minor child of the parties.

[1, 2] As already intimated, the plaintiff has not appealed from that portion of the interlocutory decree entitling her to a divorce, but confines her attack to theose portions of the decree which fix and determine the rights of the parties in and to the community property. Plaintiff's first assault thereon is grounded upon the erroneous assumption that the decree awards all of the community property to the defendant, and grants to her only an award of money for support and maintenance under section 139 of the Civil Code. This is asserted to be error. A reasonable construction of the interlocutory decree readily discloses that plaintiff *was* awarded a portion of the community property, her share being awarded to her in money rather than in kind, the same being secured by a mortgage on the real property. The fact that the decree awards said sum "for the maintenance and support of the plaintiff," does not make it any the less an award of a portion of the community property. In addition thereto, plaintiff was awarded support money, payable monthly, until such time as she remarried. This is a proper method of distribution of the property and is a matter to be determined in the sound discretion of the trial court. Marshall v. Marshall, 196 Cal. 761, 765, 239 P. 36; Meyer v. Meyer, 184 Cal. 687, 195 P. 387; Gaston v. Gaston, 114 Cal. 542, 546, 46 P. 609, 55 Am. St. Rep. 86. We perceive no abuse in its discretion.

[3, 4] Plaintiff next contends that under section 146 of the Civil Code, and the authorities construing the same, the court below should have awarded her in excess of one-half of the community property. We find it unnecessary to here determine whether or not in actions for divorce based on charges of extreme cruelty the trial court should, or must, award in excess of one-half of the community property to the unoffending spouse. Assuming this to be the general rule, as urged by the plaintiff, a point we need not decide, we cannot say on the record now before us that the court below, in awarding the property as above indicated, did violence to this asserted general rule. The appeal being on the judgment roll alone, every presumption and intendment is resolved in favor of the regularity of the proceedings in the court below. Coleman v. Farwell, 206 Cal. 740, 276 P. 335; Johnston v. Callahan, 146 Cal. 212, 79 P. 870; Kelly v. McDonald, 98 Cal. App. 121, 276 P. 404. In the absence of the evidence it is, of course, impossible for us to say that the court below awarded less than one-half of the community property to the plaintiff, or otherwise erred or abused its discretion in awarding the same. In this state of the record it will be presumed that the trial court, in the exercise of a sound discretion, determined that the best interests of the parties would be served by the disposition above outlined.

[5] Plaintiff would have us accept the allegations of the supplemental complaint as to the value of the community property, thus indicating, so she asserts, the unequal distribution of the same. This we cannot do. The parties stipulated in open court that the allegations of the supplemental complaint were to be deemed denied. This stipulation appears in the reporter's notes taken upon the trial of the cause and has been brought to our attention by diminution of the record heretofore duly authorized by this court over the plaintiff's objection. Such a stipulation made in open court constitutes "not only agreements between the parties, but between them and the Court, which the latter is bound to enforce, not only for the benefit of the party interested, * * * but for the protection of its own honor and dignity." Meagher v. Gagliardo, 35 Cal. 602; 23 Cal. Jur. 811, § 2. Nothing in section 283 of the Code of Civil Procedure militates against the binding effect of a stipulation entered into and executed by the parties in open court and duly reported in the proceedings of the trial. McLaughlin v. Claussen, 116 Cal. 490, 48 P. 487; Smith v. Whittier, 95 Cal. 279, 287-288, 30 P. 529, 530; Welch v. Stratton, 73 Cal. App. 765, 768, 239 P. 380. In Smith v. Whittier, supra, it is stated: "The evident object of this section [section 283, Code Civ. Proc.] is that, whenever the attorney shall enter into an agreement for the purpose of binding his client, there shall be *such a record thereof as will preclude any question concerning its character or effect, and that the extent of the agreement may be ascertained by the record*, if oral, that it shall be entered in the minutes, and, if written, that it shall be filed with the clerk. 'It is not intended to enlarge or abridge the authority of the attorney, but only to prescribe the manner of its exercise.' Preston v. Hill, 50 Cal. 53 [19 Am. Rep. 647]. The section *does not require a construction that in no instance shall an agreement which the attorney may make in behalf of his client be binding unless entered in the minutes of the court or filed with the clerk.* Its provi-

sions have reference to executory agreements, and not to those which have been wholly or in part executed, and it was with reference to oral agreements of this character that the court said in its opinion in Borkheim v. B. & M. Ins. Co., 38 Cal. 628 [relied on by plaintiff herein]: 'Of such agreements, therefore, there can be no *specific performance*.' If under the terms of a mutual stipulation, which was only verbal, one party has received the advantage for which he entered into it, or the other party has at his instance given up some right, or lost some advantage, so that it would be inequitable for him to insist that the stipulation was invalid, he will not be permitted to repudiate the obligation of his own agreement upon the ground that it had not been entered in the minutes of the court. * * * If the party admits that he made such verbal stipulation, it will be as binding upon him as if it had been entered in the minutes of the court. Patterson v. Ely, 19 Cal. 36; Reese v. Mahoney, 21 Cal. 306. If, however, the terms of the verbal agreement are disputed, courts refuse to settle such disputes, or to try a collateral issue for the purpose of determining whether any agreement had been made. * * * The same principles are applicable to the enforcement of a written agreement which has not been filed as to a verbal one which has not been entered in the minutes of the court. If the parties have acted upon such written agreement to such an extent that it would be inequitable not to recognize its binding effect, as, for example, if a party has obtained under the agreement that in consideration of which the other became bound thereby, or has been relieved of some burden which was the consideration for which it was given, or if the other party has been reasonably led thereby to forego any step which but for the agreement he would have taken, courts will not allow the agreement to be repudiated upon the ground that it had not been filed with the clerk."

In the instant case and during the early stages of the trial on plaintiff's complaint for *separate maintenance* and defendant's cross-complaint for divorce, it was stipulated in open court that plaintiff might file a supplemental complaint for *divorce* and that the allegations thereof should be deemed denied. Such supplemental complaint was thereafter filed and the cause proceeded to trial and judgment. In other words, the verbal stipulation has been fully executed, plaintiff receiving the benefit thereof and defendant, relying thereon, having been led to forego his right to file a written answer to such supplemental complaint, which written answer he would have filed but for the stipulation. Under these circumstances, and in the language of Smith v. Whittier, supra, it would be inequitable to permit plaintiff to now repudiate the agreement. Moreover, this is not a case where the terms of the stipulation are locked up in the breasts of the parties or their respective counsel, thus precluding an accurate ascertainment thereof. The terms and extent of the stipulation are brought to our attention by a duly authenticated excerpt of the proceedings in the court below. There can therefore be no dispute or doubt in this regard.

[6, 7] There is no merit in plaintiff's contention that the trial court by reason of lapse of time was without jurisdiction to authenticate the "Excerpt from Proceedings at Trial," wherein appears the stipulation above referred to. Plaintiff confuses the jurisdiction of the trial court with that of this court. Upon suggestion of the defendant and to meet the assertion of plaintiff that the allegations of the supplemental complaint had not been denied, this court, after hearing and over plaintiff's objection, directed diminution of the record. As a result of this court's order, the "excerpt of proceedings" was filed herein. It is well settled that an appellate court, in the exercise of its jurisdiction, may direct the correction or diminution of a record at any time during the pendency of the appeal; and, this without reference to the provisions of section 473 of the Code of Civil Procedure. McMahon v. Hamilton, 202 Cal. 319, 325, 260 P. 793; Dugan v. Forster, 101 Cal. App. 144, 281 P. 411; Barnett v. Marsili (Cal. App.) 10 P.(2d) 472. In such a case we are not confronted with a want of power or jurisdiction in the trial court, assuming the six months' period to have expired, but rather with the inherent power of an appellate court to cause the amendment of a record before it so that the same might speak the truth. Appellate courts look with favor upon an amendment the effect of which is to enable them to review the decision of the lower court in view of all the facts which that court had before it when it made its decision. McMahon v. Hamilton, supra.

Nor do we think the plaintiff has suffered any disadvantage or prejudice by reason of such diminution of the record. Plaintiff prosecuted her appeal on the judgment roll alone and then made the erroneous and misleading statement that the allegations of the supplemental complaint as to the value of the community property had not been denied by the defendant when, as matter of fact, the parties had, as already stated, orally stipulated in open court that said allegations should be deemed denied. The only method available to the defendant to overcome plaintiff's erroneous statement was by diminution of the record duly authorized by this court. It is therefore immediately apparent that defendant, and not plaintiff, was, until such diminution, the wronged party.

[8] The parties having proceeded to trial and judgment without objection being made in the trial court as to the failure to file a

written answer to the supplemental complaint, it is now too late to urge that the allegations of such supplemental complaint stand admitted. Turner v. East Side Canal Co., 169 Cal. 652, 654–655, 147 P. 579; Gervaise v. Brookins, 156 Cal. 110, 112, 102 P. 332; Kern Valley Bank v. Koehn, 19 Cal. App. 247, 249, 125 P. 358.

[9, 10] Citing Remley v. Remley, 49 Cal. App. 489, 193 P. 604, and other cases, plaintiff next contends that the interlocutory decree improperly purports to make a final adjudication of the property rights of the parties rather than merely determining the manner in which the property should be disposed of or assigned upon the entry of the final decree. Assuming the rule to be that the court below was without power to *dispose* of the community property in the interlocutory decree, a point we need not now decide, we are of the opinion that the decree here involved, when construed as a whole, may reasonably be said to constitute but a determination of how and the manner in which the property should be assigned upon the entry of the final decree. This construction is borne out by that portion of the decree which, after decreeing that plaintiff shall be entitled to a divorce upon the expiration of one year from the date thereof, declares that "at that time the court shall grant such other and further relief as may be necessary to complete disposition of this action." However, granting that the interlocutory decree contains some language susceptible of the interpretation contended for by the plaintiff, and granting further that such disposition of the property in the interlocutory decree would be improper, it is our opinion that the language thus purporting to make final disposition of the property may properly be disregarded as surplusage. It does not represent a departure from the jurisdiction of the court. Sullivan v. Superior Court, 72 Cal. App. 531, 534, 237 P. 782. There can be no doubt as to the propriety of the trial court's action in determining in the interlocutory decree the status of the property and the disposition to be made thereof. Pereira v. Pereira, 156 Cal. 1, 9–11, 103 P. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107; Strupelle v. Strupelle, 59 Cal. App. 526, 531, 211 P. 248; Remley v. Remley, supra. This being so, plaintiff's rights will be fully protected by an order directing the court below upon entering the final decree to assign the property according to the determination expressed in the interlocutory decree. A similar direction appears in Strupelle v. Strupelle, supra, and Remley v. Remley, supra.

[11] In announcing our conclusion on this phase of the case we are not embarrassed by the trial court's purported entry of the final decree during the pendency of this appeal. Section 132 of the Civil Code prohibits the entry of a final decree of divorce "if *any* appeal is taken [and pending] from the interlocutory judgment." This section has been held to preclude the entry of a final decree though the appeal be only from that portion of the interlocutory decree determining the property rights of the parties. Newell v. Superior Court, 27 Cal. App. 343–345, 149 P. 998, 999. In the cited case it is stated:

"It has been determined that in a divorce action under the provisions of our Code the function of an interlocutory decree includes not only the establishment of the right of a party to a divorce, but includes also the hearing and final determination of the rights of the parties as to property. Any disposition of property rights made in connection with the hearing of the principal cause of action is regularly included in and becomes a part of the interlocutory decree. * * *

"In the present case there is an interlocutory judgment which has become final with respect to the plaintiff's right to a divorce, but is subject to a pending appeal affecting the provisions made therein for the support of the plaintiff. Until the determination of that appeal the superior court is not in a position to know whether it will be required to make some other and different order affecting a matter closely connected with the granting of the divorce. * * * The provision contained in section 132, Civil Code, postponing the entry of final judgment until after final disposition of any appeal from the interlocutory judgment, was adopted in recognition of the fact that in granting a divorce the court has a variety of duties to perform affecting the property rights of the parties and the future welfare of those parties and their children; and it was deemed advisable that in such cases all of those matters, as far as possible, should be finally adjusted in connection with the granting of a divorce."

[12] It necessarily follows that the "final decree" entered by the court below pending this appeal was premature and improper. The fact that this court heretofore dismissed an appeal from such purported "final decree" adds nothing to its validity. The appeal was not heard on its merits but was dismissed solely because it had not been taken within the time allowed by law. Moreover, inspection of our records discloses that plaintiff, apparently realizing the impropriety of the entry of such "final decree" pending the present appeal, moved the court below, under section 473, Code of Civil Procedure, to set aside and vacate said purported "final decree." An appeal from the order refusing to vacate such "final decree" is now pending in this court. Webster v. Webster, L. A. No. 13288. When the latter appeal comes before us for decision, it necessarily follows from what has been said that the order refusing to vacate the

purported "final decree" will have to be reversed.

For the foregoing reasons, that portion of the interlocutory decree determining the property rights of the parties is hereby affirmed. Upon entering its final decree of divorce, the trial court will assign and dispose of the property according to the determination expressed in such interlocutory decree; and when it makes its final decree, it may then, pursuant to the authority conferred by section 140 of the Civil Code, make provision in that decree for such reasonable security for the payment of the money allowed to plaintiff as it may deem proper.

We concur: PRESTON, J.; SHENK, J.; LANGDON, J.; CURTIS, J.; TYLER, Justice pro tem.

216 Cal. 387

SOUTHERN PAC. R. CO. v. WILLETT et al.

L. A. 13279.

Supreme Court of California.

Sept. 23, 1932.

1. Appeal and error ⇐347(1).

Minute order of trial court dismissing action for want of prosecution *held* "final judgment," from which appeal must be taken, subsequent entry of formal judgment not tolling time for appeal (Code Civ. Proc. § 583).

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words and Phrases.]

2. Appeal and error ⇐113(1).

Order denying motion to vacate order dismissing action *held* not appealable (Code Civ. Proc. § 583).

In Bank.

Appeals from Superior Court, Fresno County; T. R. Thomson, Judge.

Action by the Southern Pacific Railroad Company against W. M. Willett and others. From a judgment dismissing the action and from an order refusing to vacate such judgment, defendants appeal. On motions to dismiss the appeal.

Motions granted.

For prior opinion, see 7 P.(2d) 713, to which rehearing was denied in 9 P.(2d) 308.

Arthur J. Dannenbaum, of Los Angeles, and Theodore M. Stuart, of Fresno, for appellants.

Walter H. Stammer, of Fresno, for respondent.

TYLER, Justice pro tem.

Motion to dismiss appeal. The facts are without dispute. The complaint in the action, which is one to condemn real property for railroad purposes, was filed on March 16, 1899. The answer of defendant and appellant was filed June 27, 1899. Appellant filed with his answer a cross-complaint, and, some six years later, on February 24, 1905, filed an amended cross-complaint. The answer of plaintiff and respondent to the amended cross-complaint was filed June 8, 1905. No proceedings were taken and no stipulations, documents, or other pleadings were filed in the action from that time until January 15, 1931, more than thirty-one years after the answer was filed and more than twenty-five years after the filing of the answer of respondent to appellants' amended cross-complaint. On March 12, 1931, respondent Southern Pacific Railroad Company served and filed its notice of motion to dismiss the action for want of prosecution; the cause not having been brought to trial within five years after answer filed. On April 17, 1931, there was made and entered in the minutes of the trial court the following order: "The motion of the plaintiff, to dismiss the above entitled action having been heretofore argued by respective counsel and submitted to the court for a ruling and by the court taken under advisement, it is now ordered that the motion be and it is hereby granted and the action is dismissed." A note of this order was entered in the clerk's register of actions on the same day. On April 18, 1931, the following judgment was signed by the trial court and entered in the judgment book: "The motion of the plaintiff to dismiss the above entitled action came on regularly for hearing before the above entitled Court on the 10th day of April, 1931; * * * and said motion having been submitted to the Court; and the Court having entered herein its minute order dismissing said action; and good cause appearing therefor. It is ordered, adjudged and decreed that the above entitled action be, and it is hereby dismissed. Done in open court this 18th day of April, 1931. [Signed.]" Appellant thereafter moved to vacate the judgment, which motion was denied. Appellant filed a notice of appeal from the judgment of dismissal and also from an order refusing to vacate it. The notice of appeal was filed on June 17, 1931, within sixty days after the entry of the formal judgment, but more than sixty days after the entry in the minutes of the trial court of the minute order dismissing the action.

If the minute order be construed the final judgment of the court dismissing the cause, as contended by respondent, then the notice of appeal from the judgment was filed too late. If, however, the time for taking the

appeal began to run on the date of the entry of the formal judgment, entered April 18, 1931, the notice of appeal was given in time, and this court has jurisdiction to consider the cause. Our jurisdiction to entertain appeals, of course, is dependent upon a compliance with the statutory prerequisites. The question here involved is primarily one of jurisdiction.

[1, 2] The provisions of the Code of Civil Procedure (see Code Civ. Proc. § 668) invoked by appellants, requiring entry of judgments in the judgment book, apply to judgments in favor of one party or another upon the merits of the case. Here there has been no decision upon the merits. The action has simply been dismissed under the provisions of section 583 of the Code of Civil Procedure for failure to prosecute with reasonable diligence and for failure to bring the case to trial within the time prescribed by the statute. It has been said that such an order of dismissal is not a judgment at all in the strict sense, but is to be treated as such for all the purposes of taking an appeal, because it finally disposes of the particular action and prevents further proceedings as effectually as would any formal judgment based on ruling on demurrer, or on findings or verdict on the facts. Wood, Curtis & Co. v. Missouri, etc., Ry. Co., 152 Cal. 344, 92 P. 868. The rule is well established in this state from a very early period that a minute order of the trial court dismissing an action is a final judgment, and the time for appeal therefore runs from the entry of such minute order. Tripp v. Santa Rosa Street R. R., 69 Cal. 631, 11 P. 219. This case has been followed with approval in the later cases of Dempsey v. Underhill, 156 Cal. 718, 106 P. 73; Howe v. Key System Transit Co., 198 Cal. 525, 531, 246 P. 39; Nelson v. Geiss (Cal. App.) 7 P.(2d) 720. In all dismissals of actions, whether made under sections 581, 581a, 581b, or 583 of the Code of Civil Procedure, the minute order of the court constitutes a final judgment from which an appeal must be taken. 2 Cal. Jur. p. 402; Id. pp. 158, 159. Nor does the fact that a formal judgment was entered in the judgment book thereafter suspend or toll the time for appeal. Matthai v. Kennedy, 148 Cal. 699, 84 P. 37; Bengel v. Traeger, 100 Cal. App. 526, 280 P. 538; Lewis v. Hammond Lumber Co., 114 Cal. App. 390, 300 P. 49. The motion to vacate the order dismissing the action is not appealable. Tripp v. Santa Rosa Street R. R., supra.

The motion to dismiss the appeal from the judgment of dismissal is granted, and the appeal is dismissed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; LANGDON, J.

216 Cal. 452

FARMERS' & MERCHANTS' BANK OF LOS ANGELES v. BANK OF ITALY.

Sac. 4197.

Supreme Court of California.

Sept. 27, 1932.

1. Garnishment ⇐118.

Where garnishment is levied under writ of execution, judgment creditor must proceed under statutes prescribing proceedings supplementary to execution and not statutes dealing with attachment (Code Civ. Proc. §§ 544, 714–721).

2. Garnishment ⇐118.

Judgment creditor garnishing judgment debtor's debtor under writ of execution could not maintain suit against garnishee without complying with statutes prescribing proceedings supplementary to execution (Code Civ. Proc. §§ 714–721).

Code Civ. Proc. §§ 714–721, require that the execution creditor must first secure an examination of the judgment debtor's debtor before the court, respecting any alleged indebtedness to the judgment debtor, and then, if such alleged debtor of the judgment debtor denies the indebtedness under Code Civ. Proc. § 720, the judgment creditor may sue.

In Bank.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by the Farmers' & Merchants' Bank of Los Angeles against the Bank of Italy. From a judgment for defendant, plaintiff appeals.

Affirmed.

Samuel V. Cornell and W. Coburn Cook, both of Turlock, and Alfred C. Skaife and Irene Bryan, both of San Francisco, for appellant.

T. B. Scott, of Modesto, and Louis Ferrari and Keyes & Erskine, all of San Francisco, for respondent.

PER CURIAM.

Plaintiff appeals from a judgment in favor of defendant. The facts as found by the trial court are not in dispute and are as follows:

On July 31, 1922, one Hemple borrowed $500 from respondent bank, and gave to that bank at its Modesto branch his note for that sum, and pledged as security therefor certificates representing twenty-five shares of the Security State Bank of Turlock, one share of United States Steel Corporation, preferred, and three shares of the Butterick Company, all of which shares were indorsed in blank. On August 10, 1922, appellant brought an action against Hemple for $5,013

in Stanislaus county. In this action a writ of attachment was levied upon the Security State Bank attaching the interest in the shares of that bank owned by Hemple and pledged to respondent. On August 23, 1922, appellant recovered judgment by default against Hemple for the amount prayed for. On the same date a writ of execution was issued. On September 27, 1922, a notice of garnishment under this writ was served on the respondent. On September 30, 1922, the respondent made answer to the garnishment in which it was stated that respondent was not indebted to Hemple. About October 9, 1922, respondent sold to one Johnson Hemple's note and transferred to Johnson the collateral pledged as security therefor. The transfer by respondent to Johnson was made subject to the rights of appellant under its garnishment. In November, 1922, the interest of Hemple in the shares of the Security State Bank was sold under an alias writ of execution, being purchased by appellant for $500. In 1923 appellant commenced this action against respondent.

[1, 2] It is rather difficult to ascertain the exact theory upon which the complaint is based. Appellant seems to be of the opinion that under the facts of this case it had the right to proceed by action directly against the garnishee after it had transferred the pledged stock. Appellant makes no pretense that the complaint is based on the theory of a creditors' bill in equity to subject to the satisfaction of the judgment assets which cannot be reached by execution. The facts necessary to such an action are not alleged. See Bond v. Bulgheroni (Cal. Sup.) 8 P.(2d) 130. In its opening brief appellant states: "The appellant in the case at bar proceeds against the respondent under section 544 of the Code of Civil Procedure, making a garnishee liable to a judgment creditor for the property in his hands at the time of a garnishment." However, that section can have no application to the instant case for the reason that it only applies when a garnishment has been levied *under a writ of attachment.* In the instant case respondent was not garnished under a writ of attachment, but under a *writ of execution.* Section 544 of the Code of Civil Procedure has no application to cases where the garnishment is levied under a writ of execution. It is well settled in this state that if the garnishment is levied under a writ of execution the judgment creditor must proceed not under the Code sections dealing with writs of attachment (such as section 544 of the Code of Civil Procedure), but under the Code sections prescribing proceedings supplementary to execution, i. e., sections 714 to 721 of the Code of Civil Procedure. There is one fundamental difference between the two procedures. By the express terms of section 544, persons indebted to the judgment debtor are, upon receiving notice that such debts are attached, made directly liable to the attaching creditor. But no such direct liability is provided for in the sections supplementary to execution. By these sections an action arises against the garnishee only when the steps provided as conditions precedent are complied with. This distinction has been long recognized in this state. In Nordstrom v. Corona City Water Co., 155 Cal. 206, at page 211, 100 P. 242, 244, 132 Am. St. Rep. 81, it is stated: "There is, furthermore, this peculiarity in the Code sections regulating garnishments. By the express terms of the statute relating to attachments, persons indebted to the defendant are, upon receiving notice that such debts are attached, made directly liable to the plaintiff for the amount thereof. Code Civ. Proc. § 544. No such direct liability is, however, provided in the case of a levy of execution upon such debts, and this court has, on several occasions, pointed out that the levy of execution upon a debtor of the judgment debtor does not give the plaintiff a cause of action against the garnishee." Since respondent herein was not garnisheed under a writ of attachment it follows, of course, that the appellant has no cause of action under section 544 of the Code of Civil Procedure. Appellant's cause of action, if any exists, must be based upon the provisions of sections 714 to 721 of the Code of Civil Procedure. The complaint fails to allege, and the evidence clearly shows, and appellant admits that it did not comply with the provisions of those sections. Those sections require that the execution creditor must first secure an examination of the judgment debtor's debtor before the court, respecting any alleged indebtedness to the judgment debtor, and then if such alleged debtor of the judgment debtor denies the indebtedness, under section 720 of the Code of Civil Procedure, the judgment creditor may sue.

It must be remembered that whatever rights appellant may have against respondent exist solely by virtue of statute. The respondent is not indebted to appellant—there is no privity between a judgment creditor and his debtor's debtor. Formerly the remedy of such a judgment creditor was by a creditor's bill, but now, except in unusual cases, of which this is not one, rights of the judgment creditor against the debtor's debtor are governed entirely by those provisions of the Code of Civil Procedure providing for proceedings supplementary to execution. Section 714 et seq. Under those sections an alleged debtor of the judgment debtor may be fully examined under oath as to any assets of the judgment debtor under his control, witnesses may be called, and if it appears that any such assets are in his hands, the court may order them to be turned over to the judgment creditor. However, if the person alleged to have the property of the judgment debtor claims any interest in the property, or denies the

debt, then and only then the judgment creditor, under section 720 of the Code of Civil Procedure, may bring an action against such person to recover the property. Before 1907 it was further required that as an additional condition precedent the judgment creditor, before such an action would lie, must secure from the court before whom the examination was held an order authorizing him to sue. By an amendment to section 720 in 1907 (St. 1907, p. 686) that condition precedent was abolished, but that was the only effect of the 1907 amendment. The other conditions precedent still exist, and must be complied with before any action under section 720 will lie. We are not here concerned with how strictly the code sections must be complied with. We have no doubt that substantial compliance is all that is required. In the instant case appellant entirely ignored the proceedings contemplated by the Code. If appellant desires to avail itself of the remedies granted by the Code, it must do so under the conditions therein provided. The respondent has been sued in this action by one to whom it is not indebted. Respondent is entitled, before any such action will lie, to the protection guaranteed by the code.

The principles above enunciated have long been settled in this state. In Herrlich v. Kaufmann, 99 Cal. 271, page 274, 33 P. 857, 858, 37 Am. St. Rep. 50, the court stated:

"The complaint goes upon the theory that the plaintiff herein, Herrlich, having a money judgment against Mrs. McDonald, and having, upon an execution thereon, served Kaufmann with a notice of garnishment, thereby acquired as direct a cause of action against the latter as in any case where indebitatus assumpsit would lie. But this is not the law. There is, at common law, no privity between a judgment creditor and his debtor's debtor; there is no contract relation between them, and no relation of any kind which, of itself, gives the former a direct cause of action at law against the latter.

"Formerly, assets of a judgment debtor, which could not be effectively seized by the sheriff under an execution, such as a debt owing to the defendant, could be reached, upon a proper showing, through a court of equity, by means of a creditor's bill or suit; but in this state, and in most of the other states, a legal remedy is afforded by statutes providing for proceedings supplementary to execution, and the general rule is that when there are such statutory proceedings they must be pursued.

"The Code of Civil Procedure of this state, from section 716 to section 721, specifically provides how a judgment creditor may proceed against a debtor of his judgment debtor. Those sections provide, in brief, that after the issuing of an execution, upon a showing by affidavit or otherwise that a person is indebted to the judgment debtor in an amount exceeding $50, the judge may order such person to appear and answer concerning such alleged indebtedness. If he admits the indebtedness he may be ordered to apply the amount thereof to the satisfaction of the judgment. If he denies any indebtedness, and the denial seems, after a hearing, to be bona fide, the court or judge may authorize the judgment creditor to institute a suit against such person to recover such alleged debt. Now, in the case at bar, the plaintiffs entirely ignored these statutory provisions, and without procuring an order for appellant to appear and answer, and without any order authorizing them to commence an action against appellant, brought this suit upon the theory of a direct liability of appellant to them, as hereinbefore stated."

The court therefore concluded that the complaint did not state a cause of action.

Again, in Matteson, etc., Mfg. Co. v. Conley, 144 Cal. 483, at page 484, 77 P. 1042, this court stated: "The question is as to whether an action can be maintained directly against a person who has been served with an execution to recover money due from such person to the execution debtor. We think the question must be answered in the negative. The defendant is not indebted to the plaintiff. At common law there is no privity between a judgment creditor and his debtor's debtor. There is no contract relation between them, and we know of no case in which it has been held that such action would lie, in the absence of a statute authorizing it. In place of a creditors' bill, and as a remedy more direct and certain, we have a chapter on proceedings supplementary to execution. Code Civ. Proc. § 714 et seq. Under the provisions of this chapter a debtor of a judgment debtor may be fully examined as to property, credits, money, or other assets in his possession or under his control. Witnesses may be examined, and the judge may order any property of a judgment debtor not exempt from execution, or due to the judgment debtor, to be applied toward the satisfaction of the judgment. If it appears that the person alleged to have property of the judgment debtor, or to be indebted to him, claims an interest in the property adverse to him, or denies the debt, the court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person for the recovery of such interest or debt. In this case the plaintiff did not attempt to comply with the provisions of said chapter concerning proceedings supplementary to execution. Defendant has not been examined concerning any property or moneys due by him to Carlisle. No order has been made as to the application of any assets of Carlisle in the hands of defendant, nor has any order been made authorizing this action.

It is therefore evident that the proceedings contemplated by the Code have been entirely ignored. The defendant, without having been examined or ordered to pay any money, has been sued by one to whom he is not indebted. Plaintiff does not claim that defendant is indebted to him. If he would reach property or credits in the hands of defendant for the purpose of satisfying his judgment against Carlisle, he must do so in the manner provided by law." See, also, Phillips v. Price, 153 Cal. 146, 94 P. 617; Carter v. Los Angeles Nat. Bank, 116 Cal. 370, 48 P. 332.

It therefore follows that since appellant has failed to comply with the statutory provisions above enumerated, no cause of action exists against respondent. This makes it unnecessary to discuss the many other points raised in the briefs of counsel.

The judgment appealed from is affirmed.

126 Cal.App. 225

WESTERN PIPE & STEEL CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 8336.

District Court of Appeal, Second District, Division 2, California.

Sept. 23, 1932.

Rehearing Denied Oct. 23, 1932.

Hearing Denied by Supreme Court Nov. 21, 1932.

1. Master and servant ⇐419.

Accident commission has, within statutory time limit, continuing jurisdiction of decision denying adjustment of compensation for serious and willful misconduct of employer (St. 1917, p. 850, § 20 (d); p. 834, § 6 (b), as amended).

2. Master and servant ⇐419.

Accident commission had "good cause" for exercising continuing jurisdiction of decision denying adjustment for employer's serious and willful misconduct, where employee failed to produce all available testimony at first hearing (St. 1917, p. 850, § 20 (d); p. 834, § 6 (b), as amended).

[Ed. Note.—For other definitions of "Good Cause," see Words and Phrases.]

3. Master and servant ⇐419.

Limitation not pleaded to claim for adjustment of compensation, account of employer's serious and willful misconduct, was waived (St. 1917, p. 841, § 11 (b).

Certiorari to Industrial Accident Commission.

Proceeding under Workmen's Compensation Act by Joseph Elbert Huston, claimant, opposed by the Western Pipe & Steel Company, employer. To review an order adjusting compensation for serious and willful misconduct of employer, the employer brings certiorari.

Affirmed.

See, also (Cal. App.) 5 P.(2d) 920.

John W. Carrigan, of Los Angeles, for petitioner.

A. I. Townsend, of San Francisco, for respondent Industrial Accident Commission.

IRA F. THOMPSON, J.

By this proceeding it is sought to annul an order of the industrial accident commission dated February 29, 1932. Joseph Elbert Huston was injured July 26, 1928, during the course of his employment with the petitioner, which corporation was at the time self-insured. The petitioner paid compensation to Huston at the rate of $20.83 per week at all times subsequent to one week following the accident, together with all hospital and medical expenses. However, on May 14, 1930, Huston filed an application asking for an adjustment of his claim, alleging that his injuries were caused by the serious and willful misconduct of his employer, the petitioner. After a hearing thereon the respondent commission determined that the accident was occasioned by the serious and willful misconduct and ordered the compensation increased by one-half. Upon the petition of the employer, however, a rehearing was granted and the commission arrived at a different conclusion. The respondent Huston then petitioned for a rehearing, which was denied, following which order he petitioned this court for a writ of review, which was denied, and the award became final. Subsequently and on November 5, 1931, he filed with the commission a petition that his case be reopened upon the ground of a mistake of fact which he could establish by additional evidence to be produced at the hearing. Over the strenuous objections of petitioner the commission heard the evidence and made its order reopening the case and determining that the accident was caused by the misconduct, ordering the compensation increased to $31.24 weekly, or one-half, beginning August 5, 1928. It is this award which the petitioner claims the respondent commission had no jurisdiction to render. The principal contention in this particular is that section 20(d) of the Workmen's Compensation Act (Stats. 1917, pp. 831, 850) does not apply to cases involving "proof" of serious and willful misconduct, and hence that the decision made after the rehearing became final and beyond the power of the respondent commission to alter or amend.

The section referred to reads as follows: "(d) The commission shall have continuing jurisdiction over all its orders, decisions and awards made and entered under the provisions of sections six to thirty-one, inclusive, of this act and may at any time, upon notice, and after opportunity to be heard is given to the parties in interest, rescind, alter or amend any such order, decision or award made by it upon good cause appearing therefor, such power including the right to review, grant or regrant, diminish, increase or terminate, within the limits prescribed by this act, any compensation awarded, upon the grounds that the disability of the person in whose favor such award was made has either recurred, increased, diminished or terminated; provided, that no award of compensation shall be rescinded, altered or amended after two hundred forty-five weeks from the date of the injury. Any order, decision or award rescinding, altering or amending a prior order, decision or award shall have the same effect as is herein provided for original orders, decisions or awards."

[1] There can be no doubt, regardless of our preconceived notions, of the construction which must be given to the designated section since the case of Bartlett Hayward Co. v. Industrial Accident Commission, 203 Cal. 522, 265 P. 195, 199. It is therein said: "It is our conclusion, therefore, that the continuing jurisdiction of the commission as provided by section 20(d) of the Act of 1917 is not limited to the consideration of changes in the physical condition of the workman, but is extended to the right to rescind, alter or amend the orders, decisions, or awards upon good cause appearing therefor. What constitutes 'good cause' depends largely upon the circumstances of each case. The term is relative. It may be assumed that the determination of the commission as to what constitutes 'good cause,' while entitled to great weight, would not be conclusive." And again, in discussing whether the commission was barred from exercising its continuing jurisdiction, the court there said: "We find no provision of the act which operates as an estoppel as against the commission to exercise its continuing jurisdiction within the stated time, either as to the changed condition of the injured employee *or as to the other matters, law or fact*, which would constitute 'good cause' for the exercise thereof." (Italics ours.) It is thus seen that, dependent upon good cause, the respondent commission has, within the specified time limit, general continuing jurisdiction over "its orders, decisions and awards made and entered under the provisions of sections six to thirty-one inclusive" of the act. The provision for the increase of the amount of compensation for injury occurring by reason of the "serious and wilful misconduct of the employer" is found in section 6(b) of the act (as amended). Hence it follows that the respondent commission has continuing jurisdiction over awards of compensation for injuries thus occasioned.

[2] It is argued, however, that newly discovered evidence does not constitute good cause—that such testimony should have been produced theretofore or the employee forever barred by the award which became final when his petition for the writ of review was denied. The contention thus advanced would unquestionably be held sound if we were considering litigation in the ordinary forum. The old maxim, "Interest reipublicæ ut sit finis litium," would be determined to be applicable. But here we are confronted with a different situation, as is pointed out in the exhaustive opinion in the Bartlett Case. It was there determined that a mistake of law on the part of the commission, i. e., giving the employee "a rating of 25 per cent. permanent disability, when as matter of law * * * he was entitled to a rating of 100 per cent. permanent disability," constituted "good cause." How, then, can we say that the commission did not have jurisdiction to determine that a mistake of fact occasioned by the failure or inability of the employee to produce certain testimony at a former hearing constitutes good cause? Logically there is no distinction.

Reliance is had by petitioner upon the authorities of Hindes v. Industrial Accident Commission, 73 Cal. App. 726, 239 P. 339; Benton v. Industrial Accident Commission, 74 Cal. App. 411, 240 P. 1021; and Crowe Glass Co. v. Industrial Accident Commission, 84 Cal. App. 287, 258 P. 130. The first two are effectively disposed of and explained in Bartlett Hayward Co. v. Industrial Accident Commission, supra, and the third is distinguished in Standard Sanitary Mfg. Co. v. Industrial Accident Commission, 208 Cal. 532, 282 P. 948.

[3] Finally it is asserted that the claim of the respondent Huston was barred by his failure to file a claim for adjustment on the ground that the injury was occasioned by the serious and willful misconduct of the employer until one year and ten months after the accident. It is a sufficient answer to this contention to point out that the period of limitation was not pleaded as an affirmative defense, as is required by section 11(b) of the act.

Award affirmed.

I concur: CRAIG, Acting P. J.

STEPHENS, Justice pro tem.

I concur:

In concurring I wish to express my opinion that any break in the rule of finality of

decision is regrettable. Courts presided over by trained judges are very strictly limited in their power of opening cases after judgment. The value of knowing that a certain judgment is final is greater in most cases than the possibility of advantageous change. The temptation to present perjured or colored testimony to meet a condition revealed in the first trial is often too great to be successfully resisted. These are good reasons, and there are others, supporting the doctrine of finality of decision as applied to courts. They certainly apply with equal force to judgments rendered by commissions untrained in our system of jurisprudence.

126 Cal.App. 324

LANDA v. STEINBERG et al.

Civ. 8149.

District Court of Appeal, Second District, Division 2, California.

Sept. 26, 1932.

Rehearing Denied Oct. 25, 1932.

1. Appeal and error ⇐758(2).

Headings of brief entitled "Statement of Facts," "Grounds of Appeal," and "Defendant Demurs to Plaintiff's Complaint," *held* insufficient to require consideration on appeal (Rules of Supreme Court and District Courts of Appeal, rule 8).

2. Master and servant ⇐404.

In action for employee's injuries, it was immaterial that employer, who was neither self-insured nor insured by carrier of compensation insurance, would have had insurance at time of accident but for broker's negligence.

3. Appeal and error ⇐110.

No appeal lies from order denying motion for new trial.

Appeal from Superior Court, Los Angeles County; Allan B. Campbell, Judge.

Action by Mike Landa against B. Steinberg and another. Judgment for plaintiff, and defendant named appeals from the judgment and from an order denying a motion for new trial.

Judgment affirmed, and appeal from order denying motion for new trial dismissed.

William P. Redmond, of Los Angeles, for appellant.

Charles Robert McCarty, of Los Angeles (Robert Black, of Los Angeles, of counsel), for respondent.

IRA F. THOMPSON, J.

[1] We have before us in this case, which involves an appeal from the judgment in favor of plaintiff as well as from an order denying a motion for new trial, an appellant's brief of 106 pages. The headings appearing therein are as follows: "Statement of Facts," "Appellant's Grounds of Appeal," "Excessive Damages," "The Court should have Allowed the Defendant to Introduce Evidence of Compensation Insurance," and "Defendant Demurs to Plaintiff's Complaint." Under the second heading, "Appellant's Grounds of Appeal," are listed specifications of error designated by letters of the alphabet, commencing with "a" and running to "u." That part of rule VIII of the Rules of the Supreme Court and District Courts of Appeal reading as follows: "The briefs must present each point separately, under an appropriate heading, showing the nature of the question to be presented," was designed to lighten the labors of the appellate tribunals by requiring the litigants to present their cause systematically and so arranged that those upon whom the duty devolves of ascertaining the rule of law to apply may be advised, as they read, of the exact question under consideration, instead of being compelled to extricate it from the mass. An appellant's brief which fails to comply is equally confusing to the respondent, who labors under an unwarranted handicap in attempting to understandingly reply. There is no reason—no great or insurmountable difficulty is presented by the rule—why there should not be a compliance. It may possibly be that the heading "Excessive Damages" and the one "The Court Should have Allowed the Defendants to Introduce Evidence of Compensation Insurance," can be construed as a partial meeting of the requirements. For that reason we shall take note of them instead of dismissing the appeal, but treat the remainder of the brief for what it is, a presentation insufficient to require consideration or comment.

Turning therefore to the first question, "Excessive Damages," we find no reason whatever assigned from which it may be argued that the verdict is excessive; the appellant contenting himself with the assertion that if $7,500 (the amount of the verdict) is "one-half of the amount of compensatory damages under said section" (subdivision 4, § 6 (a), Workmen's Compensation Act [as amended by St. 1929, p. 430]), "such verdict for $7,500 must necessarily be construed as if it was for $15,000, and excessive damages. That notwithstanding such subdivision 4, of section 6 of said Workmen's Compensation Act, $7,500 is excessive damages." Hence nothing is presented under the heading which requires consideration.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

[2] By the other point it is urged that the appellant, the defendant who was neither self-insured nor insured by any carrier of compensation insurance, should have been permitted to prove that "for a period of about seven years" he had had compensation insurance and would have had at the time the respondent, his employee, was injured except for the negligence of his broker. A complete answer to this contention is found in Soria v. Cowell Portland Cement Co., 99 Cal. App. 108, 277 P. 1061, 1062, wherein it is said: "The statute covers all cases in which the employer is not insured. The fact that an employer intended, or endeavored, to take out insurance has no bearing on the fact that he was not insured at the time of the injury."

[3] For the reason that there is no appeal from an order denying a motion for a new trial the order is: Judgment affirmed. Appeal from order denying motion for new trial dismissed.

We concur: CRAIG, Acting P. J.; STEPHENS, Justice pro tem.

126 Cal.App. 217

SOBZHAK v. RIVERA.

Civ. 8655.

District Court of Appeal, First District, Division 2, California.

Sept. 23, 1932.

Appeal and error ⇐634.

Order setting aside decree must be affirmed, where no proper record was presented.

The only record presented consisted of documents purporting to contain copies of decree with certificate of county clerk annexed, but without other authentication. A supplement was attached to plaintiff's brief which purported to be a bill of exceptions, but it did not otherwise appear in record and did not show what papers were used on hearing.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Fred Sobzhak against Espiridion Rivera. From an order granting defendant's motion to set aside a default decree, plaintiff appeals.

Affirmed.

James W. Bell, of Los Angeles, for appellant.

Robert J. Adcock, of Los Angeles, for respondent.

STURTEVANT, J.

This purports to be an appeal from an order made on August 12, 1930, by the trial court granting the motion of the defendant to set aside a decree entered against him on April 24, 1930. It cannot be heard, and the order appealed from must be affirmed because there is no record on which this court can act. 2 Cal. Jur. p. 980.

On November 17, 1930, there was filed in the office of the clerk of the Supreme Court one document which purports to contain copies of a decree for registration and some other papers filed in a proceeding commenced to register a title. Stats. 1915, p. 1932. Annexed to said document is a certificate by the county clerk in which he certifies that said copies are full, true, and correct. That document is not authenticated in any other manner. There is attached to the plaintiff's brief a supplement. The supplement is wholly printed, and purports to be a bill of exceptions. It does not elsewhere appear in the record. At most it merely purports to be a printed copy not otherwise authenticated. Furthermore, it does not show what papers, if any, were used on the hearing in the trial court. On a record so made up this court is not authorized to make any order excepting to dismiss or affirm.

If we were at liberty to make a complete examination of the papers, the same result would follow. The affidavit of merits was sufficient. Furthermore, the affidavit made by the defendant showed that he did not appear in the action because the plaintiff stated to him that no judgment would be taken against him. That statement was not denied in the affidavit of the plaintiff. The trial court, therefore, did not err in setting aside the default.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

HERSH et al., v. GARAU et ux. (MacCONNELL et al., Interveners).*

Civ. 7490.

District Court of Appeal, Second District, Division 1, California.

Sept. 27, 1932.

Rehearing Denied Oct. 25, 1932.

Hearing Granted by Supreme Court Nov. 25, 1932.

1. Vendor and purchaser ⇐350.

Evidence, in action for breach of contract to sell realty for consideration stated in option given plaintiffs' assignor, *held* sufficient to fix value thereof at sum exceeding such consideration by amount of damages awarded.

A real estate expert testified that property, for refusal to sell which for $90,000, as provided by option, plaintiffs were awarded $150,000 damages, was worth $300,000, considering lease on property at small rental.

2. Vendor and purchaser ⇐350.

Evidence *held* to justify judgment for plaintiffs in action for breach of contract to sell realty for consideration stated in option given plaintiffs' assignor.

There was evidence that property was worth amount exceeding agreed consideration by more than amount of damages awarded plaintiffs and that they were actual record owners of option when action was instituted and trial had.

3. Vendor and purchaser ⇐350.

Evidence that defendants in action for breach of contract to sell realty refused to convey for agreed sum wholly because of great increase in value of property *held* to justify findings of bad faith (Civ. Code, § 3306).

4. Vendor and purchaser ⇐350.

Evidence in action for breach of contract to sell realty *held* sufficient to show tender of agreed price by plaintiffs.

There was evidence that plaintiffs attempted to pay only portion of agreed consideration and told defendants that they wanted to subdivide property and give mortgages in payment of option to purchase, but that defendant husband told plaintiff that option was no good because his wife did not sign it, which was untrue; that written offer, complying with statutory requirements, was made and refused, though amount of consideration was not actually presented in cash; and that defendants' attorney notified plaintiffs that defendants declined to accept offer because no consideration was paid them for option.

Appeal from Superior Court, Los Angeles County; Frank Lamberson, Judge.

Action by Sara F. Hersh and husband against Aurelio Garau and wife, in which Allen R. MacConnell, as trustee in bankruptcy of the Green Mill, Incorporated, and another, intervened. From a judgment against defendants, they appeal.

Affirmed.

See, also (Cal. App.) 14 P.(2d) 536; 110 Cal. App. 198, 293 P. 860.

Haas & Dunnigan, W. E. McClintock, H. C. Johnston, and G. E. Kerrin, all of Los Angeles, for appellants.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for respondents.

YORK, J.

This is an appeal by defendants Aurelio Garau and Sarah Garau from a judgment rendered in favor of plaintiffs for the benefit of Sara F. Hersh, plaintiff, as her sole and separate property and estate, against said defendants Garau, jointly and severally, for the sum of $150,000. The cause of action arose out of a written option given by the Garaus to Morris Rauch, plaintiffs' assignor to purchase certain real property for a consideration of $90,000. The sum of $150,000 was the whole amount asked for in the complaint, and was the amount fixed by the court as the value of the property over and above the consideration named.

Appellants state their grounds of appeal as follows:

1. Excessive damages appearing to have been given under the influence of passion or prejudice.

2. Insufficiency of the evidence to justify the decision of the court.

3. That the decision of the court is against the law.

4. Errors of law occurring at the trial and excepted to by the appellants.

[1] As to the first point, there is some conflict in the evidence, but there was sufficient evidence to fix the value of the property at the sum of $150,000, plus the $90,000 consideration, or a total value in excess of $240,000. There was direct evidence of a value of $300,000 given by a real estate expert, who fixed that value, taking into consideration a lease on the property at a small rental.

[2] As to the second point—insufficiency of the evidence to justify the decision of the court—this is partly covered by the foregoing statement. In addition thereto, there was evidence that the plaintiff was the actual record owner of the option at the time the action was instituted, and at the time of the trial.

The third point, that the decision of the court is against law, is not specifically discussed in the briefs, or at least the argument in support thereof is not segregated. There

*For subsequent opinion see 23 P.2d 1022.

was a great deal of evidence about a very complicated transaction between the original owner of the option and the two plaintiffs, but there was sufficient evidence to support each of the findings made by the trial court, and as the findings of the trial court are sufficient to justify the judgment, we cannot see that there was any insufficiency in the evidence to justify the decision of the court.

Appellants in their opening brief raise the following questions:

[3] (1) They maintain that there was insufficient evidence to constitute bad faith under section 3306 of the Civil Code. If the trial court believed the testimony of plaintiff Hersh and disbelieved the testimony of the witness Garau, there was sufficient evidence of bad faith before the court to justify the findings in that particular. There was sufficient evidence to show that the refusal to convey for the sum of $90,000 was wholly because of the fact that the property had increased in value to such an extent that the defendants for that reason alone refuse to proceed with and to complete the deal.

[4] (2) Appellants also contend that there was a failure to show any tender, and in support thereof show evidence as to a "dicker" which was attempted by the plaintiffs to pay only a portion of the consideration of $90,000, and also certain evidence that was introduced as to the plaintiff Samuel Hersh telling the defendant Aurelio Garau that he wanted to subdivide the property and give certain mortgages to Mr. Garau in payment of the option. A direct conflict appears in the evidence on the question of tender. There is evidence, however, that said Garau told said Hersh that the option was no good, and that Mrs. Garau had not signed the option. However, upon evidence, the court found that Mrs. Garau had signed the option. There was a written offer made, which complied with the requirements of the law, and there is evidence that Mr. Garau refused the offer, although there was no actual presentment of the $90,000 in cash. Thereafter, a notification was given to the said plaintiff Samuel Hersh, by Haas & Dunnigan, by Walter F. Haas, a member of said firm, acting with the authority of and as the attorneys of and for said Aurelio Garau and Sarah Garau, that the said Garaus declined to accept said Samuel Hersh's offer, stating that their reason for declining to accept such offer was for the reason that no consideration of any kind was paid to Mr. or Mrs. Garau by either Morris Rauch, Wanda Rauch, his wife, or the said Hersh, for the option mentioned in their letter. Said notification also stated that "there having been no consideration for such option, Mr. and Mrs. Garau do not feel that they are bound by the same, and therefore decline to carry it out."

The trial court made a finding that in the said notice so written by said Haas & Dunnigan as agent of, on the authority of, and as the attorneys of and for the said Aurelio and Sarah Garau, they, the said Haas & Dunnigan, further stated: "You may consider this letter a final refusal on their part to do so."

It was found by the court upon evidence that, at the time Samuel Hersh elected under said option to purchase the said property for said sum of $90,000, the said premises had a market value of and were reasonably worth the sum of $240,000, which fact was at all times known to said Sarah Garau and Aurelio Garau; and the court found that the true reason why the said defendants refused to convey the said property and declined to comply with the terms of said option was because the said property at the time the said option was exercised was worth not less than $150,000 more than the purchase price thereof named in the option, and that the said defendants declined the offer of Samuel Hersh and declined and refused to convey the said property because of and for the reason that the said property, namely, the lands and premises described in said option, Exhibit A annexed to plaintiffs' complaint, at said time was worth not less than $240,000 and not less than $150,000 more than the purchase price named in said option.

The court further found that if said property at the time said option was exercised by Samuel Hersh, and at the time the defendants declined to convey the premises under said option, had been worth no more than the purchase price named in said option, then and in that event the defendants would have acknowledged the option, would have accepted the said election on the part of Samuel Hersh, and would have conveyed the said property to him on receiving the said $90,000, the purchase price thereof.

The court further found that the refusal and declination of defendants to carry out their said option and to make the conveyance and transfer therein called for was in bad faith, and that said refusal was not made in good faith on the part of both or either of said defendants.

The court also found, upon sufficient evidence, that it was true that at all times mentioned after the transfer and assignment to him of the said option, the said Samuel Hersh and the said Sara F. Hersh were, and each of them was, ready, able, and willing to buy said property and pay defendants the purchase price thereof, namely, the purchase price named in said option, Exhibit A annexed to plaintiffs' complaint.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

126 Cal.App. 380

HERSH et al. v. GARAU et ux. (MacCONNELL et al., Interveners).

Civ. 7482.

District Court of Appeal, Second District, Division 1, California.

Sept. 27, 1932.

Rehearing Denied Oct. 25, 1932.

1. Parties ⇐48.

Denial of leave for intervener to file amended complaint after trial of action for breach of contract to convey realty commenced *held* not abuse of discretion, where three years elapsed before intervener filed complaint.

2. Appeal and error ⇐110.

No appeal lies from order denying motion for new trial.

Appeal from Superior Court, Los Angeles County; Frank Lamberson, Judge.

Action by Sara F. Hersh and husband against Aurelio Garau and wife, in which Ellis I. Hirschfeld and another intervened. From a judgment for plaintiffs against named intervener and an order denying a new trial, he appeals.

Affirmed.

M. Seaton Cohen, Ellis I. Hirschfeld, and Samuel W. Blum, all of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for respondents Hersh.

Haas & Dunnigan and W. E. McClintock, all of Los Angeles, for respondents Garau.

YORK, J.

This is an appeal by intervener Hirschfeld from that portion of the judgment in the above-entitled matter in favor of plaintiff and against said intervener and the whole thereof, and from the order of court denying a new trial to said intervener.

In our opinion filed this day in Hersh v. Garau (Cal. App.) 14 P.(2d) 534, which is on the appeal of the defendants Garau from the judgment, we have rendered an opinion which covers the principal issues in the case. In addition to the points discussed in said opinion, appellant Hirschfeld attempts to raise several other points which he does not distinctly set out, referring in one part of his brief to certain findings of the trial court which he objects to, without stating exactly what his grounds of objection are, or without setting forth the findings themselves, or their substance, as required by rule VIII of the rules of practice of this court. It is sufficient to say that each of the findings objected to is supported by the evidence.

[1] The principal objection of the intervener Hirschfeld seems to be that the court refused him permission to file an amended complaint. Three years elapsed before intervener filed his complaint in intervention. However, no amended complaint in intervention was ever prepared by the intervener. Some time after the trial of the case was commenced, three statements were made to the court in which he or his attorney asked leave of the court to amend, by adding to the complaint in intervention the statement that another assignment had been made, other than the one pleaded, with the further statement that it had been lost, the contents of which, it was stated, they intended to prove by oral testimony. He also stated in general terms that the document would comply with all of the objections which had been made by his opponents. The court denied his application on the ground that the offer came too late. Intervener counters this with the statement that he did not know before that there would be objection made to the particular form of assignment that he set up in his complaint, and therefore he could not have known what was necessary, at least, until after the court had held that the document so set up in the complaint was a quitclaim deed and did not constitute an assignment of any portion of the option held by the plaintiff Hersh. This motion was directed to the sound discretion of the court, and we can see no abuse of such discretion by the court in denying leave to amend at that time. Such motion came too late.

We find no errors in the rulings of the court that were objected to by the intervener.

[2] The attempted appeal from the order denying the motion for a new trial is dismissed, as there is no provision of law for such an appeal.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

125 Cal.App. 729

SETH et al. v. LEW HING et al. *

Civ. 7942.

District Court of Appeal, First District, Division 2, California.

Sept. 13, 1932.

Rehearing Denied Oct. 13, 1932.

Hearing Denied by Supreme Court Nov. 10, 1932.

1. Appeal and error ⇐1015(2).

Order granting new trial cannot be sustained, where there is no substantial conflict in testimony, and evidence would be insufficient as matter of law to support verdict for movant.

2. Banks and banking ⇐77(6).

Joint liquidators of foreign bank, duly appointed under foreign ordinances, could prosecute action on note, as against contentions that there was no assignment of note to liquidators and no evidence that bank was defunct corporation.

3. Corporations ⇐639.

Method of winding up foreign corporation is governed by law of its residence; California statutes not applying (Civ. Code, §§ 278, 401).

4. Banks and banking ⇐77(6).

Compliance with requirements of foreign ordinances by joint liquidators of foreign bank appointed to sue on note would be presumed from recitals of orders of foreign court (Code Civ. Proc. §§ 1913, 1915).

5. Banks and banking ⇐77(6).

Suit on note *held* properly brought in name of joint liquidators of foreign bank, rather than of bank, where laws and order of foreign court expressly authorized liquidators to sue.

6. Evidence ⇐81.

When, under foreign laws, joint liquidators stand in receiver's shoes for purpose of prosecuting proceedings on creditors' behalf, they presumably have same powers and duties receivers have under California laws, hence are "proper parties" to prosecute such suits (Code Civ. Proc. § 568).

[Ed. Note.—For other definitions of "Proper Party," see Words and Phrases.]

7. Bills and notes ⇐92(1).

Note executed by bank directors for loan to bank *held* supported by consideration (Civ. Code, § 1605).

Directors received consideration, in that they were directors and stockholders in the bank, which received over $96,000 in gold from the promisee and was thus able to keep open its doors, and, moreover, when the note was executed the money in gold was taken out of the account of the promisee and credited to the account of a third person with the bank, and the detriment thus suffered by the promisee was a good and sufficient consideration for the note.

8. Bills and notes ⇐92(1).

That makers personally did not receive proceeds thereof did not render note void for want of consideration (Civ. Code, § 1605).

9. Evidence ⇐423(6).

Where makers of note received consideration, extrinsic evidence that makers were accommodation makers *held* incompetent, since makers could not be accommodation makers under statute (Civ. Code, § 3110).

10. Evidence ⇐402.

Except to prove want of consideration, fraud, accident, or mistake, which might nullify instrument, parol evidence is inadmissible to vary or contradict bill of exchange (Civ. Code, § 1625; Code Civ. Proc. § 1856).

11. Evidence ⇐441(11).

Instruction precluding recovery on note if executed with express understanding that makers would not be held liable personally *held* error.

12. Evidence ⇐441(11).

In action on note, evidence of parol agreement that makers should not be held liable personally *held* inadmissible (Civ. Code, § 3110).

13. Evidence ⇐441(11).

Maker of note cannot rely upon oral promise not to be held liable, absent fraud, mistake, or want of consideration.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by J. H. Seth and another, joint liquidators of the Oriental Commercial Bank, Limited, against Lew Hing and others. From an order granting defendants' motion for a new trial, after verdict for plaintiffs, plaintiffs appeal.

Reversed and remanded, with directions.

Lillick, Olson & Graham and Ira S. Lillick, all of San Francisco (Allan E. Charles, of San Francisco, of counsel), for appellants.

Russell P. Tyler, of San Francisco, for respondents.

NOURSE, P. J.

Plaintiffs sued as joint liquidators of the Oriental Commercial Bank, Limited, of Hongkong, China, upon a joint and several promissory note of defendants in the sum of $99,534.96. The cause was tried with a jury, which returned a verdict for plaintiff upon the note with accrued interest in the sum of approximately $127,000. The trial court granted defendants' motion for a new trial, and from

*Rehearing denied 15 P.(2d) 190.

that order the plaintiffs have appealed upon typewritten transcripts.

The facts are not in dispute. The answer admitted the execution and delivery of the note, but alleged that it was executed without consideration and as a mere accommodation to the payees with the oral assurance that they would not be called on to pay it. No payments on principal or interest were made. The eleven defendants who executed the note were at the time directors of the Canton Bank of San Francisco. Four of these constituted the financial committee and as such had active management and control of the Canton Bank. Five of these were at the time also directors of the China Mail Steamship Company, a corporation operating in San Francisco. Defendant Lew Hing was president of the Canton Bank and manager of the China Mail; defendant Fong was the secretary, Mark Thue, the treasurer, and Chin Lain the president, of the China Mail. Some of the defendants owed the Canton Bank large sums of money and some were heavy owners of its capital stock. The steamship company was badly involved—it owed the Canton Bank $72,000 on a promissory note and over $24,000 through an overdraft. Involuntary proceedings in bankruptcy had been commenced, and in September, 1923, the examiner of the state banking department notified the officers of the Canton Bank that unless the indebtedness of the China Mail to the bank was cleared the bank's license would be revoked. The directors of the Canton Bank appealed to the Oriental Bank, which was the owner of 51 per cent. of stock of the Canton Bank and which had a large sum on deposit with the latter. The Oriental Bank authorized the directors of the Canton Bank to take from this deposit a sum sufficient to pay the indebtedness of the steamship company upon the execution and delivery of the promissory note of all the directors. Upon the execution of this note $96,250 in gold was taken from the account of the Oriental Bank and the indebtedness of the steamship company was fully paid. The note in suit was executed on November 1, 1924, as a renewal of this note plus the interest then accrued. The steamship company failed to meet its obligations, and thereafter the Oriental Bank went into the hands of a receiver and the plaintiffs herein were authorized under order of the court in the city of Hongkong to prosecute this action as joint liquidators. The defendants rested their case on the special defense that the note was without consideration and that the payee had promised not to hold them liable.

[1] Preliminarily we should consider the function of this court on an appeal from an order granting a new trial. On this point the authorities are in accord with the statement found in Moss v. Stubbs, 111 Cal. App. 359, 363, 295 P. 572, 573, 296 P. 86, that: "It is equally well settled that, where there is no substantial conflict in the testimony on material issues, and the evidence as a whole would be insufficient as a matter of law to support a verdict in favor of the moving party, an order granting a new trial cannot be sustained. Springer v. Pacific Fruit Exchange, 92 Cal. App. 732, 268 P. 951; Wendling Lbr. Co. v. Glenwood Lbr. Co., 153 Cal. 411, 95 P. 1029; Empire Inv. Co. v. Mort, 169 Cal. 732, 147 P. 960; Harvey v. Machtig, 73 Cal. App. 667, 239 P. 78, 82." Other authorities to the same effect are Hitchcock v. Rooney, 171 Cal. 285, 288, 152 P. 913; Estate of Baird, 198 Cal. 490, 507, 246 P. 324; Vertson v. City of Los Angeles, 116 Cal. App. 114, 2 P.(2d) 411. No one of the cases cited by respondents supports their view. In general they hold that an order granting a new trial must be reversed when the undisputed evidence would demand a directed verdict in favor of the appellant. This is merely a more restrictive manner of stating the same rule which we have quoted from Moss v. Stubbs without, however, limiting the rule to such an extent. Other cases cited merely support the elementary principle that in general the trial court is vested with a wide discretion in ruling on a motion for a new trial and this principle is not controverted here.

[2-6] The respondents insist that these appellants are without legal capacity to sue because (a) there is no evidence of an assignment of the note to these appellants; (b) no evidence that the Oriental Bank is a defunct corporation; (c) that if it were defunct the suit should have been prosecuted by the trustees under the terms of section 401, Civil Code; (d) that there was no evidence that these appellants had complied with the laws and orders of the court of Hongkong; and (e) that the suit should have been brought in the name and on behalf of the corporation. There was received in evidence duly authenticated copies of orders of the Supreme Court of Hongkong and of the Companies Act No. 58 of 1911 from the ordinances of Hongkong. These records disclose that the Oriental Bank was in the hands of a receiver and that the appellants had been duly appointed under the ordinances of Hongkong to act as joint liquidators and to prosecute this particular action. Answering the points in order in view of this evidence we may conclude: (a) and (b) The corporation being in the hands of a receiver, it is "defunct" for all purposes herein and no assignment was necessary for the prosecution of this action (19 Cal. Jur. p. 964). (c) That section 401, Civil Code, has no application to a foreign corporation (section 278, Civ. Code) and the method of winding up the affairs of such a corporation is governed by the law of its residence. (d) That compliance

with the requirements of the Hongkong ordinances is to be presumed from the recitals of the orders of the court of that jurisdiction. Sections 1913, 1915, Code Civ. Proc. (e) That the suit was properly brought in the name of the joint liquidators, they having been expressly authorized so to do by the laws and the order of court under which they are operating and that they are thus the real parties in interest. When, under the laws of a foreign jurisdiction, "joint liquidators" stand in the shoes of a receiver for the purpose of prosecuting court proceedings on behalf of the creditors, it will be presumed that such "joint liquidators" have the same powers and duties in that regard as receivers have under the laws of this state (Christ v. Superior Court, 211 Cal. 593, 598, 296 P. 612), and that they are, therefore, the "proper parties" to prosecute such suits. Code Civ. Proc. § 568.

[7] The only real issue in the case is whether there was a legal consideration for the note. Unfortunately respondents have given us no aid in the consideration of this vital issue, being content with the bald statement "that none of the defendants received any benefit from the execution of either of the notes." But, what is a consideration? Our Civil Code, section 1605, declares that: "Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise." In 6 Ruling Case Law, p. 654, it is said: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other. Of course, there can be no question as to the sufficiency of the consideration where there is a benefit to the promissor as well as a detriment to the promisee."

As benefits accruing to the promisors in the instant case appellants refer to the admitted facts that respondents were directors and stockholders in the Canton Bank, which received over $96,000 in gold from the promisee and was thus able to keep open its doors. That such benefits made a good consideration for the directors' note is the uniform rule of decision. In Stern v. McDonald, 47 Cal. App. 79, 83, 190 P. 221, 223, it is said: "It has been held by numerous authorities that a note or bond, executed by the directors of a bank to make good an impairment of the bank's assets, so that the bank may continue in business, is based upon a valid consideration." In Bohning v. Caldwell (C. C. A.) 10 F.(2d) 298, a case where the facts were similar to those of the instant case, the court emphasized the fact that the directors' note saved the bank from failure, saved the directors as stockholders from an assessment on their stock, and increased the assets of the bank in which they were interested. Appellants cite to the same effect: Interstate Trust & Banking Co. v. Irwin, 138 La. 325, 70 So. 313; Dykman v. Keeney, 10 App. Div. 610, 42 N. Y. S. 488, 493; Union Bank of Brooklyn v. Sullivan, 214 N. Y. 332, 108 N. E. 558, and Sickles v. Herold, 11 Misc. 583, 32 N. Y. S. 1083, and Id., 15 Misc. 116, 36 N. Y. S. 488. Other authorities to the point are cited in Stern v. McDonald, supra.

Secondly, and with equal force, the appellants find a valid consideration in the undisputed evidence coming from respondents that when the note was executed "the $96,250, in gold was taken out of the account" of the Oriental Bank and credited to the account of the steamship company with the Canton Bank. That the detriment thus suffered by the Oriental Bank was a good and sufficient consideration for the note would seem to be too plain for controversy. Respondents do not argue the point and all the authorities we have found support the principle urged by appellants. In Crocker National Bank, etc., v. Say, 209 Cal. 436, 440, 288 P. 69, 71, our Supreme Court dismissed the point raised in a similar case with the statement that the detriment suffered by the plaintiff bank (payee) was an adequate consideration and that the point did not require discussion. Authorities to the same effect are cited in Prudential Trust Co. v. Moore, 245 Mass. 311, 316, 139 N. E. 645, a case involving a somewhat similar state of facts.

[8] Running through the brief on this point the respondents suggest a lack of consideration because they did not personally receive any of the money paid by the Oriental Bank. This circumstance was held insufficient to defeat a consideration under similar facts in Crocker Nat. Bank, etc., v. Say, supra, where the court say: "The fact that the defendants personally did not receive the proceeds of the note would not, of course, render the note void for want of consideration."

[9, 10] As a second defense the respondents argue that they were mere accommodation makers and that they were assured by the payee that they would not be held personally liable for payment. The point is presented as though it involved the single question of the admissibility of the parol testimony to show the collateral agreement. But there is more than that involved. In the first place, respondents were not accommodation makers. Section 3110, Civil Code, defines an "accommodation party" as "one who has signed the instrument as maker, * * * *without receiving value therefor*, and for the purpose of lending his name to some other person." The

respondents do not meet either one of the two conditions imposed. They received value for their note and they did not *lend* their name to any other party. Extrinsic evidence to show that the maker of a note was an accommodation maker is limited to those cases in which there was no consideration because, otherwise, the maker could not be an accommodation party under the statute. A more exact statement of the rule is found in Cashman v. Harrison, 90 Cal. 297, 304, 27 P. 283, 285, where the court say: "Except for the purpose of proving want of consideration, fraud, accident, or mistake, which might nullify the instrument, parol evidence is inadmissible to vary or contradict a bill of exchange." There is hardly any other subject of the law upon which the authorities are more uniform. See Leonard v. Miner, 120 Cal. 403, 406, 52 P. 655; Lompoc Valley Bank v. Stephenson, 156 Cal. 350, 104 P. 449; Wright v. Shoenhair, 100 Cal. App. 163, 166, 280 P. 174; College Nat. Bank v. Morrison, 100 Cal. App. 403, 407, 280 P. 218. Civ. Code, § 1625; Code Civ. Proc. § 1856.

[11-13] The position of respondents on this point is not clear. They suggest in their brief that the evidence was offered for the sole and only purpose of explaining the circumstances and to establish lack of consideration. But they proposed an instruction which the trial judge gave to the jury advising that if they believed that the note was executed at the request of the Oriental Bank "with the express understanding * * * that said defendants would not be personally called upon to pay said note, your verdict must be in favor of the defendants." The error of the instruction is apparent from the authorities just cited. It is also apparent that throughout the trial of the case respondents urged their defense arising out of the parol agreement that they should not be held liable. That the evidence was not admissible for that purpose is too plain for argument. Respondents cite and rely on First Nat. Bank of Reedley v. Reed, 198 Cal. 252, 244 P. 368; Liberty Bank v. Nonnenmann, 96 Cal. App. 478, 274 P. 568; Liberty Bank v. Ernst, 93 Cal. App. 560, 269 P. 959; Pacific-Southwest Bank v. Valley Finance Corp., 99 Cal. App. 728, 279 P. 222, 280 P. 134; section 3110, Civil Code. No one of the cases is helpful. In the Reed Case the question of the admissibility of the evidence was not considered, but the opinion discloses that it was received for the purpose of showing no consideration for the note. In the Nonnenmann and Ernst Cases the defense was want of consideration and fraud and the admissibility of the parol evidence was not questioned. In Pacific-Southwest Bank v. Valley Finance Corp., supra, the defense was no consideration for which purpose the evidence was admitted. The Code section is merely a definition of an accommodation party and does not relate to the subject of evidence. There is no disagreement in the authorities cited by either party, and we have found no departure from the rule that the maker of a promissory note cannot rely upon an oral promise not to be held in the absence of fraud, mistake, or want of consideration. On the other hand, when there is neither fraud nor mistake and a consideration has passed, the maker is bound by his written promise and may not rely upon parol evidence to prove a collateral agreement relieving him from liability.

Appellants argue that none of the defenses pleaded was available because the respondents failed to prove that the president had authority to make the oral contract relied on and because the respondents are estopped to deny their obligation since the note went into the hands of the receiver. Many authorities to both points are cited to which may be added the recent decision in Wood v. Kennedy (Cal. App.) 3 P.(2d) 366. No useful purpose would be served by discussing these points, as we have heretofore shown that the record demands a reversal of the order for the reasons given. Respondents' suggestion of misconduct during the course of the trial does not merit consideration.

The judgment is reversed and remanded to the trial court with directions to enter an appropriate judgment upon the verdict.

We concur: STURTEVANT, J.; SPENCE, J.

126 Cal.App. 141

TURNBULL v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 8693.

District Court of Appeal, First District, Division 2, California.

Sept. 21, 1932.

1. Dismissal and nonsuit ⇐60(1).

Court was required to dismiss action which had been at issue over 10 years, notwithstanding party moving for dismissal was in contempt (Code Civ. Proc. § 583).

2. Dismissal and nonsuit ⇐45.

Statutory requirement that action be dismissed unless brought to trial within 5 years after filing of answer *held* mandatory (Code Civ. Proc. § 583).

Code Civ. Proc. § 583 provides that any action shall be dismissed by the court on motion of defendant, after due notice to

plaintiff, or by the court on its own motion, unless brought to trial within 5 years after defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended.

3. Mandamus ⇐43.

Mandamus *held* proper remedy to compel dismissal of action not brought to trial within 5 years after filing of answer (Code Civ. Proc. § 583).

4. Dismissal and nonsuit ⇐60(1).

Trial court must dismiss action not brought to trial within 5 years after filing of answer, regardless of how facts are brought to court's attention (Code Civ. Proc. § 583).

Petition for writ of mandate by Albert C. Turnbull against the Superior Court of the State of California, in and for the County of San Francisco, and Honorable T. I. Fitzpatrick, Judge of Department 8 thereof.

Writ granted.

Jerome L. Schiller and Ralph L. Isaac, both of San Francisco, for petitioner.

Carrol A. Murphy, of San Francisco, for respondents.

SPENCE, J.

Petitioner seeks a writ of mandate to compel respondents to dismiss a certain action entitled, Harriet A. Turnbull v. Albert C. Turnbull, said action being No. 128,810 in the files of the respondent court. The answer of respondent admits that the time for bringing the action to trial was never extended by stipulation of the parties and alleges that petitioner's motion to dismiss was denied by the respondent court on the ground that petitioner was in contempt at the time the motion was made.

[1-3] The essential facts are undisputed. The action was filed in 1921 and was at issue on both the complaint and cross-complaint as early as April, 1922. In December, 1921, the respondent court had made its order requiring petitioner to pay to the plaintiff in said action the sum of $40 per month as alimony pendente lite. No further proceedings were had, and the motion to dismiss was made after the cause had been at issue for more than ten years. In the trial court plaintiff filed an affidavit in opposition to the motion to dismiss and petitioner filed a counter-affidavit. Plaintiff's affidavit admitted that petitioner had paid a total of $3,800, but alleged that there was a balance unpaid of $1,240. It further alleged facts tending to show that at all times petitioner had the ability to fully comply with said order, but had failed to do so. Petitioner's affidavit showed that a smaller amount remained unpaid than the amount stated by plaintiff and alleged facts tending to show his inability to fully comply with the order. The conflict is immaterial on this proceeding and we may assume that all of the facts alleged by plaintiff were true and that petitioner was in contempt at the time he made his motion to dismiss.

It is petitioner's contention that, even assuming that he was in contempt for failure to fully comply with the order made in 1921, it was the duty of the trial court under section 583 of the Code of Civil Procedure to dismiss the action. In our opinion this contention must be sustained. The pertinent portion of that section reads: "Any action heretofore or hereafter commenced shall be dismissed by the court * * * on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended." It has been repeatedly held that these provisions are not discretionary but mandatory and that the only exception is the one stated in the section itself. Sacramento Transportation Company v. California Reclamation Co., 205 Cal. 42, 269 P. 640; Andersen v. Superior Court, 187 Cal. 95, 200 P. 963; City of Los Angeles v. Superior Court, 185 Cal. 405, 197 P. 79; Larkin v. Superior Court, 171 Cal. 719, 154 P. 841, Ann. Cas. 1917D, 670; Cruse v. Superior Court, 102 Cal. App. 290, 283 P. 73. It is also well settled that mandamus is an appropriate remedy where the trial court refuses to dismiss the action. Andersen v. Superior Court, supra, and cases cited therein.

Respondent stands upon the proposition that petitioner, being in contempt, is not entitled to the relief sought. They cite and rely upon certain cases typical of which are Weeks v. Superior Court, 187 Cal. 620, 203 P. 93; Schubert v. Superior Court, 109 Cal. App. 633, 293 P. 814; Funfar v. Superior Court, 107 Cal. App. 488, 290 P. 626. In reply petitioner calls our attention to several cases in which writs have been issued compelling the trial courts to act under certain circumstances even though the petitioners were in contempt. Manriquez v. Superior Court, 199 Cal. 749, 251 P. 1118; Jansen v. Superior Court, 99 Cal. App. 718, 279 P. 227; Archer v. Superior Court, 81 Cal. App. 742, 254 P. 939. It is conceded by petitioner and respondents that none of the authorities are directly in point. In our opinion the duty placed upon the trial court under the mandatory provisions of said section 583 distinguishes the present case from the authorities relied upon by respondents. Under that sec-

tion it is the duty of the trial court "upon its own motion" to dismiss the action whenever it appears that the delay in bringing the action to trial exceeds the five-year period and that there has been no stipulation extending the time. This was clearly indicated in the recent case of Sacramento Transportation Company v. California Reclamation Company, supra, where the motion was made by the plaintiff rather than the defendant. The court there said at page 44 of 205 Cal., 269 P. 640, 641: "The purpose of section 583 of the Code of Civil Procedure is to compel the parties to action in the direction of a speedy trial of causes after issue joined. The trial court in the instant case would have been bound on its own motion to dismiss the action upon having the facts showing an unwarrantable delay brought to its attention, and the fact that it was the plaintiff itself who made the motion is immaterial, since the duty of the court in the premises was mandatory, whether or not a motion to dismiss was made under said section by either of the parties to the action."

[4] We believe that the manner in which the facts are brought to the attention of the trial court is entirely immaterial. Where, as in the present case the facts are admitted and it is made to appear to the trial court that the delay has exceeded the statutory limit without a stipulation extending the time the trial court has no alternative but must dismiss the action.

Let a peremptory writ of mandate issue as prayed.

We concur: NOURSE, P. J.; STURTEVANT, J.

126 Cal.App. 79

DE LANNOY (GENERAL ACCIDENT, FIRE & LIFE ASSUR. CORPORATION, Limited, Intervener) v. GRAMMATIKOS.

Civ. 8474.

District Court of Appeal, First District, Division 2, California.

Sept. 19, 1932.

Rehearing Denied Oct. 19, 1932.

Hearing Denied by Supreme Court Nov. 17, 1932.

1. Automobiles ⇐245(6, 72).

Whether pedestrian, or motorist striking pedestrian at intersection where traffic was regulated by electric signals, was unlawfully in intersection at time, *held* for jury.

2. Trial ⇐296(4, 5).

Instruction on care pedestrian struck by automobile could assume that others would use *held* not erroneous as foreclosing decision upon contributory negligence, in view of other instructions given.

Instruction that person "lawfully" crossing public street has right to assume, until the contrary reasonably appears, that drivers of motor vehicles will obey traffic laws and regulations, and will use due care to avoid inflicting injury, was not erroneous as against contention that it foreclosed the jury from deciding the question of contributory negligence, since in other instructions the subject of contributory negligence was fully and correctly covered, and the court also instructed, at defendant motorist's request, that motorist had right to assume that pedestrian would look and see vehicles along his line of vision and would exert ordinary care to avoid collision with them.

3. Trial ⇐295(1).

All instructions given are to be read together.

4. Negligence 138(2).

Instruction that presumption that plaintiff exercised due care was species of evidence continuing throughout case, unless contrary appeared by other competent evidence, *held* not erroneous, notwithstanding witnesses were called on each side regarding facts of case.

5. Automobiles ⇐246(38).

Instruction on last clear chance doctrine *held* applicable to action by pedestrian struck by motorist.

6. Automobiles ⇐246(49).

Instruction on imminent peril *held* not inapplicable to action by pedestrian struck by automobile allegedly only car's length away when first seen by pedestrian.

7. Appeal and error ⇐901.

Appellant had burden of proving contention that instructions complained of were misleading.

8. Appeal and error ⇐1066.

In action by pedestrian struck by motorist, instruction that speed limit was 15 miles per hour *held* not prejudicial, notwithstanding no witness testified defendant motorist was traveling more than 10 miles per hour.

9. Automobiles ⇐246(49).

In action by pedestrian struck by motorist, instruction on "mere accident" *held* inapplicable.

10. Automobiles ⇐245(72).

Pedestrian struck by motorist at intersection *held* not guilty of contributory negligence as matter of law.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by William B. De Lannoy against Peter Grammatikos, wherein the General Accident, Fire & Life Assurance Corporation, Limited, filed a complaint in intervention. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hadsell, Sweet & Ingalls, of San Francisco, for appellant.

Ingemar E. Hoberg, of San Francisco, for respondent.

STURTEVANT, J.

Plaintiff commenced an action to recover damages for injuries sustained in an automobile collision. The owner of the automobile appeared and answered by interposing certain denials and pleading contributory negligence. The insurance carrier of the plaintiff's employer appeared and filed a complaint in intervention. The defendant answered the complaint in intervention. A trial was had before the trial court sitting with a jury. The jury returned a verdict in favor of the plaintiff, and from the judgment entered thereon the defendant has appealed.

In the afternoon of the 26th day of August, 1930, the plaintiff was in the act of making a delivery of some automobile parts to a customer of his employer. He had the packages in his hand and was traveling on foot. He passed down the north side of Grove street to the west side of Van Ness avenue. At the crossing made by Grove and Van Ness there were at that time electric signals. A signal stood on each one of the four corners. The plaintiff testified that when he arrived at the corner he waited for the signal to say "go." He looked to his left and saw a car. That car, according to his testimony in different places, was 75, 100, or 175 feet away. He looked to his right and saw no cars approaching; then he entered Grove street to cross to the south side. As he entered the street and until the impact he was looking to his right. When he got to the center of the street he saw the same car right on top of him. It was a car's length away. The plaintiff testified that he did not know what took place after that. The next thing he remembered was being in an ambulance. One of his witnesses, Mr. Paulson, testified that on the day of the accident he was acting as the driver of a truck for a dyeing works. He had driven west on Grove, and as he approached Van Ness the signal registered "stop." He stopped on the north side of Grove east of Van Ness. As he stopped there the defendant approached from behind, passed him on the left, and proceeded across Van Ness. As the defendant did so the traffic on Van Ness, moving toward the south, forced the defendant to swerve to his left and the defendant was driving on the center of Grove. About that time and when on the opposite side of Van Ness he saw the defendant's car hit the plaintiff. The plaintiff was hit by the right-hand end of the defendant's front bumper, was swung around to the right-hand side, and knocked down.

The defendant testified that he had been traveling on the north side of Grove street in a westerly direction; that when he approached Van Ness avenue he looked at the stop sign and it said "go"; that he was ten feet away from the signal; that he did not stop, but proceeded on his way on the right-hand side. There were no cars in front of him. As he entered the intersection he saw a man facing the north standing on the northwest corner. As soon as defendant reached the corner it seemed to him that that man kind of fell over defendant's machine. As the defendant proceeded he was looking ahead to see if anybody was in front of him. He saw the man standing on the corner the whole time he was crossing the intersection. The defendant was driving a Hupmobile of the model of 1929 and it was equipped with four-wheel brakes. As the defendant crossed the intersection no automobiles were moving north or south on Van Ness avenue. The defendant testified that when he reached Van Ness avenue he was traveling ten miles an hour. That up to the time of the accident he did not go faster. At the time of the impact the defendant testified that his right-hand wheels were six feet from the Grove street curb. At the time of the accident another machine approached from the east side of Van Ness avenue and stopped alongside of the defendant. When the plaintiff fell over the defendant's car he hit the car in about the middle. After the impact the defendant stopped his car. He testified that he stopped it within ten feet. As the defendant got out of his car the plaintiff was rising to his feet. The plaintiff was in the pedestrian lane. He was on the right-hand side of it five or six feet from the sidewalk. As the defendant entered the intersection he did not see any cars at his side. Behind him there were some coming. The plaintiff was never in front of defendant's car but approached its side. As plaintiff stepped into the street he was looking toward the city hall (over his left shoulder).

At the time and place of the accident, as we have stated above, on each of the four corners of the intersection there had been installed and were in operation electrically operated traffic signals. Under the terms of the ordinance then in force it was provided: "It shall be unlawful for any operator of an automobile or pedestrian to disobey the instructions of any mechanical or electrical traffic signal, traffic sign or marks upon the street placed in accordance with the provisions of this ordinance. * * * The ringing of a bell in connection with any mechanical or electrical traffic signal shall indicate preparation for a change in the direction of traffic movement.

When such bell is sounded no traffic shall enter the intersection until a green or go signal is shown."

It was stipulated that at the time and place of the accident the electrical devices were so geared as to allow passage of traffic 34 seconds on Van Ness and 18 seconds on Grove and that there were two bells four seconds apart which indicated preparation between "stop" and "go."

[1] As to compliance or want of compliance with the provisions of the ordinance, it is patent that either the defendant or the plaintiff was unlawfully in the intersection at the time of the accident. As to which one was within his rights was a question for the jury. The one who had, under the law, the right of way was not entitled to disregard entirely all other matters of care for himself and for others. Hence the case presented other questions than the sole question as to compliance with the terms of the ordinance.

[2, 3] The defendant attacks many instructions given at the request of the plaintiff. The court instructed the jury: "I instruct you that a person lawfully crossing a public street has the right to assume that all other persons using the street will also use ordinary care and caution. This rule allows pedestrians to assume, until the contrary reasonably appears, that the drivers of motor vehicles will obey and abide by the traffic laws and regulations, and will use due care and vigilance to avoid inflicting injury to them." It is said that the instruction, as given, foreclosed the jury from deciding the question of contributory negligence. By its terms it did not necessarily do so. It refers to pedestrians "lawfully" using the streets. It will be noted that contributory negligence is not mentioned. All of the instructions are to be read together. In other instructions the subject of contributory negligence was fully and correctly covered. But, acting on request of the defendant, the court also gave an instruction: "I instruct you that defendant had a right to assume that plaintiff would look and see vehicles along his line of vision and that he would exert ordinary care to avoid collision with them." In Hoy v. Tornich, 199 Cal. 545, at page 552, 250 P. 565, 568, addressing itself to a similar record, the court said: "The instructions so given at defendant's request must be presumed to have removed any prejudicial effect of the instruction of which complaint is made."

[4] The court gave the jury an instruction: "In determining whether or not the plaintiff was guilty of contributory negligence, I instruct you that if there is no evidence to the contrary the law presumes that the plaintiff did everything that a reasonably prudent person would have done under the circumstances for the protection of his own safety. This is a species of evidence that continues throughout the case unless the contrary appears by other competent evidence." The defendant asserts that witnesses having been called on each side regarding the facts of the case, the presumption had disappeared. Heretofore the question has been much debated; however, at the present time, we think the question has been set at rest. Olsen v. Standard Oil Co., 188 Cal. 20, 25, 204 P. 393; Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529. It was not error to give the instruction.

[5] The court instructed the jury on the doctrine of the last clear chance. It is claimed that said doctrine has no application to the facts in this case. In Hoy v. Tornich, supra, the court was discussing the same contention. It quoted with approval from Wahlgren v. Market Street Railway Co., 132 Cal. 656, 665, 62 P. 308, 64 P. 993: "* * * 'We think counsel had a right to argue to the jury that the employees were interested witnesses, and, though they both testified that they did not see plaintiff before her injury, yet, there being no obstruction to the view, the conductor must have seen her from where he was at the switch before the car passed him, if he was looking for approaching pedestrians, as his testimony would seem to imply.'" So in the instant case. If we assume that the defendant had the right of way, was proceeding to cross Van Ness, was looking straight ahead into the unobstructed street, and the plaintiff, while looking to his right and away from the defendant, walked out to the center of the street, and that the defendant, seeing the plaintiff's movements, nevertheless proceeded and knocked the plaintiff down, then and under those circumstances it may not be said that the doctrine of the last clear chance had no application.

[6] The defendant complains because the trial court instructed the jury on imminent peril. He complains that the instruction was inapplicable to the facts of this case. That contention we think is too broad. If, as he claimed, the plaintiff waited until the signal said "go" and that then he walked forward using due care and that he did not see the defendant's automobile until it was only a car's length away, then the plaintiff was in "imminent peril." Viewing the facts from that angle it was not error to give the instruction.

[7] The defendant complains of the instructions given with respect to the amount of care exacted of an automobile driver as compared with the amount of care exacted of a pedestrian. The defendant argues that they might "* * * well have misled the jury into believing that this was a situation requiring a higher degree of care on the part of the defendant than otherwise. * * * Who can say but that this ambiguous instruction did not mislead the jury when considered with the other prejudicial and erroneous instructions?" We have just shown that the other instructions were neither erroneous nor prej-

udicial. As the defendant is appealing, the burden rests on him to show that the instructions regarding care misled the jury. The burden does not rest on respondent to show that error was not committed, but the burden rests on the appellant.

[8] It is contended that the court instructed with respect to matters not in issue. In that connection the defendant quotes the record that no witness testified that the defendant was proceeding more than ten miles per hour. He then calls our attention to an instruction in which the trial court stated the speed limit to be fifteen miles per hour. Conceding that the instruction is subject to the criticism, it was not prejudicial.

An instruction regarding the violation of the express provisions of the California Vehicle Act (St. 1923, p. 517, as amended) referred to an injury to a "third person." The defendant asserts that he does not know what it means. A most casual reading shows that it was an awkward expression referring to the plaintiff.

Several other instructions are objected to as having been "garbled" from the discussion in certain decisions. The criticism is justified. Furthermore, it may be conceded that the practice is not to be commended. However, no single one of the instructions so attacked contains prejudicial error.

[9] The defendant tendered an instruction as to a "mere accident." The trial court refused to give it. It was a correct statement of the law, but the trial court was right in holding that the instant case presented no such question.

[10] The defendant contends that the plaintiff was guilty of contributory negligence as a matter of law. If we accept the defendant's version of the facts that contention is sound. If we accept the plaintiff's version of the facts the contention is not sound. In this connection the defendant claims that it was the duty of the plaintiff as he crossed the street to look both ways before entering the street and thereafter to continually look in the direction from which the traffic would be approaching. When weighed under a statutory rule such as the ordinance above quoted, the defendant cites us to no authority declaring his contention to be correct under all circumstances. As negligence has reference to time, place, and circumstance, we are not prepared to hold the defendant's contention a sound rule of law.

The defendant asserts that the trial court erred in refusing to grant a new trial. He bases the point on the alleged errors hereinabove discussed. In view of what we have already said, the point may not be sustained.

Finally it is asserted that the verdict is excessive. The amount of the verdict rested on the testimony of medical experts. The plaintiff called as his expert Dr. Catton. The substance of his testimony was that in the accident the plaintiff suffered a concussion of the brain and that the effects of the concussion have not disappeared, but some have continued, and in his judgment that the injury is permanent. In his opinion a condition exists that is epileptic in its nature. If the jury accepted the opinion of Dr. Catton it was within its rights in bringing in the verdict that it returned into court.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

126 Cal.App. 183

HAYES v. KNERR.

Civ. 976.

District Court of Appeal, Fourth District, California.

Sept. 22, 1932.

Rehearing Denied Oct. 20, 1932.

1. Appeal and error ⇐110.

Order denying motion for new trial is not appealable (Code Civ. Proc. § 963).

2. Partnership ⇐336(3).

Evidence in partnership accounting suit established that after partnership dissolution, but before settlement, individual partner accepted bonds at face value in consideration of contract, so as to make such bonds chargeable against him at face value in accounting.

3. Appeal and error ⇐1011(1).

Appellate court cannot reverse judgment because of conflict in evidence.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Suit by John Hayes, Jr., against Henry E. Knerr. From a judgment for plaintiff and an order denying his motion for a new trial, defendant appeals.

Appeal from order denying motion for new trial dismissed, judgment affirmed.

Henry M. Lee, of Los Angeles, for appellant.

A. W. Sorenson and Margaret E. Faires, both of Los Angeles, for respondent.

MARKS, J.

[1] Appellant and respondent were copartners engaged in construction work. A written partnership agreement was executed in April, 1926, which, among other things, provided that all losses and profits resulting from partnership operations were to be shar-

ed equally by the partners. During October, 1928, they effected a voluntary dissolution of the partnership and attempted to arrive at an amicable distribution of the partnership assets. They were unsuccessful in reaching such a settlement and this litigation followed, which resulted in an accounting and a judgment in favor of respondent in the sum of $1,795.58. Appellant has appealed from this judgment and the order denying his motion for new trial. Such order is not appealable. Section 963, Code Civ. Proc.

While appellant states various grounds for a reversal of the judgment, we need consider but one of them here, namely, the charging against him on the accounting of $10,000, the par value of participating certificates or bonds of the Arcady Apartment Hotel Company, originally a partnership asset, when these certificates did not have a market value of that amount. In his opening brief appellant thus states the question before this court: "If the bonds were to be charged to defendant at their face, or $10,000.00, then on the accounting plaintiff would be entitled to judgment against defendant for the sum of $1,795.58. But if chargeable at their market value, which the undisputed evidence shows is nothing, then the plaintiff would not be entitled to anything and the defendant would be entitled to judgment against the plaintiff in the sum of $3,204.42."

After the parties had agreed to dissolve the partnership and while they were attempting to strike a balance on the partnership accounts, appellant gave to respondent three writings as follows:

"Los Angeles, Calif. Jan. 14, 1929.

"For and in consideration of the contract entered into by Christ Thorne and John Hayes for brick and hollow tile work in Ford Garage Glendale cal. I agree to accept $10000.00 of Arcady Apartment Hotel Co. Certificates.

"H. E. Knerr."

"Los Angeles, Calif., Jan. 14, 1929.

"Mr. Christ Thorne,

"Please pay to John Hayes out of balance remaining to my credit on Glendale High School brick, tile and stone contract Five Thousand Dollars ($5000.00). Above to be paid when due, according to contract.

"H. E. Knerr."

"Los Angeles, Calif. Jan. 14, 1929.

"Our books at this date, apper to show a balance due John Hayes of about Two Thousand Dollars (2000.00)

"Proper balance to be determined by an audit of our books.

"H. E. Knerr.
"John Hayes."

[2] From the evidence submitted by respondent it appears that on January 14, 1929, he had a contract with one Christ Thorne to do the necessary brick and tile work on a garage building in the city of Glendale; that appellant desired to acquire this contract and do the work called for under it; that appellant offered to pay respondent $5,000 and further to accept the participating certificates, or bonds, of the Arcady Apartment Hotel Company at their par or face value; that respondent assigned the Christ Thorne contract to appellant, who performed the work under it, and appellant received the participating certificates or bonds and gave respondent the three writings heretofore quoted; and that respondent received the $5,000 called for in the order on Christ Thorne.

[3] The trial court found that appellant agreed to and did take and accept these participating certificates or bonds at their face or par value of $10,000 and in the accounting charged them to him at such an amount. This finding is amply supported by the evidence. Appellant's testimony contradicted this evidence, but this merely created a conflict in the evidence which the court resolved against him. We cannot reverse a judgment because of a conflict in the evidence. 24 Cal. Jur. 1013 and cases cited.

The attempted appeal from the order denying the motion for new trial is dismissed.

The judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

126 Cal.App. 254

CAIN et al. v. RICHMOND et al.

URSTADT et al. v. CAIN et al.

Civ. 7761.

District Court of Appeal, First District, Division 1, California.

Sept. 24, 1932.

1. Appeal and error ⇐1010(1).

Trial court's fact finding is conclusive on appeal, unless as matter of law evidence is insufficient to support finding.

2. Fraudulent conveyances ⇐298(1), 308(1).

Generally, question whether conveyance was made with intent to defraud creditor is one of fact, but concurrence of insolvency and want of consideration are conclusive evidence of such intent (Civ. Code, §§ 3442, 3450).

"Insolvency" means insufficiency of debtor's entire property and assets to pay his debts.

[Ed. Note.—For other definitions of "Insolvency; Insolvent," see Words and Phrases.]

3. Fraudulent conveyances ⇐297.

Evidence *held* not to establish insolvency of trust deed debtors when they conveyed property to daughter and son-in-law (Civ. Code, §§ 3442, 3450).

4. Fraudulent conveyances ⇐299(11), 300(1).

Evidence sustained finding that trust deed debtors' conveyance of certain realty to daughter and son-in-law was not fraudulent or without consideration.

5. Fraudulent conveyances ⇐76(2).

"Valuable consideration" is such as money or the like, and inadequacy of amount or its disproportion to actual value of property are immaterial.

Adequacy of consideration is element of good-faith of transaction, and has no bearing on whether the consideration is a valuable or good one.

[Ed. Note.—For other definitions of "Valuable Consideration," see Words and Phrases.]

Appeals from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by George H. Cain and another against Harry M. Richmond and wife, in which Essie J. Urstadt and husband intervened. From so much of the judgment as quieted title of interveners to certain realty as against plaintiffs, plaintiffs appeal.

Affirmed.

Owen D. Richardson and Donald B. Richardson, both of San Jose, for appellants.

Louis Oneal and William F. James, both of San Jose, for respondents.

LANDIS, Justice pro tem.

In payment of a part of the purchase price of certain real property sold by plaintiffs to defendants on December 18, 1922, defendants executed and delivered to plaintiffs their promissory note in writing in the sum of $18,000 and interest, payable five years after date, and to secure the payment of said note executed on the same date a trust deed covering the said real property. Defendants having failed to pay the note when due, the property was sold under and pursuant to the terms of said trust deed for the sum of $10,000. By this action plaintiffs seek to recover the sum of $8,751.84 representing the deficiency or the balance due on said promissory note after the sale of the property under the trust deed.

Under the claim and contention that defendants were the owners thereof, in August, 1929, plaintiffs caused to be attached certain property which will be referred to as the "Urstadt property," and thereafter, pursuant to an order of the trial court allowing it, Essie J. Urstadt and Milton A. Urstadt were allowed to intervene by filing a complaint in intervention, under which complaint interveners claimed title to the said Urstadt property and sought a decree against plaintiffs and defendants quieting their title to the said Urstadt property. The trial court gave judgment for plaintiffs and against defendants for the balance due on the promissory note, and gave judgment for interveners and against plaintiffs and defendants quieting their title to the Urstadt property. This appeal is by the plaintiffs from the part of the judgment quieting the title of the interveners to the Urstadt property against the plaintiffs.

[1] The question presented on this appeal is whether or not the evidence was sufficient to support the findings of the trial court upon which was based the decree quieting title of the interveners to the Urstadt property and against the plaintiffs, or to be more specific, that the conveyance to the interveners was not made with fraudulent intent. The trial court having determined from the evidence that the conveyance was not made with fraudulent intent, such determination of the evidence is conclusive on appeal, unless it shall appear as a matter of law that it is insufficient to support the findings.

It may be noted that to the complaint in intervention plaintiffs' answer was limited to a denial of interveners' title and a claim that their attachment was a lien on the Urstadt property. No specific charges of fraud were made, and no attempt was made to set aside the conveyance from the defendants to the interveners. Plaintiffs contend that the said conveyance to interveners was fraudulent, and therefore their attachment in their action against the defendants constituted a lien upon the Urstadt property, and base such contention upon the following facts which they claim are shown by the evidence and which they contend constitute badges of fraud and justify an inference of fraudulent intent, to wit: That the conveyance was to a daughter and son-in-law; that the debt on the note held by plaintiffs was to mature on December 18, 1927; that the purported consideration as to support was vague and inadequate and arising from the alleged loans was uncertain, consisting of amounts uncertain as to total and time; that there was no assumption of the existing incumbrance on the Urstadt property mentioned in the deed of October 11, 1927; that, by the execution of the conveyance attacked, the defendants rendered themselves insol-

vent; that the property conveyed had a net value of $17,500; and that possession was retained by the defendants.

In support of their contention, plaintiffs appear to rely first and principally upon the added proviso to section 3442 of the Civil Code as amended in 1895 (St. 1895, p. 154), which provides that any transfer or incumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors; and, second, that the case falls within the class of cases in which a conveyance may be set aside at the instance of a creditor, when the conveyance is made with intent to defraud.

The facts necessary for an understanding sufficient for a determination of the issues involved are as follows: About December, 1922, plaintiffs sold to defendants an orchard property for $25,000. Defendants paid $7,000 in cash, and gave a note for $18,000 secured by a trust deed on the property. Defendants paid $500 on the principal in 1924 and $500 on the principal in 1927, and paid the interest up to December 19, 1928. The property was sold under the trust deed in July, 1929, and bid in by plaintiffs for $10,000, leaving a deficiency on the note of $7,000, plus interest and costs. The defendants owned another orchard property entirely distinct from and having nothing to do with the property incumbered by the plaintiffs' trust deed, being the property herein referred to as the Urstadt property. The defendants are elderly people, and the parents of Essie J. Urstadt, who, with her husband, are the interveners in this case. On October 11, 1927, the defendants executed a deed to their said daughter and her husband of the Urstadt property. There was then a mortgage on said property in the sum of $3,500 held by a bank. The defendants were indebted to the interveners for money advanced to them from time to time in small amounts aggregating between $500 and $700. The Urstadt property was conveyed by the defendants to the interveners pursuant to an agreement entered into by and between the defendants and interveners by the terms of which the indebtedness for the moneys advanced to the defendants was canceled, the mortgage indebtedness owing to the bank was assumed by the interveners, and the interveners undertook to care for and support the defendants during the remaining years of their lives. The defendants continued to live upon the conveyed premises, but from the date of the deed forward all taxes and expenses of running and maintaining the property were paid by the interveners, and all contracts and transactions concerning the operation of the property were made independently by the interveners, and all proceeds therefrom taken and retained by them, and the interveners also continued to furnish the means of subsistence for the defendants.

[2] Although generally speaking the rule is that whether or not the conveyance was made with an actual intent to defraud a creditor is never a question of law, but is always one of fact, which is to be determined from all the evidence adduced, and that it is always within the province of the court to decide what circumstances are sufficient evidence of fraud (12 Cal. Jur. p. 1045, § 87, and cases there cited), since the enactment of section 3442 of the Civil Code in 1895 the rule has been laid down that the concurrence of insolvency and a want of consideration are conclusive evidence of an intent to defraud existing creditors. 12 Cal. Jur. p. 1018, § 60, page 1019, and cases there cited, and page 1065.

As defined by the Civil Code, § 3450, a debtor is insolvent, within the meaning of this title, when he is unable to pay his debts from his own means, as they become due. In its popular and general sense and in the sense of the statute, insolvency is used to denominate the insufficiency of the entire property and assets of an individual to pay his debts. Van Riper v. Poppenhausen, 43 N. Y. 68, Paulding v. Chrome Steel Company, 94 N. Y. 334.

[3] For the reason that the debt was not due plaintiffs in October, 1927, when the conveyance attacked was executed, coupled with the facts that, in addition to the property conveyed which had a value of $17,500 and on which there was a mortgage of $3,500, defendants then owned the property purchased from plaintiffs upon which the deed of trust was given and which they had purchased for $25,000, and that, since there is no evidence in the record other than the price for which it was sold showing what the value of the property purchased was at any time, it must be presumed that its value was $25,000, and that the indebtedness owing by defendants at the time of the conveyance was $17,000 with the interest paid up and the principal not due, leaving an equity in the property of $8,000, it cannot be held that defendants were insolvent.

[4] With respect to the contention that the conveyance was fraudulent or without consideration, the undisputed evidence shows that the conveyance was made for the following considerations: (a) The canceling of the indebtedness due the grantees from the grantors, then amounting to between five and seven hundred dollars; (b) the assumption by grantees and the release of grantors of the indebtedness secured by incumbrance on the conveyed property, amounting to $3,500; and (c) the agreement on the part of the grantees to support and maintain the grantors during the balance of their lives, the value of which is indeterminate.

[5] It is only when a transfer is made or given voluntarily, or without a valuable consideration by a party while insolvent or in contemplation of insolvency, that the statute declares such transfer to be fraudulent and void as to existing creditors. Denehy v. Stewart, 41 Cal. App. 88, 181 P. 839; Hopkins v. White, 20 Cal. App. 234, 246, 128 P. 780, 785. A valuable consideration is such as money or the like, and the adequacy or inadequacy of the amount, or its disproportion to the actual value of the property, does not affect the question of the kind of consideration. Lindley v. Blumberg, 7 Cal. App. 140, 93 P. 894. The adequacy of the consideration is an element of the good faith of the transaction, and has no bearing upon whether the consideration is a valuable or good one. Frey v. Clifford, 44 Cal. 335, 342; Clark v. Troy, 20 Cal. 219, 220, 224.

There appears to be no doubt that the trial court was warranted in holding that the conveyance was made without any fraudulent intent, and, applying the rule that the findings of the trial court on a matter of fact will never be disturbed on appeal, except in those cases where the utter lack of any evidence to support such findings renders it a matter of law (Reay v. Butler, 95 Cal. 206, 214, 30 P. 208), it follows that the judgment of the trial court should not be disturbed, and, for the reasons herein discussed, it is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

HALL v. BARBER DOOR CO. et al. *

Civ. 7214.

District Court of Appeal, Second District, California.

Sept. 23, 1932.

Rehearing Denied Oct. 17, 1932.

Hearing Granted by Supreme Court Nov. 21, 1932.

1. Appeal and error ⇐927(3).

On appeal from judgment of nonsuit, plaintiff's evidence must be taken at its full probative value.

2. Negligence ⇐55.

Subcontractor engaged in installing doors *held* not liable to lessee of certain room for injury from falling of door, installation of which had not been completed before lease began.

Facts disclosed that lessee, in course of his business before term of lease began, raised large door of room or stall in leased premises, and while walking thereunder door fell and injured him. The term of lease began January 1, but lease provided that if premises should be available for occupancy by lessee prior to such date, lessee might take possession at any time without payment of additional money, and that lessee agreed that his entry into occupancy of premises should constitute acknowledgment that premises were suitable for lessee's business, and that building and improvements thereon were received by lessee in good condition.

3. Negligence ⇐124(1).

In lessee's action against subcontractor for injuries from falling of door before installation was completed and before lease began, admitting lease in evidence *held* not error.

4. Appeal and error ⇐901.

Appellate court cannot presume rejected testimony would have been material and relevant, but appellant must show error.

Appeal from Superior Court, Los Angeles County; Ruben H. Schmidt, Judge.

Action by John W. Hall against the Barber Door Company and others. From an adverse judgment, plaintiff appeals.

Affirmed.

Hoye & Boehler, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and Tanner, Odell & Taft and Philip C. Sterry, all of Los Angeles, for respondents.

IRA F. THOMPSON, J.

This is an appeal from a judgment of nonsuit, and an order denying a motion for a new trial.

The Central Manufacturing District, as owner, was erecting the Produce Terminal Building in Vernon, Cal., during December, 1927, and immediately prior thereto. The general contractor was the Wm. P. Neil Company, and the respondent the Barber Door Company was a subcontractor having agreed to install the doors, together with the hardware and mechanism for operating the same. The appellant was a lessee of room or stall No. 4216 in the building, the term of the lease beginning January 1, 1928, but the agreement therefor containing the following provisions: "1. In the event that the premises above described are available for occupancy by Purchaser prior to the first day of January, 1928, the Purchaser" (lessee) "may take possession of said premises at such time and without the payment of any additional money other than that specified in this agreement. 2. The purchaser agrees that its entry into occupancy of said premises shall constitute an acknowledgment that the same are suitable for its business and that the building and improvements

thereon have been received by the Purchaser in good and firstclass condition. * * *"

[1, 2] Plaintiff's complaint set forth that defendant took possession of the premises described in the lease about December 3, 1927, for the purpose of installing the doors and in particular a north exterior door in room No. 4216, which was to be approximately seventeen feet long and fourteen feet high, thus giving a clearance of above twelve feet; that on December 6 the door was substantially but not entirely completed; that two days thereafter, i. e., on December 8th, and when the door "had been practically but not entirely, completed, * * * and while the same was still under the control and supervision of defendants, and before the said improvement had been accepted and approved by the general contractor, or the owner, * * * plaintiff in the course of his business, raised said door and proceeded to walk out of said room No. 4216, passing under said door, so suspended; that when plaintiff had proceeded to a point directly beneath said door, due to the negligent manner in which said door, and the mechanism which operated it, had been constructed, installed and maintained, said door crashed down upon plaintiff" injuring him. It is also alleged that the defect was not obvious and was unknown to plaintiff, but on the other hand the defendant knew or by the exercise of reasonable care should have known its defective condition and also knew that plaintiff was operating the door subsequent to December 6th. In addition to the facts already noted, the evidence which was produced by the appellant and which, of course, must be taken at its full probative value, may be summed up as follows: At each end of the door was attached a cable which passed over and around a drum fitted near the end of the shaft and tightened thereon by set-screws on opposite sides of the shaft. Connected to the other end of the cable was the counterbalance weight, the two of them being almost, but not quite, as heavy as the door. At the time of the accident the door was, as alleged in the complaint, partially uncompleted. The only testimony describing their exact condition was elicited from the defendant, who testified that the door was hung on December 6th, the cables attached and the set screw tightened on the shaft, but that it was not completely installed; that the weight box had not been inclosed and the stops on the side of the door had not been completely installed; that the safety catches on the door had not been installed; that the shaft had not been countersunk for the set screws in the pulleys; that the cables carrying the weights and door had not been finally tested and that the safety catches referred to would have held the door even though there had been no counterweight. It was stipulated that at the time the door fell the set screws had slipped on the shaft, although it was expressly stated that the stipulation did not include "stipulating that the slipping of the set screws caused the falling of the door." The testimony on this point is to the effect that an inspection after the accident disclosed that the pulley or drum had turned on the shaft. Also it was testified that on the 6th the men who were working on the doors hung the one in question and worked it up and down; and that it is not customary to countersink the set screws on the day the door is hung; that the purpose of countersinking is to increase the safety factor; but that there is not a grave likelihood that without such countersinking the drum may give way unless there is greater weight on it than the door. An expert witness testified that in the mechanism described the greatest stress or major portion of the strain would be at the points of the screws, but a portion of it carried by the shaft.

From the foregoing recital of the allegations of the complaint and the testimony it is apparent that the appellant's contention that he made out a case in the trial court cannot be upheld. It is obvious that while appellant claims to have been a lessee in possession, hoping thereby to establish a relationship between himself and independent contractor (the respondent), yet in almost the same breath he attempts to reject those provisions of the lease agreement which show that his occupancy prior to January 1, 1928, i. e., on the day in question, was permissive only. His legal predicament is further made manifest by his statement that defendant was in possession for the purpose of installing the doors and that they were not completely finished and yet he (the appellant) was in possession. We fail to find in the situation portrayed any duty incumbent on respondent toward the appellant to have countersunk the set screws on the day the door was hung or prior to the 8th. While the reason for not doing so is not assigned in the testimony, to the effect that the screws are not countersunk on the day the door is set, it may well be, as is suggested in the briefs, that it is necessary to allow the cables to stretch. Such an intimation may possibly be contained in the sworn statement that the cables had not been finally tested. Be that as it may, it is obvious, as before stated, that no duty toward appellant to sink them rested upon the respondent. In Schmidt v. Bauer, 80 Cal. 565, 22 P. 256, 5 L. R. A. 580, the following quotation from Sweeny v. Old Colony & Newport R. Co., 10 Allen (Mass.) 368, 372, 87 Am. Dec. 644: "'In order to maintain an action for an injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff which the defendant has left undischarged or unfulfilled,'" is approved. It is manifest that appellant could not recover under the rule. Furthermore,

bearing in mind the quoted provisions of the lease the following language from Aguilar v. Riverdale Co-operative Creamery Ass'n, 104 Cal. App. 263, 285 P. 889, 890, is applicable. First: "* * * If his status was that of a bare licensee he is barred from recovery because, in that capacity, he assumed all the risks attached to the condition of the premises or which were incident to the operation of the business conducted thereon, and appellant owed him no duty except to refrain from doing him willful or wanton injury (Lindholm v. Northwestern Pac. R. Co., 79 Cal. App. 34, 248 P. 1033, and cases cited therein); and no such injury is claimed or established." Second: "Nor does the fact that appellant granted respondent permission to come upon the premises affect respondent's status as a bare licensee, for it is well settled that mere permission of an owner to enter and use a portion of his premises does not of itself amount to an invitation."

[3] In this connection it is argued that the trial court erred in admitting over the objection of plaintiff and during the time he was being cross-examined his lease with the Central Manufacturing District. If it was material to prove that he was a lessee, then certainly it was important to know the conditions under which he was given permission to use the premises particularly those appertaining to his possession prior to the beginning of the term. The prior discussion demonstrates that appellant's contention cannot be sustained.

[4] Complaint is also made that the court erroneously sustained objections to certain questions propounded to a certain expert witness. It is to be noted that the questions were not directed to the point of whether the door was hung in accordance with established principles, but whether it was the most efficient manner and whether the witness could under the circumstances compute the safety factor. Aside from this consideration, however, is this prevailing fact, that the record is silent upon and fails to disclose how appellant was injured by the sustaining of the objections. It is incumbent upon appellant to show error. We cannot indulge the presumption, in the absence of a showing to that effect, that rejected testimony would have been material and relevant. Crusoe v. Clark, 127 Cal. 341, 59 P. 700, Callaway v. Wilson, 141 Cal. 421, 74 P. 1035, and Estate of Angle, 148 Cal. 102, 82 P. 668.

It is not necessary for us to pass upon the assignment of error in the exclusion of certain conversation which appellant sought to elicit between one of the men who hung the door and the appellant because he very properly and frankly admits that the offer falls "short of the requirement of the rule" with respect to foundation.

Other points are suggested, but discussion thereof would serve no useful purpose.

There is no appeal from an order denying a motion for a new trial.

Judgment affirmed. Appeal from order denying motion for a new trial dismissed.

We concur: CRAIG, Acting P. J.; STEPHENS, Justice pro tem.

126 Cal.App. 219

FRIPP et al. v. MOODY et al.

Civ. 8662.

District Court of Appeal, First District, Division 2, California.

Sept. 23, 1932.

Rehearing Denied Oct. 22, 1932.

Appeal and error ⇐417(1).

Trial judge *held* to have properly refused to certify transcript where defendant merely gave notice that he had appealed from the judgment (Code Civ. Proc. § 953a).

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul and Charles S. Burnell, Judges.

Action by George M. Fripp and others against Lucile K. Moody and others. From a judgment in favor of plaintiffs, and an order denying his motion to set aside his default and vacate the decree, defendant Nelson Story Hogan, sued as John Doe, appeals.

Affirmed.

Elon G. Galusha, of Los Angeles, for appellant.

Glen Behymer, of Los Angeles, for respondents.

STURTEVANT, J.

On July 2, 1930, the trial court made findings, and on the same day it caused a judgment to be entered against certain defendants in the above-entitled action. On August 20, 1930, the defendant Hogan made a motion to set aside his default and vacate the decree. His motion was denied on August 28, 1930, and thereafter on August 30, 1930, he appealed from the judgment and the order. On September 19, 1930, the defendant gave notice that he had appealed and asked for a transcript. Code Civ. Proc. § 953a. The transcript was certified by the county clerk on October 10, 1930, but, when presented to the trial judge, acting on the objection of the plaintiffs, he refused to certify the transcript. The refusal was under the facts clearly cor-

rect. Title Ins., etc., Co. v. California, etc., Co., 168 Cal. 397, 143 P. 723.

In his brief the defendant bases all of his points on his objections to the ruling made refusing to set aside his default. But, by reason of the plaintiffs' objections to the record which is before us, those points may not be considered by this court.

However, if we were at liberty to act on the record before us, it would be necessary to enter the same judgment. In making his motion to vacate his default the defendant attempted to proceed under section 473 of the Code of Civil Procedure. To excuse his neglect to appear and file his answer in due time, he alleged that he was incarcerated in the county jail when the summons was served on him. The mere fact that he was so incarcerated without the statement of additional facts showing that he was deprived of means to communicate with his attorney did not constitute an excuse for the defendant's failure to appear and plead after being served with the summons.

The judgment and the order are affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

126 Cal.App. 280

CREAGER v. SUPERIOR COURT OF SANTA CLARA COUNTY et al.

Civ. 8484.

District Court of Appeal, First District, Division 2, California.

Sept. 24, 1932.

Rehearing Denied Oct. 24, 1932.

Hearing Denied by Supreme Court Nov. 21, 1932.

1. Divorce ⇨331.

California court establishing as foreign judgment Nevada judgment granting alimony, for purpose of enforcing it, gave it full faith and credit (Const. U. S. art. 4, § 1).

2. Divorce ⇨331.

Petitioner for prohibition to restrain collection of alimony under foreign judgment could not complain if local statute exceeded requirements of full faith and credit clause of Federal Constitution (Code Civ. Proc. § 1913; Const. U. S. art. 4, § 1).

3. Divorce ⇨331.

In proceeding to collect alimony under foreign judgment, court properly entered judgment establishing unimpeached foreign judgment (Code Civ. Proc. § 1913; Const. U. S. art. 4, § 1).

4. Divorce ⇨331.

That Superior Court treated its judgment establishing foreign judgment granting alimony as original alimony award for purpose of collecting alimony by contempt *held* proper (Code Civ. Proc. § 1913; Const. U. S. art. 4, § 1).

Application by Homer H. Creager for a writ of prohibition, prayed to be directed to the Superior Court of Santa Clara County, and Robert R. Syer, Judge thereof, to restrain further proceedings under an order to show cause for contempt for failure to pay alimony.

Writ denied.

William S. Howe, of Sacramento, for petitioner.

John J. Jones, of San Jose, for respondents.

SPENCE, J.

Petitioner seeks a writ of prohibition to restrain the respondent court from further proceedings under an order to show cause.

Petitioner and Rowena D. Creager were husband and wife up to the time that a decree of divorce was obtained by the wife in the Second judicial district court of the state of Nevada. By the terms of that decree, petitioner was ordered to pay to said Rowena D. Creager the sum of $30 per month as alimony commencing on the 1st day of March, 1930. In 1931 said Rowena D. Creager filed in the respondent court an action seeking to enforce the Nevada decree. The complaint was entitled "Complaint on Foreign Judgment." Plaintiff set forth the decree of the Nevada court, and alleged that no appeal had been taken and that the decree had not been modified. She made further allegations regarding the amount due and unpaid thereunder and the fact that both plaintiff and defendant were residents of this state. The prayer of the complaint asked that "said judgment be established as a foreign judgment," and that the unpaid amount be adjudged due and owing from defendant to plaintiff. Petitioner defaulted, and the trial court entered judgment as follows: "That said judgment be and the same is hereby established herein as a foreign judgment. It is further ordered, adjudged and decreed that there is now due and owing at this date from defendant to plaintiff as and for alimony under said decree the sum of Five Hundred and Seventy Dollars ($570.00)." Thereafter, upon affidavit of plaintiff, the trial court ordered petitioner to show cause "why he should not be adjudged guilty of contempt of court for failure to pay alimony." Thereupon petitioner commenced this proceeding.

Petitioner contends that "said order is void for the reason that it was and is in excess of and beyond the jurisdiction of said court to make the same." In support of this contention, he proceeds to question the validity of the judgment upon the ground that the Neva-

da decree upon which it was based was not a final judgment within the protection of the full faith and credit clause of the Federal Constitution (Const. of United States, art. 4, § 1), but a judgment for continuing monthly payments of alimony subject to the further order of the Nevada court. This general question has been before the courts in numerous cases, among which are: Sistare v. Sistare, 218 U. S. 1, 30 S. Ct. 682, 54 L. Ed. 905, 28 L. R. A. (N. S.) 1068, 20 Ann. Cas. 1061; Lynde v. Lynde, 181 U. S. 183, 21 S. Ct. 555, 45 L. Ed. 810; Barber v. Barber, 21 How. 582, 16 L. Ed. 226; Cyr v. Cyr, 206 Cal. 8, 272 P. 751; Bruton v. Tearle, 117 Cal. App. 696, 4 P.(2d) 623; Rinkenberger v. Rinkenberger, 99 Cal. App. 45, 277 P. 1096; Cummings v. Cummings, 97 Cal. App. 144, 275 P. 245; Levine v. Levine, 95 Or. 94, 187 P. 609; McGregor v. McGregor, 52 Colo. 292, 122 P. 390; Holton v Holton, 153 Minn. 346, 190 N. W. 542, 41 A. L. R. 1415; Armstrong v. Armstrong, 117 Ohio St. 558, 160 N. E. 34, 57 A. L. R. 1108; Page v. Page, 189 Mass. 85, 75 N. E. 92, 4 Ann. Cas. 296. We deem it unnecessary, however, to discuss these authorities. Petitioner's contention here is similar to that made by the appellant in Cummings v. Cummings, supra, where the court said on page 152 of 97 Cal. App., 275 P. 245, 248: "It should be borne in mind that appellant's complaint is not of the failure of our courts to recognize a judgment of a sister state as required by the full faith and credit clause of the Federal Constitution. His contention is that the trial court gave too much faith and credit to the New York judgment. Hence there is no federal question involved."

[1-3] We think it entirely clear that the judgment of the respondent court gave full faith and credit to the Nevada judgment in its entirety. By its terms the Nevada judgment was "established herein as a foreign judgment." If such recognition exceeds the requirements of the Federal Constitution, but is authorized by the laws of this state, petitioner may not complain. Section 1913 of the Code of Civil Procedure provides: "The effect of a judicial record of a sister state is the same in this state as in the state where it was made, except that it can only be enforced here by an action or special proceeding. * * *" This section clearly implies that an action may be maintained in this state to enforce a foreign judgment, and, as the Nevada judgment was not impeached, the trial court properly entered its judgment establishing the Nevada judgment for the purpose of enforcement here.

[4] The question then arises as to the manner of its enforcement. Petitioner contends that it cannot be enforced by contempt proceedings like an original award of alimony by the respondent court, but only by execution in the same manner as an ordinary money judgment. In our opinion, this contention cannot be sustained. Petitioner's contention would have some force if the plaintiff had merely used the Nevada decree as the basis for obtaining an ordinary money judgment for accrued installments of alimony in an action at law against petitioner. In such case the language quoted by petitioner from In re Williams' Estate (Sur.) 118 N. Y. S. 562, would be applicable. The court there said at page 565: "From these authorities it would appear that when the claimant saw fit to transfer her claim, which was in judgment in the state of South Dakota, to a suit at law in the state of New York, and recover judgment thereupon, the judgment obtained was simply a mere money judgment, and said judgment was enforceable, not as a judgment in alimony, as the original judgment in South Dakota could be enforced, but simply as a money judgment, similar to a judgment ex contractu." But here the plaintiff did not seek a mere money judgment, but sought and obtained a judgment whereby the Nevada decree was "established herein as a foreign judgment." For the purpose of enforcement in this state, we believe that the respondent court properly treated its own judgment, based upon and establishing the Nevada judgment, in the same manner as an original award of alimony by the respondent court. The language used in Cummings v. Cummings, supra, supports this view. The court there said at page 151 of 97 Cal. App., 275 P. 245, 248: "While the question seems to be a new one in this state, yet there is respectable authority in other states to support the doctrine that a judgment for alimony of a sister state may be enforced in the same manner that it could have been enforced if originally obtained here." This question is discussed at some length in Fanchier v. Gammill, 148 Miss. 723, 114 So. 813, 814, and the court came to the conclusion that "a decree for alimony granted by a foreign court may be established and enforced by and through the equity courts of our state," and that such judgment "with its peculiar right of enforcement, as one for alimony, should be established and enforced by the equity courts of our state in the same manner, and to the same extent, as it could have been enforced by our court if originally obtained in our state."

We are therefore of the opinion that the respondent court did not exceed its jurisdiction in ordering petitioner to show cause why he should not be punished for contempt. The alternative writ of prohibition is discharged, and the petition denied.

We concur: NOURSE, P. J.; STURTEVANT, J.

ABBOTT v. COOPER et al. *

Civ. 939.

District Court of Appeal, Fourth District, California.

Sept. 23, 1932.

Rehearing Denied Oct. 20, 1932. Hearing Granted by Supreme Court Nov. 23, 1932.

1. Appeal and error ⇐927(3).

On appeal from judgment of nonsuit, plaintiff's evidence must be taken as true and all reasonable inferences must be drawn in plaintiff's favor.

2. False imprisonment ⇐8.

Jailer taking into custody private police officer arrested without warrant by officer of rival private police patrol stating he did not know what charges were, *held* liable for false imprisonment (Pen. Code, §§ 142, 1597, 1611; Pol. Code, § 4157).

Facts disclosed that both the officer arrested and the arresting officers were members of different private police patrols, and also deputies under different constables of the township; that officer suing for false imprisonment was arrested without warrant and kept in custody for about 8½ hours and then released; that he was refused release on bail or the use of a telephone; and that on jailer's inquiry as to what the charges were, arresting officer replied that he did not know.

3. Sheriffs and constables ⇐157(3).

Sheriff and his surety *held* not liable for false imprisonment for deputy's act of taking, as jailer, into custody private police officer arrested without warrant or charge against him (Pen. Code, §§ 142, 1597, 1611; Pol. Code, § 4157).

Sheriff and surety were not liable for such action of deputy sheriff acting as jailer because, though jailer had general authority to receive prisoners, such authority was not unlimited and unrestricted, and because jailer taking prisoner arrested without warrant, with information indicating that no crime was charged against such prisoner, not only exceeded his authority, but assumed an authority in a case where the law imposed upon him no duty to act.

4. Sheriffs and constables ⇐100.

Constable *held* not liable for his deputy's unlawful imprisonment of private police officer made without constable's knowledge, consent, or ratification.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by L. A. Abbott against Edward F. Cooper and others. From the judgments, plaintiff appeals.

Affirmed in part, and reversed in part.

Curtis Hillyer and Irve C. Boldman, both of San Diego, for appellant.

Wright & McKee and C. M. Monroe, all of San Diego, for respondent Webber.

Harvey H. Atherton, of San Diego, for other respondents.

BARNARD, P. J.

This is an action to recover damages for false imprisonment. At the time of his arrest and imprisonment, plaintiff was engaged in conducting a private police patrol in the city of San Diego, being also a deputy under one of the constables of San Diego township. The defendants Carson and Worsham were engaged in conducting another private police patrol in or about the city of San Diego, both being also deputies under the defendant Webber, another constable of San Diego township. About 2 o'clock on the morning of November 26, 1930, Carson and Worsham arrested the plaintiff and took him to the county jail where, upon their request and order, he was locked up by the defendant Macy, who, as a deputy under the defendant Cooper, the sheriff of San Diego county, was in charge of the jail. The plaintiff was held in jail for about eight and one-half hours and then released. This action was brought against the two persons making the arrest, the constable under whom they were deputies, the deputy sheriff in charge of the jail, the sheriff, and the surety on his bond. The defendants Carson and Worsham made no appearance and judgment against them was entered in the sum of $2,000. At the conclusion of the plaintiff's case judgments of nonsuit were entered in favor of the other four defendants, and from these judgments of nonsuit this appeal is taken.

It appears from the evidence that on the night in question, the appellant and one of his assistants, named Sizer, were driving along in an automobile upon a mission connected with their business of a private police patrol. While so proceeding they came upon Carson and Worsham, whose car had in some manner become caught in a bridge, and stopped and assisted them in extricating their car. Carson and Worsham recognized the appellant and called him by name. Shortly after the appellant drove on, Carson and Worsham followed him and ordered him to pull into the curb. When he complied Worsham asked him what he was looking for, and upon receiving the reply, "I don't know as that is any of your business," Carson ordered the appellant from his car and told him he was under arrest. The appellant's gun was taken from him and he, with Sizer, was taken to the county jail. The respondent Macy received the appellant and took from him various articles, including his deputy constable badge and his private po-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 23 P.2d 1027.

lice badge. Upon the appellant's asking Macy the reason for his detention, Macy turned to Carson and asked him what the charges were, to which Carson replied: "Damned if I know. Damned if I believe he is allowed out in the county. We will leave him in here over night and let Sheriff Cooper decide it in the morning." Whereupon Macy asked Carson if Sizer was to be arrested also, to which Carson replied: "No, he is our friend; we don't want him, we want Abbott." Thereupon Sizer was released. The appellant also testified that he was refused permission to use the telephone; that he asked to be released on bail, saying: "I am a bonded man. If I have to have bail, can't I get out on bail." That Macy replied: "No, it's up to Carson, if he wants to let you out, it's all right." And that Macy then asked Carson if he would let the appellant out and that Carson replied: "No, I am carrying out my orders, lock him up." The appellant further testified that at the time of his arrest and imprisonment he was dressed in a blue uniform; that he had on his badge; that he was operating under a license from the state prison board; and that about 8:30 o'clock the next morning he was handed his articles and told to, "Get out of here."

[1] This, being the only evidence, must be taken as true in view of the motion for nonsuit, and all reasonable inferences therefrom must be drawn in favor of the appellant. It seems a fair and reasonable inference from this evidence that the arrest in question was made because of some rivalry between the respective private patrols and not because of any offense committed by the appellant. So far as appears from the evidence, there was no justification for the arrest, it was made without authority of law, and for the purposes of this appeal it must be held to have been unauthorized and unlawful. The only questions raised relate to the responsibility of parties other than those making the arrest.

[2] The first question presented is as to the liability of respondent Macy. The appellant argues that it appears from the evidence that Macy knew or should have known that the arrest was illegal and that he had no right to imprison the appellant. On behalf of this respondent it is urged that, under sections 142, 1597, and 1611 of the Penal Code and section 4157 of the Political Code, it was his duty to receive and hold the appellant when presented at the jail as a prisoner by the defendant Carson, a peace officer. It is argued that such a jailer is merely a ministerial officer and that it is no part of his duty to make any investigation or any decision as to whether or not any person brought to the jail shall be kept there. While it should not be held to be the duty of a jailer to make any extensive investigation before receiving a prisoner brought to him for custody, we think this contention of this respondent cannot be fully sustained. This arrest was made without a warrant, and whether Carson and Worsham be considered as having made the arrest as deputies of a constable or as private persons, they were only authorized to make an arrest for an offense committed or attempted in their presence or under certain circumstances upon the belief that the person arrested had committed a felony. Pen. Code, §§ 836 and 837. In Boaz v. Tate, 43 Ind. 60, the court said: "We have said that the marshal had authority to arrest when the offence was committed in his view and, under certain circumstances, commit to jail; that such authority necessarily conferred upon the jailer the right to receive and imprison the prisoner. If he had the right to receive the prisoner when brought to him by the marshal with the declaration that he had been arrested for an offence committed on view, that declaration would stand in the place of a mittimus in other cases, and it would be the duty of the jailer to receive him as a prisoner, without regard to the question of his guilt or innocence."

Conceding that a similar rule applies in this state and that a jailer is justified in receiving a prisoner without a warrant upon the declaration of the officer or person bringing him in that the arrest has been made for an offense on view or in the belief that a felony has been committed, the circumstances here fall far short of showing any such justification. Even if it could be held that a jailer is authorized to receive and hold a prisoner in the absence of any statement or declaration on the part of the officer or person bringing him in, we think it must be held that such a jailer has no authority to receive and place in custody a person brought in by another when the information furnished to the jailer affirmatively shows that the arrest has been made without authority, and that the person making the arrest neither knows what the charge is nor makes the claim that any offense has been committed either in his presence or otherwise. We think the information here conveyed to the respondent Macy was such that he knew or should have known that the arrest was illegal, and was such as to inform him that he had no right to imprison the appellant. It follows that, so far as shown by this evidence, the respondent Macy was himself liable for his wrongful act, whether done officially or otherwise (Gomez v. Scanlan, 155 Cal. 528, 102 P. 12), and that, as to him, the judgment of nonsuit was improperly entered.

[3] The next question is as to the liability of the respondent sheriff and his surety for the unauthorized act of the respondent Macy. In Jones v. Van Bever, 164 Ky. 80, 174 S. W. 795, 801, L. R. A. 1915E, 172, the

court said: "From this uniform line of authority we find the rule to be thoroughly established that, in order to render the sheriff liable for the act of his deputy, the act of the deputy must be done by virtue of his office as deputy; and, in order for the deputy's act to have that character, it must be done in an attempt to serve or execute a writ or process, and as a means to that end, or in acting under a statute giving him the right to arrest without a warrant; otherwise he is acting as an individual. In other words, when a deputy sheriff, although he assumes to act as such, commits a wrong under circumstances where the law does not impose a duty on him to act at all, the wrong is not a violation of any official duty, and is not embraced within the sponsorship of his principal."

In Hawkins v. Thomas, 3 Ind. App. 399, 29 N. E. 157, 159, the court said: "It follows as a logical sequence that in an action upon an official bond it is necessary to allege and prove the existence of conditions and circumstances requiring some official action upon the part of the officer, and that the injury sought to be redressed was inflicted while the officer was so attempting to act or on account of his failure to act at all. In the complaint in the case before us, the only allegation upon this subject is the general averment that the marshal and his alleged deputy were acting illegally, but under color of office. It does not appear that any writ or process of any kind had issued to either of them, or that any offense had been committed against the federal laws, or that they even claimed such to be the case. The averment that the officer was acting under color of authority is a mere conclusion, and is not sufficient to show that the injury resulted from an official act."

In Ivy v. Osborne, 152 Tenn. 470, 279 S. W. 384, the court said: "It appears from the declaration that the deputy sheriff arrested plaintiff without authority. He had no warrant, and no offense was committed in his presence. The liability of the sheriff, for the acts of the deputy, is not controlled by any statute of this state, but is grounded upon the common law. For failure of the deputy to properly perform an official act, deemed the act of the principal, the sheriff and his bondsmen would be directly liable to the person aggrieved. * * * But for wrongs done while acting beyond the scope of his authority, the deputy alone is liable as a personal wrongdoer."

The case of Hawkins v. Thomas, supra, is quoted with approval in Felonicher v. Stingley, 142 Cal. 630, 76 P. 504, 505, in which case the court also said:

"The weight of authority and the rule in this state is that the officer and his sureties are responsible for every abuse of his official powers. When he has in his hands a valid writ, and, under cover of the writ, claiming to act under it, he goes beyond it, and commits a trespass, his sureties are liable. * * *

"The sureties of a sheriff or constable are not liable for trespasses committed by such sheriff or constable not under color of office, nor in the line of official duty. For malfeasance and extraofficial acts the surety is not responsible. Murfree on Official Bonds, §§ 460, 461, and cases cited; Mechem's Public Office & Officers, § 238. Therefore, in order to charge the sureties in this case, it is necessary to allege and prove that Stingley, while attempting to perform some official act in the general line of his official duties, committed an unlawful trespass upon plaintiff or her property."

In that case the court further quoted from the case of Hawkins v. Thomas, as follows: " 'But the officer was acting under a valid writ, and by virtue of the mandate of the law, and the trespass consisted in an abuse of the power vested in him, and not in the performance of an act which the law did not enjoin upon him at all. It was an instance of *exceeded*, rather than *usurped*, power. Such acts are within the express line of the surety's undertaking—that his principal shall faithfully discharge the duties of his office according to law. But when an officer, though he assumes to act as such, commits a wrong under circumstances where the law does not impose upon him any duty to act at all, the wrong is not a violation of any *official duty*, and consequently is not embraced within the sponsorship of the surety.' "

These authorities seem to lay down the rule that where a deputy, in performing some duty imposed upon him by law, exceeds his authority, the act performed is in the line of his duty and his principal will be liable for any wrongful performance thereof; but where such a deputy, instead of merely exceeding his authority in fulfilling a duty imposed upon him by his position, proceeds to usurp a power and authority not given him by law, and to act in a matter in which the law imposes upon him no duty to act, such action is not in the line of his official duty and therefore his principal is not responsible therefor. While it may be said that the respondent Macy had general authority to receive prisoners and that this was in the line of his duty, we think that such authority is not unlimited and not unrestricted; that in this instance he not only exceeded his authority, but assumed an authority in a case where the law imposed upon him no duty to act; and that for this usurpation of power his principal is not liable. There is nothing in the nature of the office of a deputy sheriff acting as a jailer which gives him authority to imprison a person without a

warrant, when the only information given him clearly indicates that no crime is charged against the person and that the person making the arrest has acted without authority. It neither appears here that respondent Macy was acting under instructions from the sheriff, pursuant to any writ, or in the scope of his official duty as authorized by law. Under such circumstances, we think neither the sheriff nor his surety is liable.

[4] The only remaining question is as to the liability of the respondent Webber. No attempt was made to prove knowledge, acquiescence, consent, or ratification upon his part, as to any of the acts of his deputies on this occasion, and it was not even shown that the things done by them were done as such deputies. In any event, under the authorities above cited, Carson and Worsham were merely personal wrongdoers, and this respondent could not be held liable for this unwarranted arrest made without even a semblance of legal authority.

The judgment of nonsuit in favor of Edwin S. Macy is reversed. The judgment of nonsuit in favor of each of the other respondents is affirmed.

We concur: MARKS, J.; MORTON, Justice pro tem.

126 Cal.App. 223

McBRIDE v. DORR et al. (two cases).

Civ. 7189.

District Court of Appeal, Second District, Division 2, California.

Sept. 23, 1932.

1. Bills and notes ⇐518(1).

Evidence *held* to sustain finding that there was no consideration for notes sued on, and that therefore no recovery could be had thereon.

2. Appeal and error ⇐843(2).

There being no consideration for notes sued on, question as to their due execution was moot.

Appeals from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Actions by J. D. McBride against D. G. Dorr and others, which were consolidated for trial. From an adverse judgment, plaintiff appeals.

Affirmed.

Kennicott & Williams, of Los Angeles, for appellant.

Salisbury & McNeil and Halverson & Halverson, all of Los Angeles (Byron Halverson and B. R. Ware, both of Los Angeles, of counsel), for respondents.

CRAIG, Acting P. J.

Two actions upon promissory notes were consolidated for the purposes of trial in the Superior Court, upon which a judgment adversely to the plaintiff's demands was rendered, and he appealed.

[1] Many asserted grounds assigned for reversal are resolved by the appellant into three concise comprehensive inquiries which are presented for determination. Briefly stated, the questions to be decided are, as to whether or not said notes were completely executed, were based upon an illegal consideration, and whether or not any consideration was given therefor. Since each of these questions arises from specifications of insufficiency of the evidence, it becomes apparent that, if there was sufficient substantial evidence before the trial court to support the findings of fact and judgment, upon any hypothesis, as to the third specification, the judgment cannot be set aside. Chaplin v. Amador, 93 Cal. App. 358, 269 P. 544. It appeared that the plaintiff and others as promoters and directors of a corporation each furnished funds with which the same was established and qualified to issue shares of its capital stock in this state, that at the instance of the board of directors statements of their respective investments were directed to be prepared, and McBride was given promissory notes, renewals of which were the subject of the instant controversy, as evidences of his advancements pending the issuance of certificates of stock therefor. It was contended at the trial and is here urged that said notes represented an indebtedness of the appellant's copromoters, yet a witness whose evidence is relied upon by all of the parties, and who was familiar with the transaction, testified that the board decided to determine, when in funds, from the sale of stock which, if any, items should be adopted, ratified, and paid as the indebtedness of the corporation; and to quote: "The Court: Paid out of this money that came in? A. No, paid by the issue of capital stock. That is my recollection, that it was to be paid by the issue of capital stock to those persons who had incurred this expense." "In helping organize the company, he [McBride] was to have issued to him the number of shares of stock stated in the application. In addition to that, in addition to those shares he was to have issued to him stock up to the amount of cash that he had advanced." It is conceded in effect that, upon the advice of their counsel, the board ultimately decided not to issue any stock, although authorized so to do by a per-

mit from the division of corporations. From this and other evidence of like import the trial court may well have concluded that the instruments in question were not intended as contract or evidences of financial obligations, but that they were executed pursuant to an oral understanding of a contemplated stock issue, as evidences of an investment in a common enterprise. Smith Co. v. Muller, 201 Cal. 219, 256 P. 411; Gleeson v. Dunn, 113 Cal. App. 347, 298 P. 119.

[2] Since it inevitably follows that there was no consideration for the instruments upon which the action was founded, the question as to their due execution becomes moot.

The judgment is affirmed.

We concur: IRA F. THOMPSON, J.; STEPHENS, Justice pro tem.

126 Cal.App. 221

MERCANTILE FINANCE CORPORATION v. HUCKE et al.

Civ. 8651.

District Court of Appeal, First District, Division 2, California.

Sept. 23, 1932.

Appeal and error ⇐973.

Appellate court cannot disturb order on conflicting evidence dismissing action for failure to bring it to trial, absent clear abuse of discretion (Code Civ. Proc. § 583).

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by the Mercantile Finance Corporation, a corporation, against H. A. Hucke and others. From an order dismissing the action, plaintiff appeals.

Affirmed.

Samuel S. Gelberg, of Los Angeles, for appellant.

John C. Kleber, of Los Angeles, for respondents.

NOURSE, P. J.

This is an appeal from an order dismissing the action made under section 583, Code of Civil Procedure, for want of prosecution within two years after answer filed.

The complaint (to foreclose a mortgage on real property) was filed June 10, 1927, against thirty-five defendants. The last answer was filed October 7, 1927. The default of seven defendants was entered and the plaintiff voluntarily dismissed as to all except Sorrille. The cause was set for trial on April 26, 1929, but went off the calendar. On October 31, 1929, plaintiff gave notice of motion to set the cause for trial and August 12, 1930, was set for that purpose. At that time the defendant Sorrille moved to dismiss the action upon the ground that plaintiff had failed to bring it to trial within two years after the answer was filed. This motion was granted.

Appellant's attack upon the order is based on the ground that the trial court abused its discretion in granting the motion. Discretion in this respect is exercised on determining the issue of fact whether the plaintiff's failure to bring the cause to trial within the two-year period is excused. Where the evidence on this issue is conflicting, the appellate courts cannot interfere with the order unless the whole record shows a clear abuse of discretion. Here the appellant cites some circumstances tending to excuse its neglect over a part of the period only. The evidence as a whole, however, discloses that for more than two years after respondents' answer was filed appellant's neglect was inexcusable.

The order is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

125 Cal.App. 602

Frances C. BOWMAN, Plaintiff, Cross-Defendant, and Respondent, v. Horace D. BOWMAN, Defendant, Cross-Defendant, and Respondent, and Bryan Houston Bowman, Defendant, Cross-Complainant, and Appellant.

Civ. 1009.

District Court of Appeal, Fourth District, California.

Sept. 23, 1932.

Hearing Denied by Supreme Court Oct. 27, 1932.

Appeal from Superior Court, San Diego County; A. C. Finney, Judge.

On rehearing.

Denied.

For former opinion, see 13 P.(2d) 1049.

Hill, Morgan & Bledsoe and Kenneth K. Wright, all of Los Angeles, for petitioner.

Wright & McKee and C. M. Monroe, all of San Diego, for respondent Horace D. Bowman.

Stearns, Luce & Forward, of San Diego, for respondent Frances C. Bowman.

MORTON, Justice pro tem.

Counsel for appellant in their petition for rehearing do not seem to grasp the underly-

ing reason for our affirmance of the judgment of the lower court. 13 P.(2d) 1049.

Bryan Houston Bowman filed her cross-complaint in the court below seeking to vacate an order of the superior court which set aside the final decree of divorce terminating the marriage of Frances C. Bowman and Horace D. Bowman. In filing this cross-complaint she took the position of a plaintiff (cross-complainant) asking relief in a court of equity. The trial court, upon ample evidence, found that she did not come into court with clean hands. Under the well-established doctrine of equity that a person must come into a court of equity with clean hands, the trial court denied her the relief she sought in her cross-complaint, and in so far as she sought redress under its allegations, left her where it found her. For a like reason, among others, we also left her in the same position she occupied at the time she filed her cross-complaint, in so far as the relief she sought by this pleading is concerned.

Petition for rehearing denied.

We concur: MARKS, Acting P. J.; JENNINGS, J.

126 Cal.App. 241

BUENA VISTA WATER STORAGE DIST. v. SHIELDS, County Treasurer.

Civ. 1027.

District Court of Appeal, Fourth District, California.

Sept. 23, 1932.

Rehearing Denied Oct. 20, 1932. Hearing Denied by Supreme Court Nov. 21, 1932.

1. Statutes ⇐194.

Special statutory provision controls general one; special provision being treated as exception to general provision.

2. Waters and water courses ⇐183½.

County treasurer may receive water storage district's assessments without county auditor's certificate, and pay district warrants without auditor's warrant (St. 1911, p. 1095; Pol. Code, §§ 4093, 4101, 4102; St. 1921, p. 1727, as amended).

This is so, since provisions of St. 1921, p. 1727, as amended, that landowners in the district must pay their assessments to county treasurer, that county treasurer shall forthwith pay this money into county treasury, and that county treasurer must pay out this money upon a warrant issued by the officers of the district, are controlling over provisions of Pol. Code, §§ 4093, 4101, 4102, that the treasurer must receive no money into the treasury unless accompanied by auditor's certificate, and disburse moneys placed in his custody by official authority only on county warrants issued by auditor.

3. Waters and water courses ⇐183½.

Water Storage District Act provisions for handling district funds *held* controlling over Political Code provisions requiring auditor's certificate for receipts and auditor's warrant for disbursements (St. 1921, p. 1737 et seq., §§ 20, 56, and §§ 19, 21, 24, 28, as amended; St. 1911, p. 1095; Pol. Code, §§ 4093, 4101, 4102).

4. Waters and water courses ⇐183½.

County treasurer *held* obligated to pay warrant issued by water storage district, where county treasury contained sufficient funds, notwithstanding treasurer allegedly kept district fund segregated and it was stolen (St. 1911, p. 1095; Pol. Code, §§ 4093, 4101, 4102; St. 1921, p. 1727, as amended).

This was so, since St. 1921, p. 1727, as amended, clearly provides that, while a record of the water district fund shall be kept and the district credited in this fund with moneys collected for it, the actual cash shall be placed in the county treasury, which implies the mingling with other moneys therein, and negatives the idea that money so placed shall retain its identity.

Petition by the Buena Vista Water Storage District for a writ of mandate against J. P. Shields, County Treasurer of Kern County.

Writ granted.

Hearing denied by Supreme Court; SEAWELL, J., dissenting, 15 P.(2d) 861.

J. E. Woolley, of San Francisco (Vincent J. McGovern, of San Francisco, of counsel), for petitioner.

Ray Bailey, Dist. Atty., and W. A. McGinn, Deputy Dist. Atty., both of Bakersfield, for respondent.

Thornton & Watt, John Ralph Wilson, and Myrick & Deering and Scott, all of San Francisco, amici curiæ.

BARNARD, P. J.

This is an application for a writ of mandate, an alternative writ having been issued by the Supreme Court and made returnable before this court. The purpose of the action is to compel the respondent county treasurer to pay from a fund asserted to be in the county treasury to the credit of the petitioner a certain warrant issued by the petitioner district.

The petition alleges that the petitioner is a water storage district organized and existing under and by virtue of the California Water Storage District Act; that the respondent Shields is the county treasurer of Kern county; that in the year 1929 an as-

sessment was levied upon the lands within the district in the sum of $942,731.11, the assessment being unpaid and bonds being issued and sold for that amount in accordance with the provisions of the Water Storage District Act; that, pursuant to the provisions of the act named, the petitioner has from time to time called installments of accrued interest on said assessment and said installments have been paid to respondent and by him forthwith paid into the county treasury of Kern county to the credit of the bond fund of petitioner; that on June 28, 1932, and ever since that date, there has been and now is on deposit in said county treasury to the credit of said bond fund the sum of $31,861.81; that on June 28, 1932, pursuant to a resolution of its board of directors, the petitioner made and issued its warrant, drawn on respondent, in the sum of $28,281.93, for the purpose of paying the bond interest due and payable on July 1, 1932; that said warrant was presented for payment to the respondent on June 30, 1932; and that said respondent refused and still refuses to pay the same.

In his return to the writ, the respondent admits most of the allegations of the petition, but justifies his refusal to pay the warrant upon two grounds. While admitting that the amounts alleged to have been paid to him by the landowners in the district were actually received by him as county treasurer and that they were by him paid into the county treasury, it is alleged that this was done by him without the authority of the auditor of that county, and that he has never received the authorization of said auditor to receive said assessments into the county treasury. As a second defense he alleges that he placed all of the moneys received on said assessments in a separate parcel; that at all times he kept said moneys segregated, separate, and apart in said parcel from other moneys in the county treasury; that about noon on June 25, 1932, the parcel containing said moneys thus received on said assessments was feloniously and forcibly taken from the possession of a deputy county treasurer of said county; and that, by reason of said robbery, there are not sufficient funds in the county treasury of Kern county to the credit of the bond fund of the said water storage district with which to pay the warrant in question.

At the oral argument it was stipulated that there was at the time the warrant was presented sufficient money in the county treasury to pay the same. Testimony was introduced to the effect that the amounts paid in on the assessment in question were kept in the treasurer's office in a certain leather wallet, segregated from other funds, and that on June 25, 1932, at a time when the deputy treasurer had brought out the wallet for the purpose of exchanging certain bills therein for certain other bills, the wallet was taken from the deputy at the point of a gun. In the argument and in the briefs, the first defense interposed by the respondent has been enlarged by adding the contention that the treasurer may not, under the law, pay out any of these funds except upon a warrant drawn by the county auditor.

The first point presented by respondent and by amici curiæ in his behalf, is that such funds as are here involved may only be received by a county treasurer upon the certificate of the county auditor and may only be paid out upon a warrant drawn by the county auditor, for the reason that certain statutes relating to the duties of a county treasurer and a county auditor apply to the handling of the funds of such a district as this and that, as so applied and considered in connection with the provisions of the Water Storage District Act, these statutes are controlling. The statutes especially relied upon are sections 4101, 4102, and 4093 of the Political Code.

Section 4102 provides that the treasurer must receive no money into the treasury or for deposit with him as treasurer unless accompanied by the certificate of the auditor, which is provided for in section 4093.

Section 4093 reads as follows:

"*To settle with debtors of county.* The auditor must examine and settle the accounts of all persons indebted to the county, or holding moneys payable into the county treasury, and must certify the amount to the treasurer, and upon the presentation and filing of the treasurer's receipt therefor, give to such persons a discharge, and charge the treasurer with the amount received by him, provided, that all persons or officers indebted to the county or holding moneys payable into the county treasury, must make oath, before the auditor, of the total amount of money payable by him to the county or into the county treasury, and on what account. Moneys payable into the county treasury, as the term is used in this section, shall include moneys belonging to estates of deceased persons and required by law to be paid to the county treasurer, taxes on inheritances and transfers, all moneys deposited by order of court, and all other moneys deposited with such treasurer by virtue of any official authority whatever."

Section 4101 provides in part that the treasurer must:

"2. File and keep the certificates of the auditor delivered to him when moneys are paid into the treasury. * * *

"6. Disburse the county moneys and all other money placed in his custody by official authority only on county warrants issued by the county auditor, except on settlement with the state."

The claim of petitioner is based upon the

Water Storage District Act (St. 1921, p. 1727), with its subsequent amendments. The provisions of this act are numerous and of considerable length, and it will only be necessary to call attention to certain portions thereof. After various provisions relating to the formation and control of such a district, and the levying of assessments for the purpose of carrying out the purposes thereof, section 19 of the act provides that two copies of the assessment roll, as finally fixed, shall be certified and transmitted to the board of directors of the district, who shall file one copy in their records and transmit one copy to the county treasurer. It is then provided in section 20 that such assessment list must remain open for payment in the office of the county treasurer for a period of thirty days, during which time any person may pay the amount of the charge assessed against his land to the county treasurer. By section 21 it is provided, among other things, that at the end of thirty days the county treasurer must make a return to the board of directors of the district of all assessments paid, and that "thereafter all unpaid assessments and accrued interest shall be collected when and as called, and paid to the treasurer of the county or counties, who shall collect and hold such moneys to the credit of the district." This section has other provisions to the effect that moneys collected by the treasurer shall be deposited to the proper fund of the district and to the credit of the district. Section 24 of the act provides, among other things, for the issuance of bonds. It is conceded that in pursuance of these provisions this particular district has so issued bonds. This section also contains the following provisions:

"All moneys collected by a county treasurer upon any assessment upon which bonds shall have been issued, including all moneys derived from sale of land for delinquent installments, or from redemption thereof, or from sale of lands bought by such treasurer at any such sale as trustee of the bond fund of the district, shall be by such treasurer forthwith paid into the county treasury of the county from which the same arose to the credit of the bond fund of such water storage district, and shall be used exclusively for the payment of principal and interest of said bonds issued on such assessment. * * *

"All moneys collected by any county treasurer upon account of an assessment on which bonds shall not have been issued shall be similarly accounted for to the treasurer of the district, and shall be credited to the general fund of the district. * * *

"The county treasurer of each of the several counties shall report all transactions of delinquencies and sales to the treasurer of the district who shall keep a record thereof in the office of the district."

Section 28 contains the following:

"All claims against the district shall be paid by warrants of said district. To provide a fund for that purpose the board of directors may from time to time draw from the general fund deposited and kept to the credit of the district in the office of the county treasurer of a county having funds belonging to the district in his possession sums aggregating not more than twenty-five thousand dollars, which said sum shall be deposited with the treasurer of the district and paid out by him upon warrants of the district, and he shall report to the board of directors in writing at its regular meeting in each month the amount of money in the district treasury and the amount of receipts and the amount and items of expenditures for the month preceding, which said report shall be verified and filed with the secretary of the board."

Section 56 (St. 1921, p. 1765) provides in part as follows:

"Warrants, drawn by the board of directors shall be signed by its president and secretary and countersigned by its treasurer, and shall be drawn upon the county treasurer of a county having funds belonging to the district in his possession for payment of the principal or interest of bonds, and upon the treasurer of the district or the county treasurer of such a county, as the case may be, for payment of all other claims and demands."

It is argued on behalf of respondent that the provisions of the Political Code, above referred to, were intended by the Legislature to be a part of the Water Storage District Act, and that, until those provisions are complied with, the money raised by and for the purposes of such a district can neither be received into the county treasury nor paid out therefrom. While this act provides that the amount of the district assessments shall be paid to the county treasurer, shall by him be forthwith deposited in the county treasury in a fund to the credit of the district, and shall be paid out upon warrants drawn by the officers of the district and directed to the treasurer, a somewhat different procedure is contended for by respondent. It is argued that, when any landowner pays his assessment to the county treasurer, he must obtain a receipt therefor; that he is then required to present this receipt to the county auditor; that he must then make oath as to the amount of money payable by him and on what account the payment is made; that the auditor must file the taxpayer's receipt and charge the treasurer; that the auditor must give to the landowner a discharge; that the auditor must certify the amount to the treasurer; that the treasurer may not deposit the amount in the county treasury until furnished with such a certificate from the auditor; and that the mon-

ey may then be paid out by the treasurer only upon the warrant of the auditor. It is argued that this gives the auditor the necessary check upon the transaction, and the inference seems to be that in some unexplained manner the warrant drawn by the district, as provided for in the act, shall be by the payee taken to the county auditor and exchanged for a corresponding warrant drawn by the auditor.

In our opinion, the suggested procedure adds to the Water Storage District Act a number of provisions not placed therein by the Legislature. By the terms of that act itself, no duty is placed upon the county auditor and no provision is made for giving him such information as would naturally be required to enable him to keep a check upon the transactions involved, although under general statutes he is furnished with the information needed in order to keep a check upon those transactions in which his certificate and warrant addressed to the county treasurer are required. On the other hand, the Storage Act makes full provision for a complete check upon all transactions of the county treasurer in connection with district affairs, by the board of directors of the district, including the making of frequent and complete reports, and the provision that each shall keep a copy of the assessment roll. In addition, the act in question contains definite and specific provisions for the paying out of the funds upon warrants drawn by officers of the district and directed to the county treasurer.

It was held that section 4101 of the Political Code, as it formerly read, prohibiting the county treasurer from paying out moneys in the county treasury except upon warrants issued by the auditor, applied only to county moneys (MacMullan v. Kelly, 19 Cal. App. 700, 127 P. 819). This section of the Code and a number of related sections were so amended in 1911 (St. 1911, p. 1095) as to extend this prohibition to any money paid into the county treasury or placed in the custody of the county treasurer by official authority, to require that a certificate of the auditor accompany any such money paid into the treasury, and to require that no such moneys be paid out except upon a warrant issued by the county auditor. As so amended, these respective sections would seem to be broad enough to cover the situation here in controversy, and, in the absence of any other expression from the Legislature, might well be held to be controlling in the question before us. But the Legislature, having the power to enlarge the scope of these statutes, as was apparently done in the amendments of 1911, likewise had the power to restrict their scope or to require a different procedure in a specific instance. The Water Storage District Act was passed ten years later than these amendments, and we are called upon to decide whether, in passing this act, the Legislature intended to include therein and make a part thereof those amended sections of the Political Code which have been referred to.

[1] In 23 California Jurisprudence, at page 762, the general rule of statutory construction is thus set forth: "It is a settled rule of statutory construction that a general provision is controlled by one that is special, the latter being treated as an exception to the former. A specific provision relating to a particular subject will govern in respect to that subject as against the general provision, although the latter standing alone would be broad enough to include the subject to which the more particular provisions relate. Moreover a provision, although expressed in general and comprehensive language, is construed with reference to the general intent of the act."

In Matter of the Estate of James A. Brewer, Deceased, 156 Cal. 89, 103 P. 486, 488, the court said: "But 'where two statutes treat of the same subject, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although latest in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject-matter as far as coming within its particular provisions.' "

Some of the provisions of the act here in question are inconsistent with these prior statutes, and cannot be reconciled therewith except by reading into the act a number of provisions that were definitely omitted therefrom by the Legislature.

[2, 3] The Water Storage District Act is a special act, passed for a definite and specific purpose, and containing a full and complete procedure for raising money and paying claims incurred in carrying out the purposes of the act. Although the machinery therein provided for raising and spending money differs in several material respects from the corresponding plan of handling the general finances of a county, it would appear that such different procedure was intentionally inserted in the act by the Legislature. Not only would this appear from the omission of the very considerable requirements which the respondent would now read into the act, but from its affirmative provisions requiring assessments to be paid directly to the county treasurer, requiring that a copy of the assessment roll be furnished to the county treasurer and kept in his office, requiring him to forthwith deposit all moneys collected in the county treasury, and authorizing and requiring him to pay out the same upon district warrants only. In our opinion, this is a case where a specific act of the Legislature must be held to be controlling over prior existing general statutes.

We take it that this act means what it says when it provides that landowners in the district must pay their assessments to the county treasurer, that the county treasurer shall forthwith pay this money into the county treasury, and that the county treasurer must pay out this money upon a warrant issued by the officers of the district. And that it was the intention of the Legislature in enacting this statute to have the provisions thereof, which are complete in themselves, govern and control in the handling of funds raised for the use of such districts.

[4] The second point raised is that it was the right and duty of the county treasurer to keep the funds collected for the petitioner segregated from county funds, that because of the robbery referred to there is not sufficient money in this particular fund in the county treasury to pay the warrant in question, and that this constitutes a complete defense in this proceeding. In effect, the contention is that the funds stolen were in fact the property of the district and that the consequent loss must fall upon the water storage district. In support of this contention, we are referred to the provisions of the act; that the assessments referred to shall be collected by the county treasurer and held to the credit of the district; that they shall be deposited in the proper fund of the district; that they shall be deposited to the credit of the district; that they be credited to the bond fund of the district; and many others of like import. It is argued that these various provisions not only contemplate that all moneys collected for the district shall be credited to the district in a particular fund, but that they authorize and require the county treasurer to make a physical segregation, keeping such moneys separate and apart from other funds in the treasury. No law to this effect is pointed out to us, the act itself is specific in requiring such moneys to be paid into the county treasury, and we are unable to see in the provisions referred to anything other than a requirement of bookkeeping. Taking the act as a whole, it seems to clearly provide that, while a record of such a fund shall be kept, and while the district shall be credited in this fund with moneys collected for it, the actual cash shall be placed in the county treasury. The very act of placing money in a "treasury" seems to imply a mingling with other moneys therein, and negatives the idea that money so placed shall retain its identity. The provisions that moneys collected under the terms of the act shall be placed in the treasury and entered in a bond fund to the credit of the district are, to our minds, inconsistent with the idea that such moneys are merely to be held in the custody of the treasurer, kept separate and apart from all other moneys in his custody, and that the specific cash is to remain the property of the district.

In the case before us, it is admitted that certain money has been paid into the county treasury. We feel constrained to hold that this has been done in accordance with the provisions of the act, and that this money, having been legally placed in the county treasury, must be considered as remaining there until it has been legally withdrawn in accordance with the terms of the act. While a county treasurer may and must keep track of the various funds in his custody, when money is placed in the county treasury under the provisions of this act, particular bills and coins may not be earmarked as those belonging to the district. If a county treasurer feels compelled to accede to the demands of a robber that money be handed over to him, we think that such a treasurer may neither elect which particular fund he shall hand over, nor may he say that it was the particular property of such a district as this which was handed over, any more than could a bank charge a similar loss to the account of a particular depositor upon the claim that the money taken actually came from that source.

Not only do we think that such a physical segregation of money as is claimed to have existed here is not authorized by law, but the evidence shows that the amounts collected for this district were not at all times kept by the county treasurer separate and distinct from other funds in his possession. While the treasurer testified that it was his custom to put checks paid in by landowners in this district in this particular leather wallet, he also testified that upon the assessment involved here he received a check from Miller & Lux, Inc., for $21,272.23, that shortly thereafter an agent of a bank came into his office with a bunch of claims against the county, and that he used this check from Miller & Lux to pay these claims, taking back a cashier's check from the bank for $9,000, to cover the difference. He testified that it was his usual custom to use checks received in payment of assessments of this district in clearing county claims with the bank, and that "almost immediately" thereafter he would take a corresponding amount of cash out of the cash drawer and place it in the wallet referred to. He further testified that on the day of this robbery there was $41,000 and some odd dollars on his books to the credit of this water storage district; that all of the money belonging to the district was not in this leather wallet; and that at the time something like $34,000 was in the wallet, while about $7,600 was in the hands of the receiver of a building and loan association. He also testified that at the time of the robbery his deputy had taken this wallet out for the purpose of mak-

ing change, that it was their custom to put $1 bills as they accumulated in this particular wallet, and that on the occasion in question the deputy was going to take $10 in $1 bills out of this wallet and put them in the county wallet in anticipation of a call for $1 bills from various county offices.

In view of the evidence that this district, on the date in question, had a credit upon the books of the county treasurer and in the fund in that treasury created by assessments it had made in pursuance of the provisions of this act sufficient to cover the warrant drawn, that the warrant was drawn in the manner provided by the act, and in view of the stipulation that there were sufficient funds in the treasury of the county at that time to pay the amount of the warrant, we think the writ applied for should issue.

It is argued with much force that under the Constitution no county can give or loan its credit to or in aid of any person, and that to use county money to reimburse a water storage district for its losses would be a violation of this provision. This argument presupposes that the money stolen from this county treasurer was the particular property of this district, a premise which we cannot accept.

Let a peremptory writ issue as prayed for.

We concur: MARKS, J.; HARDEN, Justice pro tem.

126 Cal.App. 481

LERNER v. SANDERSON et al.

Civ. 4584.

District Court of Appeal, Third District, California.

Sept. 28, 1932.

1. Joint adventures ⇐4(1).

Rights and liabilities of joint adventurers, as between themselves, are governed by same principles which apply to partnership.

2. Joint adventures ⇐7.

Delivery of grapes purchased to one joint adventurer was delivery to other joint adventurer.

3. Joint adventures ⇐8.

That judgment against joint adventurers included cost of large lug boxes, *held* not error, where joint venture contract for purchase of grapes was silent with respect to character of packing boxes and obligated one joint adventurer to pay for packing material.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by Margarethe Lerner, as administratrix of the estate of Jacob Lerner, deceased, against F. H. Sanderson, Jr., and another, doing business under the fictitious name of the California Land Products Company, and the Tracy-Waldron Fruit Company. From a judgment in favor of plaintiff, the last-named defendant appeals.

Affirmed.

H. A. Frank, of Oakland, for appellant.

Wallace T. Rutherford, of Napa, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The complaint in this case consists of seven counts which were based upon assigned claims for the price of grapes sold and delivered, together with the value of materials furnished and labor performed. From a judgment which was rendered in favor of the plaintiff and against both defendants, the Tracy-Waldron Fruit Company has appealed.

It is contended the judgment is not supported by the evidence. There is no merit in the appeal.

The appellant is a corporation which is engaged in the business of buying and marketing fruit. The defendants Sanderson and Digardi are copartners doing business under the firm name of California Land Products Company. In 1925, the appellant entered into a written agreement for the season with the defendant partnership for "buying, shipping and handling * * * grapes, from the following California counties, to-wit: Contra Costa, Santa Clara, Napa, Mendocino and Sonoma, to points within or without the State of California."

This contract was executed by the appellant and accepted by the copartnership. It contains the following provisions:

"You (California Land Products Company) to handle the general field work including soliciting of business * * * on a purchase basis * * * to be bought at prices and on such terms as may be mutually agreed upon between us. * * * You are to devote the principal part of your time to this joint venture, * * * but if we reject any grapes offered by you, you are at liberty to purchase the same yourselves or sell them to others for your own account. * * *

"We are to furnish labor, shooks and other necessary material for packing and loading such grapes for shipment. * * * We are to finance payments for such grapes purchased * * * as such payments fall due; also for all necessary items of expense properly chargeable to this joint venture. * * *

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

"Profits or losses resulting from transactions under this joint venture are to be divided equally between us. * * *

"It is understood that this joint venture covers only such cars of grapes as you directly originate and does not cover any other business that may be handled by us in the same general territory or district by purchase, * * * or any business which may be handled by you in other parts of the State of California or which we may have rejected as hereinbefore provided. * * *

"It is understood that shipments under this joint venture are to be made through shipping sheds owned by us or leased by us in the counties aforesaid. * * *"

[1] This contract creates a joint venture for the purchase of grapes during the season ending October 15, 1925, in Napa and the other four counties mentioned in the agreement. In effect, it provides that all the grapes which are purchased by the copartnership in these named counties shall belong exclusively to the joint venture, except such as may be rejected by the appellant. The contract fails to specify conditions or grounds upon which grapes may be rejected. It specifically excludes grapes purchased by the appellant in these named counties and grapes which are purchased by California Land Products Company "in other parts of the state." By necessary implication, all grapes purchased by the copartnership in the named counties, unless they are rejected, belong to the joint venture, and create a liability for the purchase price thereof against both parties to the contract. The rights and liabilities of joint adventurers, as between themselves, are governed by the same principles which apply to a partnership business. Ford & McNamara, Inc., et al. v. Wilson (Cal. App.) 6 P.(2d) 996.

[2] The appellant contends that it is liable only for such grapes as were purchased by the copartnership in Napa county and which were actually delivered to it. It is asserted that the burden of showing that all such grapes were actually delivered to the appellant was upon the plaintiff. The court found they were "delivered to the defendants." It is conceded they were delivered to the California Land Products Company. We are pointed to no evidence indicating they were not actually delivered to the appellant. We are cited to no evidence that the appellant ever rejected any of these grapes. The record clearly shows all the grapes which are involved in this action were purchased by the copartnership in the district which is covered by the contract of joint adventure. The agreement of joint adventure precludes the copartnership from purchasing any grapes for its separate account within the five counties therein mentioned. All grapes purchased in that district were for the benefit of the appellant. A delivery of grapes to the copartnership which were purchased in that district was therefore a delivery to the appellant. A reasonable construction of the contract leaves no other solution of this problem. The findings to the effect that these grapes were delivered to the appellant is amply supported by the evidence.

If any of these grapes were rejected by the appellant, that fact might furnish a defense to the action with respect to the purchase price of such rejected grapes. The burden of proving that defense rested upon the appellant. No such defense was alleged or proved.

The appellant contends it was engaged solely in shipping grapes to Eastern markets, and that its custom was to ship grapes only in small three and a half pound boxes, containing twenty-five pounds of grapes, that many of the grapes were delivered to the California Land Products Company in large lug boxes, and that the judgment wrongfully includes some items of expense for the cost of large lug boxes.

[3] It will be observed, contrary to the alleged custom of the appellant, that the contract which is involved in this suit specifically authorizes the purchase of grapes in the five counties named, for shipment "to points within or without the state." The contract is silent with respect to the character of boxes in which the grapes are to be delivered. The agreement obligates the appellant to pay for "labor, shooks and other necessary material for packing and loading." We are directed to no evidence to indicate that any change is included in the judgment for the cost of large lug boxes. The only item of this nature which we are able to discover by reference to the briefs is 4476 pounds of grapes at $44.76 which were apparently delivered "in big lugs." Nor are we pointed to any evidence that the appellant for any reason rejected fruit which was purchased. It is stated in its brief that 1,733 boxes were shipped on October 3d, "the date after which this appellant received no fruit from any shipper." It is not stated this shipment was refused. No evidence is cited to support such contention. Moreover, the contract authorized the copartnership to purchase grapes during the season of 1925, "or approximately (until) October 15, 1925." The grapes were all purchased within that period. No reason appears why both defendants are not liable therefor.

The judgment is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

126 Cal.App. 146

In re ANDRES' ESTATE.

ANDRES v. ANDRES.

Civ. 8436.

District Court of Appeal, Second District, Division 1, California.

Sept. 21, 1932.

Rehearing Denied Oct. 18, 1932. Hearing Denied by Supreme Court Nov. 18, 1932.

1. Executors and administrators ⇐185.

In order to bar family allowance, wife's intention to waive right in written agreement must be clear and explicit.

2. Contracts ⇐147(1), 169.

In determining effect of contract, expressed purposes of agreement when made, and circumstances under which it was made, must be considered.

3. Executors and administrators ⇐188.

Where spouses lived apart from 1905 to husband's death in 1931 without wife's consent, wife continued to be member of decedent's family and was entitled to family allowance.

4. Executors and administrators ⇐185.

Under contract made before separation whereby wife released rights in husband's property, wife did not waive right to family allowance.

Under the contract which was made about six months before husband and wife separated, and which did not mention separation, wife released to her husband, his heirs and assigns forever, all right, title, and interest which wife then had or might thereafter acquire by operation of law or otherwise in and to all property, real, personal, and mixed, which husband then owned or had acquired, or which he might thereafter acquire or own, or which might then or thereafter stand in his name, whether it be community property or otherwise, and in the contract itself, the purpose was stated to be that each party might have exclusive control and disposition of all property standing in his or her respective name.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

In the matter of the estate of William S. Andres, deceased. Margaret Andres, as widow, filed a petition for an allowance for her support and maintenance, opposed by Frank E. Andres, executor. The petition was granted, and the executor appeals.

Affirmed.

Harvey M. Parker and Merriam, Rinehart & Merriam, all of Pasadena, for appellant.

Daniel M. Hunsaker and Lloyd E. Keiser, both of Los Angeles, for respondent.

CONREY, P. J.

Respondent Margaret Andres is the widow of William F. Andres, who died on the 22d day of February, 1931, leaving property in the county of Los Angeles now subject to administration under the will of decedent. Respondent petitioned for an allowance for her support and maintenance, which petition was granted. Contestant, who is executor of the will, and also is an heir at law of decedent, appeals from said order.

Respondent and the decedent, William F. Andres, had lived separate and apart from each other at all times since the year 1905, but never were divorced. Shortly before their separation they entered into an agreement in writing, dated November 17, 1905. In this agreement nothing was said to indicate that the parties intended to live apart from each other. The agreement referred entirely to property and recited that they desired to separate their property interests, "in order that each party may have exclusive control and disposition of all property standing in his or her respective name." Therefore in consideration of the premises and of other good and valuable consideration, and of the sum of $2,350 received by Mrs. Andres "in full satisfaction for this agreement and in full settlement of her community rights now or hereafter acquired by her," she released to her husband, his heirs and assigns forever, "all the right, title and interest, which said party of the first part now has or may hereafter acquire, by operation of law or otherwise, in and to all other property, real, personal and mixed, which said party of the second part now owns or has acquired or which he may hereafter acquire or own, or which may now or hereafter stand in his name, whether the same be community property or otherwise." In similar terms the husband, as party of the second part, in consideration of the agreements therein contained on the part of the party of the first part and of the sum of $1, released all present or future rights in property of the party of the first part, Mrs. Andres.

It is contended by appellant that the said agreement of November 17, 1905, is a complete and final adjustment of all property rights between the spouses, and constitutes a waiver of the respondent's rights to a widow's allowance.

[1] In a very recent case the Supreme Court of California had before it an appeal from an order granting a family allowance to the widow of a decedent, where the objection to the allowance was based upon a claim of waiver by virtue of a contract between husband and wife. The court said: "The sole

question presented on the appeal is whether the petitioner waived her right to ask for a family allowance by reason of the above-quoted provision of the property settlement agreement. It is not disputed that the wife may, by her agreement, waive such right. It is well established, however, that in order to bar a family allowance the intention to waive the right must be clear and explicit, and that any uncertainty in the language of the agreement will be resolved in favor of the right. In re Estate of Whitney, 171 Cal. 750, 154 P. 855; In re Estate of Gould, 181 Cal. 11, 183 P. 146." In re Bidigare's Estate (Cal. Sup.) 8 P.(2d) 122, 123. In that case the agreement between the parties had been that "each party hereto is hereby released and absolved from any and all obligations and liabilities for the future acts and duties of the other, and that each of said parties hereby releases the other from any and all liabilities, debts or obligations of any kind or character incurred by the other from and after this date, and from any and all claims and demands, including all claims of either party hereto upon the other for support and maintenance as wife or husband, or otherwise, it being understood that this instrument is intended to settle the rights of the parties hereto in all of said respects." Applying to said contract the rule as stated in the above-quoted language of the court, it was noted that the agreement did not in terms waive or purport to waive any claim as surviving widow. It was in evidence that only two months before the death of Mr. Bidigare an interlocutory decree of divorce had been granted to the wife. Concerning the contract and its effect upon the right of the widow to an allowance for support during the period of administration of the husband's estate the court said: "No provision of the contract suggests that the parties had in contemplation the death of the husband before the entering of the final decree of divorce. The release of claims and demands of one against the other would seem to refer to claims and demands between them as living spouses. The claim of the widow here asserted is against the estate of the decedent and not against him. The words 'or otherwise' should not, we think, be held to extend the waiver to a claim for family allowance, but should be held to refer to the claims mentioned in the clause in which they are found, viz., claims between them as husband and wife. These words used in the agreement, instead of being plain and explicit evidence of waiver, tend to the uncertainty which is not permitted to control in cases of this kind." In re Bidigare's Estate, supra, and In re Minier's Estate (Cal. Sup.) 8 P.(2d) 123, 125, were decided on the same day. In the Minier Case there was a question of right of inheritance by the widow of the decedent Joseph Minier, where prior to his death a certain agreement of separation had been made between the husband and wife. Among other things the agreement provided that "from this time on neither of the said parties shall have or claim anything from the other, and each of said parties does hereby release the other in full of all claims and demands of every nature and kind whatsoever, as well in the past as in the present and future and shall be and remain separate from each other, and in case of any action for divorce being brought by either of said parties against the other, neither of said parties will claim or demand from the other any costs, counsel fees or alimony or any other property, claim or demand of any kind whatsoever." The decision in this case somewhat extensively reviews the prior decisions in this and other states relating to separation agreements or property division agreements between husband and wife, and the effect of such agreements under circumstances like those of the case at bar. Referring particularly to the Minier agreement the court said: "That the parties should so carefully and minutely provide against either party claiming any rights from the other in case of divorce proceedings being instituted, and should omit any reference to any claim either should make against the property of the other in the case of the death of either, under the rule of expressio unius est exclusio alterius, leads strongly to the inference that they did not intend by their agreement to relinquish or in any way affect their inheritable rights." Among the cases thus discussed is the Estate of Davis, 106 Cal. 453, 39 P. 756, 757, concerning which it was pointed out that in the Davis Case the release as contained in the agreement attached to the property of the spouses and extended to all property acquired by them during their lifetime or owned by them at the time of death. In that case the release provided that the wife "hereby does relinquish and surrender forever all claims of any nature she may now or hereafter have against any property that said W. W. Davis may now have or may hereafter in any manner acquire." It also recited that she received the property which, pursuant to the agreement, was conveyed to her, "in full satisfaction of all claims she may have as the wife of said W. W. Davis on any property he now has or may in any manner acquire." In view of this agreement the Supreme Court said: "The obvious purpose was not only to definitely sever the property rights of the parties, but mutually to relinquish and release all inheritable interest of each in the property and estate of the other."

[2-4] Thus the question is squarely presented whether, in the case at bar, the terms of the contract constituted a release of all future property rights, including inheritable

interests, as in the case of Estate of Davis, supra, or whether said contract should be construed as reaching no further than did those considered in the Bidigare Case and in the Minier Case. This brings us back to the terms of the release executed between respondent and the decedent. She released to her husband, his heirs and assigns forever, all the right, title, and interest "which said party of the first part now has or may hereafter acquire, by operation of law or otherwise, in and to all other property, real, personal and mixed, which said party of the second part now owns or has acquired or which he may hereafter acquire or own, or which may now or hereafter stand in his name, whether the same be community property or otherwise."

In order to determine the effect of the contract in relation to the present subject of controversy, consideration must be given to the expressed purposes of the agreement when made, as well as to the circumstances under which it was made. In the contract itself, the purpose for making the agreement was stated to be "that each party may have exclusive control and disposition of all property standing in his or her respective name, whether the same be considered community property or otherwise." In the contract nothing was said about any separation or proposed separation between husband and wife. But, at the hearing in this proceeding, there was evidence pursuant to which the court found that, at the time of the death of William F. Andres, he and Mrs. Andres were living separate and apart without her consent and solely by reason of cruel treatment of her by decedent. And since it appears that they separated about six months after the making of said agreement, and after such separation never lived together, it is fairly inferable that the alleged cruel treatment occurred at or before the time of the separation.

Under the circumstances above stated, the trial court was justified in determining that, at the time of the death of the husband, respondent herein continued to be a member of the family of decedent and entitled to receive support as such member. In this respect the case is different from that presented in the Estate of Yoell, 164 Cal. 540, 129 P. 999, wherein it was held that by reason of the fact that the surviving wife had voluntarily and deliberately severed her relationship as a member of the husband's family, she was not entitled to succeed in her application for a family allowance. Another difference may be noted in that in the Estate of Yoell the contract of separation between husband and wife contained an express covenant by which each party surrendered, as against the estate of the other, all claim as surviving husband or wife.

Our conclusion is that, under the contract relied upon by appellant herein, it does not appear that there was any express waiver of the wife's right to support or of her right to a family allowance. There is an absence of any clear and explicit intention of the wife to waive her rights in this respect.

The order is affirmed.

We concur: HOUSER, J.; YORK, J.

126 Cal.App. 388

FRIDDLE et al. v. SOUTHERN PAC. CO. et al.

Civ. 4396.

District Court of Appeal, Third District, California.

Sept. 27, 1932.

Rehearing Denied Oct. 27, 1932.

Hearing Denied by Supreme Court Nov. 25, 1932.

1. Railroads ⇐316(1).

Mere fact that train was traveling 50 miles per hour, without evidence as to surrounding circumstances, furnishes no foundation for inference of negligence.

2. Railroads ⇐350(7).

Evidence of trainmen's failure to give signals at crossing *held* insufficient to make issue of railroad's negligence, in action for death.

There was positive evidence of the entire train crew to the effect that whistle was blown, and fireman and engineer testified that bell was being constantly sounded, and the whistle was heard by others, while there was only negative testimony of driver of truck preceding deceased's truck that no signals were given.

3. Railroads ⇐348(6).

Deceased operating truck on highway running parallel with train in same direction, who, after making turn, collided with train at unobstructed crossing, *held* under evidence guilty of contributory negligence.

4. Negligence ⇐117.

Answer alleging that deceased's own negligence was proximate cause of death *held* sufficient to present issue of contributory negligence.

5. Negligence ⇐122(1).

Presumption, in action for death, that deceased exercised ordinary care, falls when plaintiff produces inconsistent evidence.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by Eugene Friddle, by Lila Friddle, his guardian ad litem, and others, against the Southern Pacific Company and others. Judgment for plaintiff, and defendant named appeals.

Reversed.

J. M. Walthall, of Modesto, and William H. Devlin, of Sacramento (Devlin & Devlin & Diepenbrock, of Sacramento, of counsel on appeal), for appellant.

P. O. Solon and W. H. Hollander, both of Oakland, for respondents.

Mr. Presiding Justice PRESTON delivered the opinion of the court.

This is an appeal by defendant Southern Pacific Company, a corporation, from a judgment entered against it upon a verdict of a jury in the sum of $25,500. The plaintiffs are two minor children and the widow of Glen Friddle, who was killed on the 21st day of March, 1929, by reason of a collision between an autotruck, which said Glen Friddle, as the sole occupant, was driving, and a passenger train of the appellant. The case was dismissed as to all defendants save appellant Southern Pacific Company. A motion for a new trial was made and denied.

The facts necessary for a correct understanding of the questions involved on this appeal may be thus briefly stated:

Glen Friddle was a young man of the age of twenty-five years and was engaged in the occupation of truck driver. His place of occupation was at or near the town of Crows Landing in Stanislaus county. The Southern Pacific Company operates its lines through the said town, among which trains is the passenger train generally known as "The Owl," being one of the company's fast trains operating between San Francisco and the empire south of Tehachapi. Near Crows Landing is an open country crossing where the main traveled highway intersects the tracks of appellant company. To effect this crossing the highway makes a turn, effecting, upon completion, a right angle to its prior course. Up to the point where the highway turns the general course thereof parallels the track, the outer line of the highway being some sixty-two feet distant from the railway.

Glen Friddle, the deceased, was familiar with the locality and had been, for some months, in the habit of traversing the crossing at least three times a week and always at an early hour in the morning, ranging between 4 o'clock a. m. and 6 o'clock a. m.

On the morning of the accident Friddle and one Carvelho were proceeding in separate trucks to a slaughterhouse which was located about a mile distant from the crossing. Carvelho was ahead of Friddle as they proceeded along the highway in a northerly direction. Carvelho reached the crossing first. While upon the tracks he looked back to ascertain the whereabouts of Friddle and saw the latter approaching the crossing at a distance of some two hundred yards back. Carvelho testified that, though he was not looking for the train, he nevertheless did see the train approaching at a distance of some five or six hundred yards down the track. It was then 5:30 a. m. and the light condition may be described as twilight. Carvelho could see the lights of the train plainly and could see the engine. As noted, when Carvelho looked to locate Friddle, the latter was some two hundred and fifty yards behind and traveling at a uniform speed approximating thirty-five miles per hour. Carvelho testified that he heard no whistle, bell, or other warning given by the train.

Aside from testimony offered to support the claim of damage the foregoing constituted plaintiffs' case. It was admitted that deceased met his death as a result of the collision between the train and the truck.

Testimony was adduced in behalf of appellant showing that the train was proceeding on its own right of way at a speed of fifty miles per hour. The usual crossing whistle was blown at a point a quarter of a mile distant from the crossing. The engine was equipped with a bell conforming in weight and construction to the legal requirement and the bell was continuously sounded by means of automatic control. Without detailing the evidence, the claim of appellant was that decedent did heedlessly, recklessly, negligently, and without regard for his own safety rush his truck headlong into the path of the train, with the consequent disastrous result.

The appellant advances two main contentions in support of its appeal: First, it contends that there was no negligence shown as against the company or any of its agents or employees; secondly, that even if such negligence can be found from the facts then the negligence of the decedent so far contributed to the result that no recovery can be had.

[1] No claim is urged that the speed of the train was excessive and there is absolutely no evidence on that point. It is true that under certain conditions, into which may enter many varying factors, a speed of fifty miles per hour would be an excessive and dangerous speed. But the mere statement that such a speed was being maintained, with no further evidence as to conditions or surrounding circumstances, furnishes no foundation for any slight inference of negligence.

The only evidence as to surrounding conditions indicates that at the particular place here involved the railway right of way ran through an open country over an area in plain and unobstructed view. It is not the function of the courts to fix the speed or schedule of railroad transportation nor to arbitrarily de-

termine the rate of speed permissible. There is not a word in the record indicating any negligence in the matter of speed.

[2] Indeed, excepting the reliance upon the presumption hereinafter to be noted, the sole act of negligence charged against the appellant is its failure to sound an alarm.

The only testimony on this point offered by the plaintiffs is the testimony of Carvelho to the effect that he heard no whistle, bell or other signal of warning.

The value of negative testimony is relative. That is to say, in determining the effect to be given such testimony, we must take into consideration all of the circumstances surrounding the witness giving such testimony. In the first place, Carvelho testified that he was not looking for the train but happened to see it in looking backwards for Friddle. His attention was at no time specifically or intently directed toward the engine or cars. The train was then some 500 to 600 yards distant, and Carvelho was directly on the track. Estimating the distance roughly to be approximately one-third of a mile, it would take a train traveling at fifty miles per hour just twenty-four seconds to reach the crossing where the collision occurred. In those twenty-four seconds Carvelho, traveling at thirty-five miles per hour, would have reached a point less than four hundred yards from the scene of the collision.

The testimony is without dispute that when the train hit the truck there was a loud explosion, either of gasoline or some other explosive, the noise of which was heard for several blocks around. Carvelho, only some four hundred yards away, did not hear this explosion, nor did he hear anything of the crash. He did not know that anything unusual had happened until he drove on to the agreed meeting place and after a brief wait, surmising from the absence of Friddle that something had happened, returned to the crossing.

These facts tend to render the negative testimony of this witness of little weight, and while it is not our province to scrutinize with extreme nicety of detail any claimed conflict of evidence, yet we are brought fully within the rule announced in Wenban Estate v. Hewlett, 193 Cal., at page 693, 227 P. 723, that evidence may be so nebulous and evanescent as to render it nothing more than a mere pretense of evidence, and therefore it may be said that, as a matter of law, it is not evidence at all and does not contradict or tend to contradict, either directly or by justifiable inference, the positive evidence against it.

The positive evidence of the entire train crew is to the effect that not only was the whistle blown a quarter of a mile from the crossing but also at the point where the truck came into view approaching the track. Further it is the positive evidence of the fireman and engineer on the train that the bell was being constantly sounded.

The evidence of the whistling is likewise adduced by persons resident of the town of Crows Landing and whose attention was being directly attracted thereto. For instance, the night watchman who timed his period of employment by the arrival of the train and also a neighbor who regulated her arising by the whistle of the Owl train. Thus the only claimed evidence of negligence is entirely dispelled.

[3] We next approach the claim of contributory negligence. Under the facts as shown there can be no logical argument presented against this contention.

Railway crossing cases are without number both in this jurisdiction and throughout the entire nation. The subject is carefully, thoroughly and most ably reviewed in the case of Koster v. Southern Pacific Company, 207 Cal. 753, 279 P. 788, and the mere reference thereto will suffice.

The physical facts of the instant case speak for themselves and there can be no doubt that had decedent stopped, looked, and listened, as the law required him to do, he would have been warned at a safe distance from the main track of the approach of the said train and the hazard he would assume in attempting to cross the railroad crossing ahead of the train.

We have an unobstructed crossing with a clear view of the track in both directions. Friddle was operating his truck at a distance of some sixty-two feet from the right of way and running parallel with the train and in the same direction. According to the testimony of plaintiffs the train, approaching at fifty miles per hour, had but one-third of a mile to cover to reach the crossing and said train was clearly visible. Friddle had about one-eighth of a mile to cover to reach the crossing and a turn to make in his journey. He was familiar with the territory and knew that trains did pass over the track at the point of crossing. It is not conceivable that any person, using the ordinary senses, could have failed to observe the approaching train.

As a matter of calculation the situation demonstrates itself. Friddle going thirty-five miles per hour would have reached the crossing, from the point at which Carvelho observed him, in approximately fifteen seconds. The train, from the point observed by Carvelho, would have reached the same point in twenty-four seconds, leaving in the approximation only nine seconds within which to figure out the crossing ahead of the train. With this picture, it would be idle to attempt to show ordinary care or prudence on the part of the deceased. In order to justify the conduct of the unfortunate decedent we would

first be compelled to overrule every known California case on railroad crossings.

[4] It may be noted that respondent does not seriously question the existence of negligence upon the part of decedent (passing for the purposes hereof the application of the presumption of due care) but it is the contention of respondents that contributory negligence is entirely out of the case by reason of appellant's failure to affirmatively plead such a defense. This brings us to the pleadings of appellant. Appellant's answer, filed in the court below, is as follows: "That said Glen Friddle met his death by and through his own negligence and that his own negligence was the proximate cause of his death in this that the said Glen Friddle at the time of and for some time prior to said accident had knowledge that the highway crossed the railroad track at the point of the accident and immediately preceding the accident knew that he was approaching a railroad crossing and that notwithstanding said facts said Glen Friddle approached said crossing and attempted to cross said railroad track at said point without stopping, looking or listening and negligently failed to make use of his sense of understanding, sight and hearing at the time said train was approaching and that by reason of the said negligence of said Glen Friddle, he was struck and killed at the time and place in said plaintiffs' First Amended Complaint alleged."

It is difficult to see wherein this pleading is insufficient to present the issue of contributory negligence. It is true that in a discussion between counsel at the trial, counsel for appellant equivocally conceded that contributory negligence was not an issue but this concession was always with the stout insistence that the appellant was guilty of no negligence and that the accident was caused solely through the negligence of decedent. Both counsel in the discussion seemed to be adroitly maneuvering the other into some sort of an admission.

Appellant's counsel and respondents' counsel both were of the impression that in order to advance the defense of contributory negligence it was necessary that defendant first admit its own negligence. This the appellant declined to do. In this appellant was correct. In Sheets v. Southern Pacific, 212 Cal., at page 515, 299 P. 71, the court said: "It is not the law that a plea of contributory negligence is an admission of culpable negligence on the part of the defendant. A defendant may deny that he was guilty of any negligence, and at the same time consistently claim that, even if the jury should find that he has been negligent, the plaintiff would not have sustained any injury if it had not been for his own negligence as the approximate cause." This is exactly what appellant did here.

In Hoffman v. Southern Pacific Company, 84 Cal. App., at pages 346 et seq., 258 P. 397, this question of pleading is elaborately discussed. As a matter of interpretation and construction, the greater always includes the lesser, and where, as here, the defense is made that the negligence of plaintiff was the proximate cause of the injuries, the allegation would include any negligence that contributed to the said injuries.

As stated in the Hoffman Case, it would seem an absurd proceeding to put the defendant at the risk of absolving himself from all negligence before he could advance the defense of contributory negligence.

Here the appellant did plead specifically the facts going to show the negligence of deceased and whether it described this negligence as the sole cause of the accident or the contributing cause could make no difference in the effect of the proven facts. Regardless of the argument between counsel the trial court did instruct the jury upon the doctrine of contributory negligence and did consider such negligence to be an issue in the case.

[5] Lastly respondents earnestly contend that it is the settled law of California that the decedent in the case at bar is presumed to have done everything that a reasonably prudent man would have done under the circumstances for the protection of his own safety and that this presumption, while disputable, is evidence in the case.

Following up this contention it is then urged that, giving the presumption the weight of evidence, a sufficient conflict appears which will preclude the interference of an appellate court. Naturally, reliance is had upon the case of Smellie v. Southern Pacific, 212 Cal. 540, 299 P. 529. However, the Smellie Case sets forth certain clear limitations. In passing, it must be noted that this case went through several hearings and rehearings and must be classed as one most thoroughly considered, and being of such far-embracing nature we must assume that every phase of the problem was carefully analyzed before opinion rendered. With this in mind, we must give to the language used its exact meaning. Two things are definitely announced by the court in that case. Quoting from page 552 of 212 Cal., 299 P. 529, 534: "In the Mar Shee Case [190 Cal. 1, 210 P. 269] it was held that a fact is proved against a party relying on the presumption 'by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and that, when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case.' This is undoubtedly true, but it does not nec-

essarily follow that the presumption may not be overcome or 'dispelled' as a matter of law by proof of the party against whom the presumption is invoked." Quoting from page 555 of the opinion cited in 212 Cal., 299 P. 529, 535 we find: "When the presumption is invoked by a party, and his evidence is not inconsistent therewith, it is in the case, provided, of course, the evidence sufficiently establishes a sphere or field within which the presumption can operate. Whether it does must, of course, be decided by the trial court as a question of law."

Thus we find one thing definitely decided beyond argument, and that is that the presumption falls in the face of evidence produced by the party relying thereon which is inconsistent therewith. The evidence adduced by plaintiff discloses a man familiar with the locality and the conditions there existing driving a truck at a speed of approximately thirty-five miles per hour. It shows this driver in a position of complete safety on a highway paralleling a railway track upon which is a train approaching a crossing at a speed of fifty miles per hour, which train is at a distance of between two hundred and fifty yards and three hundred and fifty yards directly behind the truck. The location of the highway upon which the truck is being operated is sixty-two feet from the rails. It discloses the driver of the truck, with the train rushing to the crossing, turning from his place of safety directly into the path of the oncoming train. We may then reasonably and seasonably inquire by what process of reasoning can we indulge the presumption that the truck driver exercised due care for his own safety.

Under the law of railroad crossings due care would be measured by certain conduct, namely, that the driver stop, look, and listen before attempting to cross a railroad track. The slightest glance by decedent would have disclosed the danger and the slightest attention would have given him ample warning. The judgment is reversed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

126 Cal.App. 344

In re GARNETT'S ESTATE.

Civ. 8524.

District Court of Appeal, First District, Division 1, California.

Sept. 27, 1932.

Rehearing Denied Oct. 27, 1932.

Executors and administrators ⇐437(3).

Claim on notes presented against estate on May 6, 1927, and within time mentioned in notice to creditors, *held* not barred by limitations, although normally action on notes would have been barred on August 16, 1927, which was prior to time claim was allowed by executrix and approved by court (Code Civ. Proc. §§ 337, 353).

Claim was not barred under Code Civ. Proc. § 337, since section 353 expressly extends time for bringing an action against deceased person's representative for one year after issuance of letters testamentary, and the purpose thereof was to extend the time within which to present claim and bring action in event of rejection.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

First accounting of Minnie F. Barnard, formerly Minnie F. Garnett, executrix of the estate of James R. Garnett, alias, deceased. From an order allowing a claim of the Bank of Willows, a corporation, the executrix appeals.

Affirmed.

H. L. McAllister, of San Francisco (J. S. Josselyn, of San Francisco, of counsel), for appellant.

Cross & Brandt, of San Francisco, and Carroll F. Byrd and H. C. Bell, both of Willows, for respondent.

LANDIS, Justice pro tem.

The appeal is by the executrix of the above-entitled estate from that part of an order of the said Superior Court made in connection with the settlement of the first account of the executrix ordering that a certain claim of the Bank of Willows, a corporation, allowed, approved, and filed in said court for the sum of $4,843.77 constitutes a valid and subsisting claim against said estate.

On February 16, 1923, the said deceased made, executed, and delivered to said Bank of Willows, a corporation, two promissory notes, each of said notes made payable six months after date, one note in the principal sum of $3,140 and one in the sum of $2,419, secured by mortgage. On January 19, 1927, the deceased died. On February 17, 1927, Minnie F. Garnett, now Minnie F. Barnard, was duly appointed executrix of the estate of her said deceased husband. On May 6, 1927, said Bank of Willows presented its claim upon said two promissory notes to said executrix, and no further step was taken by said bank. The claim was allowed by the executrix November 3, 1927, and approved by the court and filed December 2, 1927. The notes would normally outlaw August 16, 1927.

Appellant contends that this case involves

the following two legal questions, to wit: (1) Did or did not the filing of the alleged claims of the Bank of Willows, with said executrix, on the 6th day of May, 1927, stop the tolling of the statute of limitations (section 337, Code Civ. Proc. of the State of California)? (2) Did the executrix of the said estate of James R. Garnett, deceased, and/or the said court, have sufficient and/or any legal right or authority, to so or at all allow and/or approve the said alleged claim of the Bank of Willows, on the 3d day of November, 1927, and the 2d day of December, 1927, respectively?

Appellant urges and takes the position that normally and under the general statute of limitations the notes would have outlawed August 16, 1927, and contends that, the claim having been filed May 6, 1927, not allowed by the executrix until November 3, 1927, and not approved by the court until December 2, 1927, therefore, since the mere filing of the claim with the executrix did not toll the statute of limitations, the claim was barred by the statute of limitations when allowed by the executrix and approved by the court, and could not have been legally allowed by the executrix or approved by the court because of the provision of section 1499 of the Code of Civil Procedure (now section 708, Probate Code), which in part reads as follows: "No claim which is barred by the statute of limitations shall be allowed or approved by the executor or administrator, or by the judge."

Appellant also contends that, although respondent could have prevented the running of the statute of limitations by filing an action on the claim prior to the expiration of one year, which was February 16, 1928, and suing after the issuance of letters testamentary, it failed to do so.

Respondent concedes that the mere filing of the claim with the executrix would not toll the statute of limitations, and that no outlawed claim could legally be approved by the executrix or the judge, but contends that, because of the provisions of section 353 of the Code of Civil Procedure which in part provides as follows: "If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives, after the expiration of that time, and within one year after the issuing of letters testamentary or of administration," the claim was not barred by the statute of limitations, and that it was not necessary to file an action on the claim prior to February 16, 1928, in order to prevent the running of the statute of limitations.

Respondent further contends that in this case, therefore, respondent had one year from and after February 17, 1927, the date letters testamentary were issued, within which to have its claim allowed and approved, and that the claim, having been allowed by the executrix November 3, 1927, and approved by the court and filed December 2, 1927, which was within the said year, was within the time allowed.

In undertaking to meet this situation and contention of respondent, appellant takes the position that section 353, as above quoted, does not extend the time for the allowance and approval of claims, but only extends the time for bringing an action upon the claim. In other words, in effect the position of appellant appears to be that section 353 does not extend the power of the court to approve the claim within the year, although the claim has been allowed by the executrix, but does extend and give the court a power to award a judgment thereon if action is brought within the year.

This brings us to the point where it becomes necessary to interpret the meaning of the provisions of section 353 of the Code of Civil Procedure, at least to the extent of determining whether it relates exclusively to the commencement of actions or relates to and extends the time for presenting or filing claims against an estate, which would otherwise be barred by the general statute of limitations.

In the case of Wallace v. Gable, 209 Cal. 10, page 12, 285 P. 309, 310, wherein, as against the contention of respondent, that the general statute of limitations is extended by section 353, appellant contended that section 353 relates exclusively to the commencement of actions, and does not relate to or extend the time for presenting or filing claims against an estate, and that the claim was barred under the general statute before the claim was presented, and that presentation of a valid claim is a condition precedent to bringing an action, the court stated that: "Reliance is placed upon the case of Morrow v. Barker, 119 Cal. 65, 51 P. 12. That case holds that no suit may be brought on a claim unless the claim be presented within the time limited by the notice to creditors. In that case, the claim was presented after the time limited in the notice. In the instant case, the claim was presented within the time mentioned in the notice to creditors and the claim and the action were both filed within one year after the appointment of the executors. We think the purpose and meaning of section 353, Code of Civil Procedure, is to extend the time within which to present claim and bring an action in the event of rejection. Since section 353, Code of Civil Procedure, expressly extends the time for bringing an action, a presentation of a claim at any time before action is barred is within time, provided it be filed within the time provided in the notice to creditors. Such was the view of this court, apparently, in the case of Barclay v. Blackinton, 127 Cal. 189, 59 P. 834, 835. In that

case, the claim was presented to the administrator within one year after the death of the intestate, but suit was not brought thereon within the year allowed by section 353, Code of Civil Procedure. That year expired on March 2, 1897, and the action was not brought in time. However, the court said: 'After the 2d day of March, 1897, the claim was barred by the statute of limitations, and thereafter neither the administrator nor the court had the power to allow it'—thus assuming that section 353, Code of Civil Procedure, extended the time for filing claim as well as the time for bringing an action."

In this case the claim was presented within the time mentioned in the notice to creditors, and was presented before the action was barred, and, the claim having been allowed by the executrix and approved by the court, there was no necessity to file an action on the claim. It follows that, guided by the above-mentioned rules, it is clear that the executrix had the authority to allow the claim on November 3, 1927, and that the court did not err in approving the claim on December 2, 1927, and subsequently ordering and decreeing that the claim in question constituted a valid and subsisting claim against said estate.

The portion of the order of the trial court appealed from is therefore affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

126 Cal.App. 314

HURLEY v. HIBERNIA SAVINGS & LOAN SOC. et al.

Civ. 7872.

District Court of Appeal, First District, Division 1, California.

Sept. 26, 1932.

1. Husband and wife ⇨264.

Evidence sustained finding, in wife's action to determine ownership of deceased husband's deposit account, that deposits were made from husband's separate property.

It was clearly established that the original deposit by the deceased husband consisted of his separate funds, and there was evidence that additional deposits were made from proceeds of rentals of flats constituting deceased's separate property, and that aggregate amount of withdrawals from account exceeded total amount of additional deposits.

2. Joint tenancy ⇨3.

Finding that deposits in name of father or son, payable to either or survivor, constituted joint tenancy, *held* justified in view of entries (St. 1909, p. 90, § 16, as amended by St. 1915, p. 1139; Civ. Code, § 683).

3. Joint tenancy ⇨3.

Whether deposit created joint tenancy must, in absence of written declaration clearly disclosing intention, be determined from attending circumstances.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Mary Hurley as special administratrix of the estate of Patrick J. Hurley, deceased, against the Hibernia Savings & Loan Society and Daniel Hurley, in which defendant last named filed a cross-complaint. Judgment for last-named defendant, and plaintiff appeals.

Affirmed.

Thomas R. McGrath and Joseph A. Brown, both of San Francisco, for appellant.

Hugh K. McKevitt and Jack M. Howard, both of San Francisco, for respondents.

LANDIS, Justice pro tem.

This is an action to determine the ownership of a deposit of money with the defendant Hibernia Savings & Loan Society, and to declare a constructive trust in said money. Briefly stated, the complaint recites that Patrick Hurley died intestate on the 29th day of October, 1929; that plaintiff, Mary Hurley, was on October 30, 1929, appointed special administratrix; that plaintiff and Patrick J. Hurley were married May 26, 1918, at San Francisco; that on September 18, 1918, Patrick J. Hurley opened an account with the defendant bank with the community earnings and accumulations; that in case of death or need the same should be transferred or withdrawn in her favor; that having confidence in the promise of said Patrick J. Hurley, she permitted him to deposit the community earnings and savings in said bank; that notwithstanding said promise, said Patrick J. Hurley, in bad faith, opened said account in his name and in the name of defendant Daniel Hurley, payable to either or the survivor of them; that the amount involved is $1,697; and that the defendant Daniel Hurley has no right or interest in said moneys; that the amount on deposit at the time of the death of the deceased was $1,350.

The defendant Hibernia Savings & Loan Society answered, in effect taking the position of a mere stakeholder in the matter, and defendant Daniel Hurley, sometimes also known as Daniel F. Hurley, answered denying the allegations concerning the circum-

stances involved, and by cross-complaint claimed title to the money in question and sought a judgment quieting his title thereto.

Judgment went for defendant Daniel Hurley under his cross-complaint quieting his title to the money in question, and plaintiff prosecutes this appeal.

There are some general allegations of fraud and undue influence set forth in the complaint, but at the trial appellant appears to have conceded that, at least in so far as respondent Daniel F. Hurley is concerned, no proof was made justifying such charge. In any event, such allegations derive no direct support from the evidence.

It is conceded by both appellant and respondent that there are but two questions involved: (1) Whether or not the money is separate property or community property; and (2) whether or not the deposit as worded constitutes a joint tenancy.

The evidence shows that Patrick Hurley died intestate October 29, 1929; Mary Hurley was on October 30, 1929, appointed special administratrix; appellant Mary Hurley and decedent were married May 26, 1918. This was a second marriage of both parties, the respondent Daniel Hurley being a son of decedent by a former marriage. The bank account which is the subject of the action was opened at the said Hibernia Bank on September 11, 1918; the first deposit of $700 was made by decedent in the company of his son, the respondent Daniel Hurley. This sum of $700 was withdrawn from an existing account in the Humboldt Bank, the funds of which were owned and deposited there by decedent on February 18, 1918, and prior to decedent's marriage with appellant. The present balance of the account, aggregating the sum of $1,213.96, which is the subject of controversy, is made up of the original deposit of $700, interest credits, and additional deposits made by decedent from time to time in amounts varying from $11 to $75, and from which is deducted withdrawals made by decedent from time to time in the amounts varying from $5 to $300.

The interest items aggregate the sum of $567.96; the deposits other than the original $700 deposit aggregate the sum of $951; and the aggregate amount of the withdrawals, $1,005.

The bank passbook shows the account was opened and carried in the name of Patrick Hurley or Daniel Hurley, a minor aged fourteen years eight months, and payable to either or to the survivor of them.

Daniel F. Hurley testified that at the time the account was opened, he was going away to school, and the morning before he was to leave, his father took him to the Humboldt Bank and withdrew an account in the name of Patrick J. Hurley and took him to the Hibernia Bank and placed it in the name of Patrick Hurley or Daniel F. Hurley; that it was decedent's understanding that if anything happened to him, that money would help respondent up through school, or any time he needed it, it would be there for him.

The book record shows that on August 29, 1923, the balance in the account which then amounted to $1,697.78 was withdrawn by decedent and redeposited by decedent on August 31, 1923. Daniel F. Hurley testified that he knew about said transaction and explained it as follows: He, referring to decedent, was at that time at the home of my uncle; he boarded there in the month of August, 1923; he had family difficulties at home; he was under the impression that his wife would go down to the bank and put an attachment against the money; the check was withdrawn and brought to the home of my uncle; he left it with him and his wife and it was redeposited in the Hibernia Bank.

The evidence shows that all deposits and all withdrawals were made by decedent. None was made by either Daniel F. Hurley or Mary Hurley.

That the original deposit of $700 and the accrued interest thereon were separate funds of decedent was very clearly established. With respect to the additional deposits, appellant relies upon, first, the legal presumption that property in the possession of either the husband or the wife at the time of his or her death is presumed to be community property; and, secondly, contends that such presumption is supported by her testimony, which in effect shows that during the time the additional deposits were made decedent was working, earning money, and was not accounting to her for all his earnings. That is the most that can be said in connection with the evidence relied upon to support the presumption. There is not a word of testimony showing that such earnings or any part thereof found their way into the account in question.

In support and justification of the inference or deduction made by the trial court that it was decedent's separate property, it was shown that decedent was a laboring man and that his earnings contributed not only to his own maintenance, but also to the support of appellant and children of appellant by a former marriage; that during the period of time the additional deposits were made decedent was receiving rentals from flats, conceded to be separate property, and in which flats respondent Daniel Hurley owned an undivided interest through inheritance from his mother, and it was testified by Daniel Hurley that the rental money was collected by decedent and deposited in the account at the Hibernia Bank in the name of his father and himself.

The evidence also shows that the aggregate amount of the withdrawals made from the

account by decedent exceeds the total amount of the additional deposits, and also shows that while decedent was very sick and immediately before his death, an attempt was made to have him sign a writing said to be a release of the money in the bank. This he refused to sign.

[1] The question, then, is whether, upon the evidence hereinbefore set forth, a finding by the court that the property in question was the separate property of decedent could be held to be supported by the evidence.

In the case of Freese v. Hibernia Sav., etc., Soc., 139 Cal. 392, 73 P. 172, 173, the court says:

"While the presumption attending the possession of property by either husband or wife is that it is community property, such presumption is a disputable one, and may be controverted by other evidence. Respondents contend that the evidence of plaintiff was not legally sufficient to overcome this presumption. They rely upon expressions of this court in various cases to the effect that the fact that property is separate property of one of the spouses must be affirmatively established 'by clear and decisive proof,' 'by clear and satisfactory evidence,' and 'by clear and convincing evidence.' * * * Ballinger, in his work on Community Property, says, in section 167: 'It is not believed, however, that these terms should be considered as going to the length that their general meaning might import. Certainly it is not required that the proof to destroy this presumption should be any more than sufficient to satisfy the mind of court or jury that its weight is enough to cause a reasonable person, under all the circumstances, to believe in its sufficiency, in order to counterbalance the naked presumption that the property was acquired with the funds of the community. The property is merely considered as the property of the community until the contrary is shown by legal proof, and legal proof would seem to be a preponderance of the testimony under all the facts and circumstances of the particular case.' See, also, 6 Am. & Eng. Ency. of Law (2d Ed.) p. 327.

"Clearly, it was never intended by this court to lay down a rule requiring demonstration in such matters; that is, such a degree of proof as excluding possibility of error, produces absolute certainty. Civ. Code Proc. § 1826. Such proof is never required. * * * We are of the opinion that it is incumbent on the party seeking to overcome the presumption of community property to do no more than to produce such legal evidence as, under all the circumstances of the particular case, would ordinarily produce conviction in an unprejudiced mind, and that in the face of such evidence the naked presumption, unsupported by any testimony, must fall. In considering whether or not such a degree of proof has been attained, we have the right to consider such presumptions and inferences as are authorized by the law of evidence. That a presumption declared by law has its place in such a dispute was acknowledged by this court in Denigan v. San Francisco Savings Union, 127 Cal. 142, 147, 59 P. 390, 78 Am. St. Rep. 35. An inference is simply a deduction which the reason of the judge or jury makes from the facts proved, and, in considering a question of the character here involved, we have the same right to make such reasonable deduction from the facts proved as we have in considering other questions."

There was not a single circumstance shown by the evidence in aid of the presumption of community property, unless it be the circumstance that decedent having had possession of the money he received for his labor he could or might have deposited some of it in the bank. Not a word of evidence that he did, and the apparent inference of the trial court that he did not, is a reasonable deduction from the facts proved.

As before stated, the $700 and interest accrued thereon was very clearly established as separate property, and there is undisputed evidence that the rental money was separate property and was deposited in the account in question. Measured by the foregoing rules, we are unable to hold that the evidence given on the trial was not legally sufficient to support a finding that the property was separate property.

[2, 3] With respect to the question of whether or not the deposit as worded constitutes a joint tenancy, the evidence shows that the account was opened and made in the name of Patrick Hurley, or respondent Daniel Hurley, payable to either or to the survivor of them. The written evidence consists of the following: (1) On the bank book No. 520493 is written, both on the outside cover and on the inside immediately preceding the entries of the deposits, withdrawals, and balance, the following: "Patrick Hurley or Daniel Hurley a minor aged 14 yrs. 8 mos. Payable to either or to the survivor of them. In account with The Hibernia Savings and Loan Society." And (2) on a card retained by the bank, signed by each, Patrick Hurley and Daniel Hurley, there is written above the said signatures of the depositors, the following: "Patrick Hurley or Daniel Hurley A minor, aged 14 yrs. 8 mos. Payable to either or to the survivor of them. I hereby agree to the by-laws and rules of The Hibernia Savings and Loan Society as to all deposits and withdrawals made on this account," and below the signatures is shown identification information such as the residence, birthplace, mother's maiden name, etc. We are not aware of any Code provision or principle of law which would prevent decedent by this transfer of deposits from his

sole account to a joint account from giving his son a joint interest or making him the joint owner with him in the latter deposit. Whether he intended to do so or not is the essential element to be considered, and if that clearly appears from the instruments executed by him and his son when he made the deposits in their names, we cannot look beyond those instruments. If it is clear on the question of intent the right of the parties must be determined solely from its consideration. No parol evidence could affect it.

Appellant urges the contention that there was no written agreement; in other words, that the above-mentioned written evidence does not constitute the written agreement required. Considering the above writings, although the bank book is not signed by the depositors and while the card which is signed by them may be but a mutual declaration of the father and the son as to the deposits, the particular question is: Do they clearly disclose an intention on the part of the father when the deposit was made by him to the account of himself and his son, to constitute it and further deposits the joint property of himself and his son? We do not perceive how any other reasonable construction can be given to the instruments than that he did. The written declaration as applying to him says so in express terms. The moneys were his before the deposit account was opened. He declares that as deposited by him it is not his separate property but the joint property of himself and his son. There is no ambiguity or uncertainty about this language. It was undoubtedly intended to and did create a joint interest or ownership in the deposit, and this being the intention, and as the right of survivorship applies to joint interests or ownerships of personal property, it must have been the intention of the deceased Hurley in declaring the deposit to be joint property to have intended that the incident which follows joint ownership should apply to it, and that upon his death his son should take the deposit as survivor. It was unnecessary to accompany the creation of the joint ownership with a declaration respecting survivorship. That follows as a legal incident to the creation of the joint interest and a matter which decedent must be held to have known and intended to effect by the clear creation of the joint interest.

The foregoing principles of law are abundantly supported by the following authorities: Section 16 of the Bank Act (as amended by St. 1915, p. 1139), as said section stood prior to its repeal in 1919 (St. 1919, p. 623, § 3), an excerpt from which read as follows: "When a deposit with a bank shall be made by any person in the names of such depositor and another person or persons, and in form to be paid to either or the survivor or survivors of them, such deposit thereupon and any additions thereto made by either of such persons upon the making thereof, shall become the property of such persons as joint tenants, and the same, together with all interest thereon, shall be held for the exclusive use of the persons so named," etc.; section 683 of the Civil Code; and the following cases: Estate of Gurnsey, 177 Cal. 211, 170 P. 402; Kennedy v. McMurray, 169 Cal. 287, 146 P. 647, Ann. Cas. 1916D, 515; Estate of Harris, 169 Cal. 725, 147 P. 967; Crowley v. Savings Union Bk., etc., Co., 30 Cal. App. 144, 157 P. 516; Crowley v. Savings Union Bank, etc., Co., 30 Cal. App. 535, 159 P. 194; McCarthy v. Holland, 30 Cal. App. 495, 158 P. 1045; and see, also, the cases of Reilly v. Filben, 107 Cal. App. 722, 291 P. 454; Hill v. Badeljy, 107 Cal. App. 598, 290 P. 637; Waters v. Nevis, 31 Cal. App. 511, 160 P. 1081; Halsted v. Central Bank, 36 Cal. App. 500, 172 P. 613. The general character of a joint tenancy account is set forth in the matter of the Estate of Gurnsey, supra, wherein it is held that in such a bank deposit the title does not pass to and vest in the survivor on the death of the cotenant, but rather each tenant is seized of the whole estate from the time of the creation of the account. No change occurs in title on the death of the cotenant, the survivor merely becoming the sole owner of the account of which he was already seized.

In 7 California Jurisprudence, at page 335, we find the following: "Perhaps the most common joint tenancy is that which is created in bank deposits," citing a long list of cases holding that a joint deposit constitutes a joint tenancy.

The cases cited by appellant, among which the case of Denigan v. Hibernia, etc., Society, 127 Cal. 137, 59 P. 389, is the leading case of the line of decisions relied upon, and which case is expressly referred to in the case of Conneally v. San Francisco S. & L. Soc., 70 Cal. App. 180, 232 P. 755, and Kennedy v. McMurray, supra, did not involve deposits with a right of survivorship expressed.

Finally, if it should be held that the written evidence does not measure up to the requirements necessary to constitute a written agreement and it could be said that no written agreement was executed between the parties to the deposit and accompanying its making, presenting the question as to the intention of the depositor in making the deposit in the form he did, whether he intended to make a gift, or create a joint interest in the deposit with right of survivorship, or to establish a trust as to any balance on deposit at his death, we must apply the rule that in the absence of any written instrument clearly disclosing his intention in those respects, such intention was open to inquiry and was to be determined from all the facts and circumstances connected with the deposit. The

whole matter would rest in parol and it would be for the court to determine the intention from all the facts and circumstances proved in the case.

In this case, without again reciting the facts, suffice it to say it clearly appears that the facts and circumstances shown by the evidence were ample to support the conclusion of the trial court that the intention of decedent was to create a joint tenancy.

The judgment appealed from is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

126 Cal.App. 260

ALVES v. ALVES.

Civ. 7780.

District Court of Appeal, First District, Division 1, California.

Sept. 24, 1932.

1. Divorce ⇐109.

Husband seeking divorce for desertion, on account of wife's refusal to change domicile, must show he has established new domicile and must show character and suitableness thereof; that he offered it to wife; and that wife unreasonably refused to comply with his selection (Civ. Code, §§ 95, 103).

2. Divorce ⇐133(3).

Evidence which merely showed refusal of wife to leave present home after husband secured work elsewhere *held* not to show desertion by wife justifying divorce (Civ. Code, §§ 95, 103).

Appeal from Superior Court, Contra Costa County; H. V. Alvarado, Judge.

Action by Mary Alves against Manuel Alves for divorce, in which defendant filed a cross-complaint. From an interlocutory decree for defendant, plaintiff appeals.

Reversed.

C. W. White, of Hayward, for appellant.

J. E. Rodgers and A. F. Bray, both of Martinez, for respondent.

LANDIS, Justice pro tem.

Plaintiff sued defendant for a divorce on the grounds of willful neglect and willful desertion. Defendant answered, and in a cross-complaint charged plaintiff with and sought a divorce from plaintiff upon the ground of willful desertion. The court denied the prayer of plaintiff's complaint and adjudged defendant entitled to a divorce upon the ground of willful desertion. This appeal is by the plaintiff from the interlocutory decree adjudging defendant entitled to the divorce.

In his cross-complaint respondent charges appellant's desertion as follows: "That on or about the 25th day of November, 1928, and more than one year last past, the said cross-defendant, disregarding the solemnity of her marriage vows, wilfully and without cause, deserted and abandoned the cross-complainant and ever since has, and continues so to wilfully and without cause abandon said cross-complainant and to live separate and apart from him, without any sufficient cause or any reason, and against his will and without his consent."

Appellant contends that the said interlocutory decree is not supported by and is contrary to the evidence, and is against law for the following reasons: (1) That there is no evidence showing willful desertion of defendant, by plaintiff; (2) that there was no corroboration of the claim of desertion, as required by section 130 of the Civil Code.

The following are the facts as set forth in respondent's brief, and appear to substantially cover the controlling facts, stated most favorably to respondent, to wit: Defendant testified that he left the then home of plaintiff and defendant at Hayward, because it was costing him too much money to live in town, and he had obtained work in the Bollinger canyon in Contra Costa county from a man named Silveira at the Bettencourt place; that Mrs. Alves stated to him that she would not move out into the country with him anywhere, that she would not leave her family which consisted of her sons and daughter, who were then living in Hayward.

"Q. And will you state to the court the circumstances under which you left? A. Well, the reason I left home, was because I was working up in the Bollinger canyon, for a party by the name of Silveira.

"Q. Is that on what they call the Bettencourt place? A. That is the Bettencourt place, and I couldn't—it was costing me too much money to live in town, and I told the wife that we had to move out of town. I didn't tell her that we were going to move up there. I just mentioned it to her, we had to pull out of town. She told me she wouldn't leave her family to move out in the country with me nowheres, so I just simply walked out. I told her I couldn't make it go in town. * * * We had our family all raised; the youngest girl was getting sixty-five dollars a month, and I couldn't make ends meet, so I just simply told her, 'We have to pull out of town.' 'Well,' she said, 'I wouldn't leave my family to go with you out in the country nowheres.' Of course she had an idea I was offered a house with Mr. Silveira, I was working for. He offered me a house free of charge to live. I

never mentioned this to her, but she had an idea; she got it from the outside that I had a house I wanted to live in, and she told me she wouldn't leave the family to go out in the country nowhere, so I just dropped the matter there. * * *

"Q. When was it your wife told you she wouldn't live with you in the country anywhere? A. This was when I was working for this Mr. Silveira. That must have been along about in the month of November sometime. I had just been working there a short while. I had been working there just about a month and then I went home and I handed her thirty-five dollars. I said, 'Here's thirty-five dollars towards paying the house rent'; we were paying thirty-six dollars a month house rent in town, and she threw the money back at me. The youngest boy was with her; he was there. She threw the money back at me, and said, 'Keep the money; I don't want your money.' She said, 'My boys will help me keep up the house.' I said, 'All right.' I took the money and put it back in my pocket. She said I could come home. I felt I wasn't welcome at home; if I couldn't keep my home, I wasn't welcome; if my children had to keep a home for me, I wouldn't go home. I was willing to provide a home for her any place. I am willing to provide a home for her now, providing she moves where I can get employment. I couldn't get employment in Hayward. I haven't any trade; I work at farm work; she refuses to live out in the country with me. I have no way of traveling back and forth to my work; I have no machine. I am willing to provide a home for her now, if she is willing to live wherever I can get employment. * * *

"Q. How do you mean you felt you weren't welcome, in what way? A. Because they had no use for me, none of them. They haven't none of them come to see me since I left home. I think the least they could do, is come and see me, because I always provided for them, the same as any father could a family. * * *

"Q. Did you ever talk to your wife about coming to live with you in the country after that time in November, when she said she wouldn't live with you in the country? A. No, I did not.

"Q. Why not? A. because I knew it was no use.

"The court. Q. Is that because she told you before? A. Because she told me before she wouldn't come and live with me out in the country nowheres. There was no use in fighting with her, to come out, if she didn't want to come out. * * *

"The court. Q. Were your relations with your wife pleasant, at that time? Were you friendly with your wife at that time? A. We weren't on very good speaking terms, because she didn't want to move where I wanted to move. * * * I didn't tell her to come and live in Bollinger canyon. I told her we had to move out of town, because we couldn't make it in town, and she told me she wouldn't leave the family to live with me in the country no place, and the youngest boy said, 'No, you ain't taking mother to the "Styx" nowhere. We're keeping this house.' I said, 'All right, if you are keeping this house, you can go to it, I am out.' * * *

"Q. Was your wife there at the time when he said that? A. She was right there with him.

"Q. Did she make any remark? A.—But she didn't make any remark. * * *

"The court. Q. What kind of a home could you have provided for her in Bollinger canyon? A. There was a nice house in Bollinger canyon."

It is obvious that the decree must find support, if any, in the charge of desertion, under the provisions of section 103 of the Civil Code, whereby it is provided that "the husband may choose any reasonable place * * * of living, and if the wife does not conform thereto, it is desertion."

Briefly reviewing the evidence most favorable to respondent, it is shown that the parties had been living in Hayward about two years, in a rented house; defendant worked out at different places and finally went to work in the Bollinger canyon in Contra Costa county; he would return to the Hayward home first every week, and then every two weeks, and finally stayed away entirely. According to defendant's testimony, on one of the trips home in November he said to his wife, " 'We have to pull out of town.' * * * it was costing me too much money to live in town. * * * I didn't tell her that we were going to move up there [to Bollinger canyon]. I just mentioned it to her, we had to pull out of town. She told me she wouldn't leave her family to move out in the country with me nowheres, so I just simply walked out. I told her I couldn't make it go in town. * * * Of course she had an idea I was offered a house with Mr. Silveira, I was working for. He offered me a house free of charge to live. I never mentioned this to her, but she had an idea; she got it from the outside that I had a house I wanted to live in, and she told me she wouldn't leave the family to go out in the country nowhere, so I just dropped the matter there. * * * After that time in November, when she said she would not live with me in the country, I never talked to her about coming to live in the country, because I knew it was no use."

In the case of Bibb v. Bibb, 39 Cal. App. 406, 409, 179 P. 214, 215, and supported by abundant authorities therein cited, the court says: "Ordinarily the husband may choose the family domicile at pleasure. It is the wife's duty to follow his fortunes—'to go

whither he goeth'—and abide in that place where it is most convenient for him to enjoy her society, and where he is able and willing to make provision for her support and that of his family. But his right to determine the family abode does not give him an entirely arbitrary power; it is not without its limitations. He is bound to provide and establish a suitable home for his wife, ere he can insist that she follow him. The law has limited his right to change the family abode. It is so limited that he can only 'choose any reasonable place of living.' Civ. Code, § 103. It is when, and only when, he has so chosen and established the new domicile, and, in good faith has made offer of the new abode to her, and she, without a sufficient cause, has refused to comply with his selection, that a cause of action for desertion arises."

[1, 2] In this case, the most that can be said in support of the wife's desertion is that she informed her husband that she would not follow him. There is no showing that defendant had established a new domicile; not a word of testimony that he had offered to her or requested her to go with him to any particular place. By affirmative evidence he must not only show that he has established a new domicile, but must show its character and its suitableness. Kenniston v. Kenniston, 6 Cal. App. 657, 92 P. 1037. No presumption in that regard can be indulged in his favor.

As said by the court in Bibb v. Bibb, supra: "It is not enough that, prior to his establishing the new domicile, she informs him she will not follow him. For, perchance, he may accede to her wishes and not make the change; or she, perhaps, when the new domicile shall have been actually chosen and established, may exercise a woman's privilege and change her mind. The law does not countenance a divorce for a mere disagreement as to whether a contemplated change shall or shall not be made. Her duty is to follow him if and when he actually moves to a new, but suitable, domicile. Until he moves she cannot follow. Nor is she in default until, having established a new domicile, he has offered it to her and requested her to follow him. Until such offer and request be made, and she [is] thereby informed as to the location and character of the place chosen by the husband, she cannot know whether it is a 'reasonable place of living.'"

And as said by the court in the case of Vosburg v. Vosburg, 136 Cal. 195, 204, 68 P. 694, 697: "* * * she was not guilty of desertion until he had made the choice, offered it to her, and she, without sufficient cause, had refused to comply with his selection." "* * * if it be his intention to visit upon his wife the penalty of her failure to follow him to the new domicile, he should present to her, in plain and unequivocal terms, the alternative of a compliance with his wishes or a surrender of all her conjugal rights. Hardenbergh v. Hardenbergh, 14 Cal. 654. Unless such alternative be so presented to her, it cannot readily be ascertained whether or not she harbors an actual intent to desert him; and the actual intent to desert is as much an essential ingredient of the desertion as is the voluntary separation itself. Civ. Code, § 95; Hardenbergh v. Hardenbergh, supra." Bibb v. Bibb, supra, at page 410 of 39 Cal. App., 179 P. 214, 215.

Defendant failed to present to his wife, clearly and definitely, the alternative of a compliance with his will to move to any particular place, or be deemed guilty of desertion.

Viewing the facts disclosed by the record in the light of these principles of law, we are constrained to hold that the trial court erred in granting a divorce to respondent.

Judgment reversed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

126 Cal.App. 306

YOUNG v. YOUNG et al.

SAME v. SHANNONHOUSE.

Civ. 8529.

District Court of Appeal, First District, Division 1, California.

Sept. 26, 1932.

Rehearing Denied Oct. 26, 1932.

Hearing Denied by Supreme Court Nov. 23, 1932.

1. Husband and wife ⇐249.

Neither separate property of either spouse nor joint property of both could be community property (Civ. Code, §§ 161, 687).

2. Husband and wife ⇐266.

As between spouses, property interest of husband and wife in stocks and bonds was subject to oral contract, and transfer thereof could be made without writing (Civ. Code, §§ 158, 1052).

3. Husband and wife ⇐266.

Husband and wife may enter into binding agreement that any certain property shall thereafter be held in joint tenancy (Civ. Code, §§ 158, 161).

4. Joint tenancy ⇐3.

Joint tenancy in personal property may be created by oral agreement transferring title to two persons as joint tenants (Civ. Code, § 1052).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

5. Husband and wife ⇐266.

Separate property of each spouse may by agreement be converted into community property, or community property may be converted into separate property of both or either (Civ. Code, §§ 158, 159).

6. Husband and wife ⇐264.

Evidence *held* to sustain finding that, on death of husband, certificate for shares of stock became property of wife pursuant to joint tenancy agreement (Civ. Code, §§ 158, 159, 161; St. 1909, p. 90, § 16, as amended).

7. Husband and wife ⇐266.

Written agreement by husband and wife on renting safe deposit box that everything then in it or that should thereafter be put into it should be joint property was valid (Civ. Code, §§ 158, 159, 161).

8. Husband and wife ⇐266.

That certain shares found in safe deposit box held under joint tenancy agreement between husband and wife regarding contents belonged to third person was immaterial, where survivor did not claim such shares.

Appeals from Superior Court, Alameda County; John J. Allen, Judge.

Separate actions by John C. Young, as executor of the estate of William D. Young, also known as W. D. Young, deceased, against Emily B. Young, the First National Bank in Oakland, and John G. Shannonhouse, and against John G. Shannonhouse, which were consolidated for trial and tried together. From judgments for defendants, plaintiff appeals, and, by stipulation of the parties, the two appeals were consolidated and heard as one.

Affirmed.

Lawrence W. Young, of Fresno, and Trefts & Young, of San Francisco, for appellant.

George W. Lupton, Jr., of Oakland, for respondents John G. Shannonhouse and First National Bank in Oakland.

Randolph V. Whiting, of San Francisco, for respondent Emily B. Young.

GEORGE H. THOMPSON, Justice pro tem.

In these actions the plaintiff, as the executor of the last will of said William D. Young, deceased, sought to enforce a trust on certain personal property consisting of stocks and bonds alleged by the plaintiff to have been fraudulently and wrongfully taken by the said defendants, thereby depriving the estate of the said personal property. The defendants answered, denying these allegations, and alleging that Emily B. Young, the surviving wife of the decedent and one of the defendants herein, became the owner and legal possessor of these stocks and bonds, and that in regard to them she had done nothing wrongfully or fraudulently. The two actions were consolidated for trial by order of the trial court, and were tried together; and the trial court, finding in favor of the defendants, entered judgments accordingly. A new trial was denied by the court in each case. The plaintiff has appealed from each judgment, and by stipulation of the parties the two appeals have been consolidated and have been heard as one.

William D. Young died on November 14, 1928, at the age of sixty-nine years. For two days prior to his death he had been in a state of coma, and for some months prior to his death his health had been failing, and during that time he had exhibited manifestations of being afflicted with Parkinson's disease, a disease otherwise known as paralysis agitans. On September 12, 1928, he made the will that was admitted to probate, of which the plaintiff John C. Young is the executor.

William D. Young and the defendant Emily B. Young had been married for some thirty-one years, and it would appear that their married life was a happy and harmonious one, and that each entertained the greatest regard and respect for the other, and trusted the other at all times implicitly in all matters. All the property owned and possessed by them at the time of the death of the decedent was acquired by them subsequent to their marriage, and was the acquisition of the marital union. It appears that, by different agreements entered into by them, they sought to cast or transmute certain of their acquired property into a joint interest, in order to avail themselves of the advantages incident to such estate, as has been done quite commonly in California during recent years, illustrations of which appear in the following cases: Estate of Harris, 169 Cal. 725, 147 P. 967; Kennedy v. McMurray, 169 Cal. 287, 146 P. 647, Ann. Cas. 1916D, 515; Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 P. 370; McCarthy v. Holland, 30 Cal. App. 495, 158 P. 1045; Kelly v. Woolsey, 177 Cal. 325, 170 P. 837; Williams v. Savings Bank of Santa Rosa, 33 Cal. App. 655, 166 P. 366; Halsted v. Central Savings Bank, 36 Cal. App. 500, 172 P. 613; Halsted v. Oakland Bank of Savings, 36 Cal. App. 816, 172 P. 614; Conneally v. San Francisco S. & L. Soc., 70 Cal. App. 180, 232 P. 755; Hill v. Badeljy, 107 Cal. App. 598, 290 P. 637; Estate of Gurnsey, 177 Cal. 211, 170 P. 402; McDougald v. Boyd, 172 Cal. 753, 159 P. 168; Estate of Nelson, 104 Cal. App. 613, 286 P. 439; Salles v. Loane, 204 Cal. 55, 266 P. 538.

As to the personal property in controversy —the stocks and bonds, the ownership and possession of which the surviving wife claims she acquired pursuant to and as the legal result of an agreement entered into by her with

her said husband and by and with his consent—the question arising now herein is: Are the findings and the judgments of the court that Emily B. Young became such owner sustained by the record? As the facts will have to be weighed and considered in the light of the law of California in effect during the period of time involved, a reference will be made to certain of the sections of the Civil Code deemed applicable:

"The ownership of property by several persons is either: 1. Of joint interests; 2. Of partnership interests; 3. Of interests in common; 4. Of community interest of husband and wife." Section 682.

"A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants." Section 683.

"An interest in common is one owned by several persons, not in joint ownership or partnership." Section 685.

"Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint interest, as provided in section six hundred and eighty-three, or unless acquired as community property." Section 686.

"Community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either." Section 687.

"Transfer is an act of the parties * * * by which the title to property is conveyed from one living person to another." Section 1039.

"A voluntary transfer is an executed contract, subject to all rules of law concerning contracts in general; except that a consideration is not necessary to its validity." Section 1040.

"A transfer may be made without writing, in every case in which a writing is not expressly required by statute." Section 1052.

"Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying the confidential relations with each other, as defined by the title on trusts." Section 158.

"A husband and wife may hold property as joint tenants, tenants in common, or as community property." Section 161.

[1] The foregoing sections of the Civil Code were in effect during the time of the acquisition of the property in controversy and during the time of all dealings had by William D. Young and his wife concerning such property. It is quite clear under the law that any property acquired as the separate property of either (section 687, Civ. Code), or any property made separate property (joint) by a transmutation effected by the husband and wife during the married relation, would not constitute or be community property of the parties at the time of the death of the decedent, for a community estate and a joint tenancy cannot exist at the same time in the same property. Siberell v. Siberell (Cal. Sup.) 7 P.(2d) 1003, 1005.

[2-5] As mentioned heretofore, the property concerning which there is controversy herein is personal property, stocks and bonds. As between the husband and wife the property interest therein was subject to oral contract: a transfer could likewise be made without writing. That a husband and wife, at least as between themselves, may enter into a binding agreement that any certain property shall not thereafter be held as community property, but instead as a joint tenancy, with all the characteristics of such an estate, has long been recognized in California, and, as the law (section 1052, Civ. Code) does not require the execution of a writing to effect a transfer of personal property, it follows that a joint tenancy in personal property may be created by an oral agreement by which the title to the property is transferred to two persons as joint tenants. Estate of Harris, supra; Kennedy v. McMurray, supra. Even to establish a joint tenancy account in a bank under the Bank Act, a formal written agreement between the depositors is not necessary. Section 15a of the Bank Act (added by St. 1921, p. 1367, § 5, as amended) does not require it (Hill v. Badelj, supra, at page 605 of 107 Cal. App., 290 P. 637), and, prior to the enactment of said section 15a, the language of the Bank Act, then section 16, which in this regard was substantially the same as appears in section 15a, did not require it. When a husband and wife by agreement declare that a certain fund or certain money shall thereafter be held by them as a joint tenancy, the effect of such an agreement is, as between them, to create a joint interest or estate in the property to which it relates, and thereafter such property ceases to be community property. Estate of Gurnsey, supra; In re Finley, 103 Cal. App. 694, 284 P. 941. The Civil Code lays down a definition for "joint interest"; and at one time, regardless of the asserted technical essentials of joint tenancy under the common law, designated as a joint tenancy, the relation between the spouses created by a declared homestead (Schuler v. Sav. & L. Soc., 64 Cal. 397, 1 P. 479); the right of survivorship being attached to such relation. Under sections 158 and 159 of the Civil Code, it is now well settled that husband and wife may, as between themselves, enter into any con-

tract respecting property which either might if unmarried. Under this plenary authority, the separate property of each may be converted into community property, and the community property of both may likewise be converted into separate property of both or either. Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 712, 719, 720, 103 P. 190, and cases cited; Siberell v. Siberell, supra, at page 1004 of 7 P.(2d).

[6] The personal property concerning which the plaintiff seeks to enforce a trust comprises: (1) A certificate for 100 shares of Union Oil Associates; (2) the contents of the safe deposit box. The certificate for the 100 shares of Union Oil Associates was at the Crocker National Bank of San Francisco, and the safe deposit box was at the French American Bank in San Francisco. Between November 10, 1928, and the date of her husband's death, November 14, 1928, Mrs. Young took over the foregoing, claiming that she did so with the consent of her husband expressly given by him prior to his decease. As to the certificate for 100 shares of Union Oil Associates at the Crocker National Bank, it appears that in January, 1913, at a time when provisions (section 16) substantially the same as section 15a of the Bank Act made such a deposit the property of the depositors as joint tenants, Mr. and Mrs. Young opened an account with the Crocker National Bank under an agreement, signed by them both, concerning such "Deposit Account" reading as follows: "All moneys now or at any time deposited by us, or either of us, or by any person whomsoever with The Crocker National Bank of San Francisco to the credit of the above account, are and shall be so deposited by us and received by it upon the following terms and conditions of repayment, namely; that the amount thereof shall be paid by The Crocker National Bank of San Francisco to us, or either of us, or to the survivor of us, or to the executors, administrators or assigns, of such survivor, subject to the statute relating to inheritance and succession taxes and all the rules and regulations made pursuant thereto; or upon the written order of any such person so entitled to payment; and without reference to the original ownership of the moneys deposited."

It appears under the evidence that William D. Young in June, 1926—in this transaction as the representative of and the agent of the joint tenancy (Simpson v. Bergmann, etc., et al. (Cal. App.) 13 P.(2d) 531 et seq.), for it does not appear otherwise—purchased from this joint account the 100 shares of Union Oil Associates later evidenced by this certificate; that the certificate though issued to William D. Young was by him indorsed in blank "William D. Young" and left at the bank; no other disposition thereof having been made by him. This certificate was later, in November, 1928, turned over to Mrs. Young by the bank at her request. Under the situation so appearing, embracing as it does the fact that the certificate for the 100 purchased shares was indorsed in blank by Mr. Young, when the presumption is applied that what was done was done in good faith and for the joint tenancy and not in violation of the rights of the parties under their joint tenancy agreement, as we think it must, we can see no basis for holding that a transmutation to community property was accomplished thereby or that there was any intention to accomplish such transmutation. Under the circumstances here presented, the taking of or the issuing of the certificate in the name of William D. Young was but a step necessary to the purchase under the circumstances, and is not entitled to be regarded as otherwise. We do not think that the finding and judgment of the trial court is against the record in this particular.

[7] As to the contents of the safe deposit box, it appears that in May, 1916, Mr. and Mrs. Young rented a safe deposit box at the French American Bank in San Francisco. In a writing then executed by them, there is set forth among other things the following declaration of the parties: "We hereby declare that all the contents of said safe now or hereafter placed therein, are our joint property and that the title and right of ownership thereto and to the whole thereof rests in the survivor of us as his or her separate property." Such was the agreement of the parties. As between themselves, they had the right to make this agreement. It must therefore be considered a binding agreement as between them. It is not necessary to travel outside of the facts of this case, for we have here to deal with only the situation of fact that is presented. Restricted to the facts of this case, it cannot be said that there was any uncertainty involved in the undertaking and agreement of the parties or that the said agreement worked harm to either in any way. They each knew what they were doing and what they wished to accomplish. There is no claim that the personal property was placed in the safe deposit box by any outside party or that outside parties had tampered with this personal property or had had anything to do with the placing of it in this safe deposit box. Admittedly it was placed there by Mr. Young and at a time when there could be no question concerning his ability to realize what he was doing; he was then fully himself, and was aware of just what such act meant under the terms of the agreement just mentioned, and without question he attached to his act the meaning and effect the two parties had contemplated. In the situation presented, we do not perceive anything in the record or in the law applicable thereto that should be held to destroy the effect of this

agreement and to nullify what was evidently done in pursuance of and in reliance on its terms.

[8] Under this view, the fact that William D. Young held for John G. Shannonhouse 22 of the 72 shares, the Texas Corporation, evidenced by the certificate, does not help plaintiff, for plaintiff is in no way concerned with any property other than community property. Moreover, the defendant Emily B. Young has not contested the claim of Shannonhouse, but has admitted Shannonhouse's ownership.

The record and the contentions of appellant in connection therewith have been carefully read and considered, but we find no sufficient reason for disturbing the judgments of the trial court. The judgments are affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

126 Cal.App. 237

WOOD v. WOOD.

Civ. 989.

District Court of Appeal, Fourth District, California.

Sept. 23, 1932.

1. Appeal and error ⇐907(3).

Reviewing court on appeal upon judgment roll assumes every necessary step was taken to support judgment.

2. Husband and wife ⇐295.

Order awarding support money and counsel fees in separate maintenance action *held* authorized, where entered after amendment conferring such power on court, though action was commenced before amendment (Civ. Code, § 137, as amended by St. 1927, p. 441, § 2, and by St. 1929, p. 160).

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Lulu G. Wood against Lee C. Wood for separate maintenance. From a judgment awarding maintenance and attorney's fees, defendant appeals.

Affirmed.

E. O. Leake, of Los Angeles, for appellant.

S. S. Hahn, of Los Angeles, for respondent.

MARKS, J.

This is an appeal from a judgment of the superior court of Los Angeles county awarding to respondent $100 per month for her support and maintenance during the period of one year, and the sum of $100 attorney's fees expended by her for the prosecution of the action.

The complaint was filed on the 12th day of August, 1929. The cause was tried on September 24, 1929, and the judgment filed on October 7th of the same year.

Appellant presents but two grounds for reversal of the judgment which are necessary for us to consider on this appeal. He maintains: First, that the portion of the judgment awarding attorney's fees to the respondent, gave her this money as fees for past services of the attorney; and, second, that as the action was commenced on August 12, 1929, and the amendment of that year to section 137 of the Civil Code did not go into effect until the 14th day of August, 1929 (St. 1929, p. 160), the amended portion of the section could not be held effective in so far as this action is concerned.

[1] This is an appeal upon the judgment roll. We must, therefore, assume that every necessary step was taken in the court below to support the judgment. E. E. McCalla Co. v. Sleeper, 105 Cal. App. 562, 288 P. 146. We may therefore assume, in support of the award of attorney's fees, that an order to show cause was duly and regularly issued after August 14, 1929, requiring appellant to show cause why he should not be required to pay a reasonable attorney's fee for the services of respondent's attorney; that this order to show cause was duly set down for hearing and heard; and that upon stipulation of both parties the trial court reserved a decision upon the question of attorney's fees until the trial of the case and the rendition of judgment, and that the portion of the judgment awarding attorney's fees was, in effect, a decision of the trial court upon the order to show cause made after such stipulation and the reservation of such ruling.

[2] The right to award a party support money and counsel fees in a separate maintenance action is based upon the provisions of section 137 of the Civil Code. It is contended by appellant that by an amendment to this section (Stats. 1927, p. 441, § 1), changing the opening words of the fourth sentence of the section from "During the pendency of such action" to "During the pendency of an action for divorce," the trial court was deprived of the right to award respondent support money or attorney's fees as the action was commenced during the time this amendment of 1927 was in effect, and before the amendment of 1929 took effect.

The section was amended in 1929 (Stats. 1929, p. 160), effective August 14, 1929, which restored the language of this part of the section, already quoted, which was changed by the amendment of 1927, and restored to the

court, if it was ever taken away, the right to award support money and attorney's fees in a separate maintenance action.

The contention of the appellant has been effectually disposed of by the Supreme Court in the case of McClurg v. McClurg, 212 Cal. 15, 297 P. 27, 28, in which action the defendant husband sought to recover from the plaintiff wife costs and attorney's fees to prosecute an appeal from an order of the trial court, under the provisions of the amendment of 1927 to section 137 of the Civil Code, which became effective July 29, 1927 (Stats. 1927, p. 441). The action was instituted on April 24, 1927, prior to the taking effect of this amendment, which for the first time gave a husband the right to apply for such attorney's fees and costs. The order awarding them to him was made on September 23, 1927. In holding that the amendment was effective in so far as a pending action is concerned, the Supreme Court said:

"The order which the court did make, from which this appeal is taken, was made under the express provisions of section 137 of the Civil Code as amended in 1927 (St. 1927, p. 441), and by which amendment the terms of the original section were broadened so as to permit a husband to apply for and receive alimony, counsel fees, and costs in an action for divorce.

"The appellant, however, further contends that, since this action was commenced on April 4, 1927, and since section 137 of the Civil Code did not, as to said amendment thereof, become effective until August, 1927, the section as thus amended cannot be given retroactive effect so as to have application to an action commenced prior to the adoption and taking effect of the amendment; and that for this further reason the trial court had no jurisdiction to make the order appealed from herein. This contention is also without merit. The provision of the Civil Code embraced in section 3 thereof, providing that 'no part of it is retroactive, unless expressly so declared,' has been held to have no application to purely procedural matters arising in the course of a litigation commenced before the passage or amendment of a law affecting the procedure in civil actions. 23 Cal. Jur. 632, § 28, and cases cited; Sutherland on Stat. Construction (2d Ed.) § 674; Rice v. Dunlap, 205 Cal. [133], 134, 137, 270 P. 196; Maguire v. Cunningham, 64 Cal. App. 536, 222 P. 838. Whether, however, the said order of the trial court directing the plaintiff to pay to the defendant counsel fees and costs in order to enable him to prosecute his former appeal was a procedural or a substantive order, it was an order made after the statute had become effective permitting the trial court to make such orders in actions pending for divorce, and was not therefore retroactive in character or effect, and was not, therefore, susceptible to the attack made upon it upon this appeal."

The appellant has attempted to appeal from an order of the trial court awarding support money pendente lite to respondent. The clerk's transcript contains a copy of a minute order made on August 29, 1929, whereby the court recited the issuance of an order to show cause and awarded the respondent $100 a month as support money during the pendency of the action. No formal order appears in the record, although it is stated in the brief of respondent that such formal order was made, signed, and entered after that date. The notice of appeal was filed on November 1, 1929. We deem it unnecessary to decide whether the record properly presents this order for review. If it were properly before us, it would have to be affirmed. McClurg v. McClurg, supra.

The judgment and order appealed from are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

126 Cal.App. 382

ROYAL INDEMNITY CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8232.

District Court of Appeal, Second District, Division 2, California.

Sept. 27, 1932.

Rehearing Denied Oct. 25, 1932.

Hearing Denied by Supreme Court, Nov. 25, 1932.

Master and servant ⊂405(4).

Evidence *held* to support finding that employee received in course of employment accidental injury causing infection of hand.

Certiorari to Industrial Accident Commission.

Proceedings under Workmen's Compensation Act by Peter Serna, claimant, opposed by the Kahn Construction Company, employer, and the Royal Indemnity Company, insurance carrier. From an award of the Industrial Commission, the insurance carrier and the employer bring certiorari.

Affirmed.

F. Britton McConnell, of Los Angeles, for petitioners.

A. I. Townsend, of San Francisco, for respondents.

IRA F. THOMPSON, J.

Petitioners asked this court to review an award of the Industrial Accident Commis-

sion rendered in favor of Peter Serna against Kahn Construction Company and its insurance carrier, Royal Indemnity Company. The commission found that Serna had sustained an injury arising out of and in the course of his employment by the Kahn Construction Company, caused by running a steel sliver into his right hand, resulting in infection.

The facts are as follows: On the dates December 22, 23, 26, and 27 of 1930, Serna was employed by the Kahn Construction Company, building contractors, in the capacity of laborer; his duties including that of assisting in the handling of steel plates about sixteen inches square and one or one and one-half inches thick, which were used in the construction of the building. While so engaged, according to the witness Martinez, who was working with him on December 27th, at about a quarter to four in the afternoon Serna said to him in Spanish, "I thought I got a sliver." The witness was asked:

"Did you understand him to say at that time that he got a sliver in his hand? A. Yes, sir.

"Q. That was on the last day that you worked together for the Kahn Construction Company? A. Yes."

The facts further show that on December 29, 1930, Serna entered the employ of Preston Brothers, subcontractors under the general contractor Kahn Construction Company; that while working for Preston Brothers his work consisted in the handling of bricks; that after working a while Serna noticed that the skin on the thumb of his right hand was worn down almost to the flesh; but that there was no wound and that the hand did not bleed. Serna testified that after working for Preston Brothers four hours or thereabouts he had soreness in both the thumb and wrist of his right hand; that he worked the day following, his wrist being still sore; and that it began to swell. Serna then went to his home and stayed there until January 2d, when a doctor was sent for who immediately instructed that Serna be taken to a hospital, where he remained about six weeks, undergoing two operations on his hand while there.

Petitioners' contention is that the evidence does not justify or support the findings of fact, and in particular that the finding of fact that Serna sustained an injury on or about December 26th arising out of and in the course of his employment by Kahn Construction Company, is not supported by any substantial evidence.

Petitioners rely in particular upon a part of Serna's testimony which is as follows:

"Q. Did you have any accident during the four days that you worked for the Kahn Construction Company? A. Accident, you say?

"Q. Yes. A. No, sir.

"Q. Nothing unusual happened to you during this four days? A. No, sir, nothing.

"Q. Did you have any accident during the day that you worked for Preston Brothers on December 29th? A. No, sir; the only thing I noticed was about four or six hours after I started to working, the bricks wore out my thumb tips to almost bleeding. * * *

"Q. Do you recall at this time of anything happening to either hand or either finger or thumb while you were handling these steel plates? A. No, sir.

"Q. You heard Mr. Martinez' testimony? A. Yes, sir.

"Q. Do you have any recollection of saying anything like that to him? A. Well, I never say that I *got* a splinter in there. I never *know* I got one.

"Q. I am asking you, do you remember of saying anything like that to him? A. No, sir; I did not say nothing like that." (Italics ours.)

In his original application Serna stated that his injury was received by handling bricks, and he so stated to one of the doctors who attended him, and in his testimony stated: "I think it comes from the brick because when I started to work in the brick on the 29th in the morning I had nothing in my hand. I am sure it was in perfect condition; both of my hands were in perfect condition." The referee questioned Martinez very carefully as is shown by the following:

"Did Serna tell you that he got this sliver from one of these pieces of iron? A. Yes, sir.

"Q. One of these pieces that he was handling that minute? A. Yes, sir.

"Q. Right then? A. Right then."

Petitioners claim that any effect of this last-quoted testimony falls in the face of the testimony of Serna regarding this incident. It should be noted that Serna was a Mexican and this purported conversation had between Serna and Martinez was in Spanish, and that Dr. Gaulden, while attempting to elicit information from Serna regarding his injury, was put to the necessity of having a Spanish interpreter present. The foreman of the Kahn Construction Company testified that Martinez came to him and told him of the injury to Serna's hand as follows:

"Q. * * * Did you at any time while foreman for the Kahn Construction Company receive notice from anyone on the job that Mr. Serna had received an injury? A. Yes, I did, through another man; Mr. Martinez told me; that is the first I heard. * * *

"Q. Did Mr. Martinez mention to you some injury to Mr. Serna before Mr. Serna left your crew? A. That I could not say exactly. Mr. Serna did not tell me that he had hurt his hand. Mr. Martinez came alone and said

to me: 'Mr. Serna has hurt his hand.' Then I ask him how, and all about it. At that time he was working for the Preston Brothers, that is the time Martinez told me, but you see there is a time there between the time they were talking together and the time Martinez came over to me; we just happened to speak about it. * * *

"Q. To your recollection did Mr. Serna ever work for the Kahn Construction Company after Mr. Martinez told you of this alleged injury to Mr. Serna? A. No. He went from under me over to Preston Brothers and that was all that I had with him.

"Q. Then he was working for Preston Brothers at the time Mr. Martinez told you about this? A. As near as I can remember. * * *

"Q. Mr. McFarlane did Mr. Martinez state to you that Mr. Serna had received an injury on the Kahn Construction job, and did Mr. Martinez make that statement to you while Mr. Serna was still working on the Preston job? A. As near as I can remember he did."

It would seem that such an incident as described by Martinez and McFarlane actually did take place but that Serna had forgotten it, and the referee who is the judge of the credibility, manner, and demeanor of the witnesses made this statement in his decision: The applicant, himself, is a Mexican and beyond the fact that he was working and became sick with a badly infected hand, he is not able to give very much light upon either the date of the beginning of infection or as to whether he was working for Preston Brothers or the Kahn Construction Company. Dr. Gaulden testified, in part, as follows:

"He (applicant) told me his hand became sore handling bricks. He could not speak English, and I could not speak in Spanish, and we could not find out much about what had happened.

"Q. Did you question him through an interpreter? A. Yes."

Petitioners rely upon the testimony of Dr. Gaulden to the effect that the infection which originated in the hand is only one of "20 or 30" places where it might have come from, such as the teeth, tonsils, intestinal tract, etc., and that an infection localized in the hand and arm is no indication that the germ causing the infection entered at the hand or arm; that it may have entered from any other part of the body and localized in the hand and arm. But Dr. Gaulden also stated that there might have been an entry of infection without visible evidences as to the point of entry. Dr. Gaulden also agreed with Dr. Jones that the development of symptoms on the same day as an injury would be a mighty short time for either a streptococcic or staphylococcic infection.

On the other hand, the respondent contends that the report of Dr. Jones, together with the testimony of Martinez and McFarlane, justifies the finding of the commission. Dr. Jones says: "He presents no history of having received an injury upon December 26th which is mentioned in the record. If this applicant had received an injury in the nature of a penetrating wound upon the aforementioned date, it could have caused an infection with subsequent cellulitis, which necessitated operation seven days later. The record is somewhat clouded concerning the history of such injury, but the incubation period is correct for the pathology which was found upon January 2, 1931. Upon December 29th and 30th, this applicant was handling bricks, and his finger tips became tender, but he reports no open lesion upon his thumb or fingers as the result of this type of work. In fact, he reports that he wore gloves upon his right hand, the second day that he worked at this occupation. It was the night of December 30th when the thumb and wrist became painful and swollen. An injury due to handling bricks causing a swelling of the thumb and wrist, within a twenty-four-hour period, would have to be a virulent infection. Such an infection extending with such great rapidity would have to have been of a streptococcic type, and undoubtedly would have proven fatal."

Under this condition of the record we find ourselves unable to say that there is no substantial evidence to sustain the finding of the commission. While it is true that the respondent Serna was unable to remember the sliver incident testified to by Martinez and reported by him to McFarlane, nevertheless the scientific testimony, together with common knowledge, supports the conclusion that an infection occurring during the time that Serna was working for Preston Brothers could not in all probability have achieved the mischief manifest in the employee in so short a time. As Dr. Jones testifies, an infection so virulent "undoubtedly would have proven fatal." The incident of the sliver, however, checks with scientific observations and experience, i. e., to again quote the last-named physician, "the incubation period is correct for the pathology which was found upon January 2, 1931."

Award affirmed.

We concur: CRAIG, Acting P. J.; STEPHENS, Justice pro tem.

126 Cal.App. 186

RANCHO SANTA MARGARITA v. SAN DIEGO COUNTY.

Civ. 1012.

District Court of Appeal, Fourth District, California.

Sept. 22, 1932.

Rehearing Denied Oct. 20, 1932.

1. Taxation ⇐40(1).
Tax, to be valid, must be equal as to its burdens and uniform as to its operation.

2. Taxation ⇐40(1).
In considering validity of revenue law, it is immaterial whether inequality in levy is result of design, accident, or inadvertence.

3. Taxation ⇐543(7).
Finding that valuations of real estate fixed through resolution of board of equalization were discriminatory and illegal *held* supported.

4. Taxation ⇐459.
Members of board of equalization may act honestly and in good faith, and yet, where their method of increasing assessed valuations shows serious discriminations, their action will be deemed equivalent to fraud.

Appeal from Superior Court, San Diego County; Eugene Daney, Jr., Judge.

Action by the Rancho Santa Margarita, a corporation, against the County of San Diego. Judgment for plaintiff, and defendant appeals.

Affirmed.

Stephen Connell, Dist. Atty., E. S. Lovett, Deputy Dist. Atty., Thomas Whelan, Dist. Atty., and E. I. Kendall, Deputy Dist. Atty., all of San Diego, for appellant.

Hunsaker & Cosgrove, of Los Angeles, for respondent.

MORTON, Justice pro tem.

The assessed valuation of a portion of plaintiff's ranch in San Diego county, as determined by the county assessor, was raised by the board of equalization of the county in July, 1929, after a hearing on the matter of which plaintiff had due notice. The raise in assessed valuation increased plaintiff's taxes $20,479.25. Under written protest as provided in section 3819 of the Political Code, plaintiff paid all of its taxes for the year 1929–30 and brought suit for a refund of $20,479.25. It alleged the action of the board of equalization was illegal and void. Defendant county duly answered, the action was tried without a jury, and judgment was for the plaintiff, from which defendant appeals.

The findings show that Tax Factors, Inc., pursuant to an agreement with the board of supervisors, made a survey and valuation of all real property located within San Diego county and filed with the board a series of schedules showing their appraised values, which schedules included the lands of the plaintiff. That prior to July 1, 1929, the county assessor, in the preparation of his assessment roll for the fiscal year 1929–30, placed a valuation of 40 per cent. of the value fixed by the report of Tax Factors, Inc., on all the real property in the county. That on the 15th of July, 1929, the board of supervisors, sitting as a board of equalization at a regular meeting of which plaintiff had notice, adopted the following resolution:

"Whereas, the lands of the Santa Margarita Rancho y Los Flores, have been valued for the purpose of tax assessment by the Tax Factors, Inc., and

"Whereas, Such valuation was made upon a basis of discounting any available water service or supply possible for the coast lands of reasonable immediate development; and

"Whereas, This board, acting as a board of equalization, has reviewed the lands of said Rancho and made particular inquiry and examination into values at which these lands may be readily sold, and gathered testimony and data showing that the same are greatly undervalued; and

"Whereas, It is the opinion of this board that there is sufficient justification, if the lands were handled with regard to the highest utility, to greatly increase the appraised values of certain land over that figure placed by Tax Factors, Inc.;

"Therefore, Be It Resolved: That that part of the coastal plane within the boundaries of the Santa Margarita Rancho and lying between the San Luis Rey River on the South, the Pacific Ocean on the West, and more particularly described as follows: Sections 4, 5, 6, 8, 9, 10, 11, 14, 15, 16, 22, Township 11 S., R. 5 W., containing 3260 acres of arable land, within Oceanside school district, as shown on the assessor's books of San Diego County, be raised the sum of $64 per acre, assessed value or a total assessed valuation of $208,640.00.

"That lands lying along the Pacific ocean within the Santa Margarita Rancho, and more particularly described as follows: Sections 18, 19, 20, 29, 30, 31, 32, 33, Township 10 S., R. 5 W., and Sections 2, 3, 4, 10, 11, 12, 13, 14, 23, 24, 25, Township 10 S., R. 6 W., containing 7640 acres arable land within West Fallbrook DeLuz and Libby school districts, as shown on the assessor's books of San Diego County, be raised the sum of $46 per acre assessed value, or a total assessed valuation of $351,440;

"That lands lying along Pacific ocean within the Santa Margarita Rancho, and more par-

ticularly described as follows: Sections 19, 29, 30, Township 9 S., R. 6 W., and Sections 13, 14, 15, 22, 23, 24, 25, Township 9 S., R. 7 W., containing 1370 acres arable land, within San Onofre school district, as shown on the assessor's books of San Diego County, be raised the sum of $58.40 per acre, assessed value, or a total assessed valuation of $80,008.

"Be It Further Resolved: That the proper authorized official be and is hereby authorized to make such computations and adjustments as will be necessary to conform to the order as above set forth, and apportion the amounts to the various sections listed as hereinabove set forth, in accordance with the arable lands suitable for subdivision, as they may appear upon the records of the classification of such lands as prepared for this board by Tax Factors, Inc.

"Mr. Hurley: Mr. Chairman, in requesting the Board's representative Mr. Mueller to compile these figures he was also requested and I notice it was left out, that there be an increased valuation on the lands adjoining West Fallbrook, the dry farming land, along the lines at Morra to conform more readily with the lines on the outside of the ranch which we find it does not do, therefore I add to that resolution that the value of ten per cent be placed upon the so-called dry farming lands along that line."

That after some discussion among the members of the board the resolution, with this addition, was unanimously adopted. Following this action, or early in the morning of the 16th of July, 1929, the board of equalization duly and regularly adjourned as a board of equalization for the year 1929. That pursuant to the foregoing resolution the assessment roll was amended on or about July 17, 1929, to show the valuations fixed by the board of equalization on the parcels of land specified therein; that the assessments or valuations so entered on the assessment roll were supplied and furnished to the deputy county assessor making the entries by one Richard W. Miller, a person then in the employ of the board of supervisors. Finding VII further holds: "That there is not in the records of Tax Factors, Inc., nor in any official records of said County of San Diego, any classification sheets or classification plats or other records or data containing any reference to, or indicating the extent or location of, the arable lands in said sections referred to in said resolution of July 15, 1929, or the lands suitable for subdivision purposes whether arable or not. That said Richard W. Miller, in preparing the figures constituting the assessments or valuations so entered on said assessment roll, on, to wit, the said 17th day of July, 1929, by said Gordon R. Sears (a Deputy County Assessor) and appearing in said schedule No. Two (2) of said Exhibit 'A' under said title 'Valuation by Board of Equalization', relied upon the classification plats of the Tax Factors, Inc., and his own knowledge of the location and slopes of said lands, and in ascertaining arable lands suitable for subdivision relied partly upon his individual knowledge, judgment and discretion in determining what lands were arable and what arable lands were suitable for subdivision purposes."

The remaining findings of fact and conclusions of law will be set out verbatim.

"IX. That thereafter, and subsequent to said 17th day of July, 1929, and subsequent to said adjournment of July 15, 1929, of said Board of Equalization for the year 1929, said Board of Supervisors on, to wit, July 22, 1929, without notice to the plaintiff of its intention then and there so to do, and without any notice to the plaintiff, and without the knowledge of the plaintiff, held a meeting and transacted business as a Board of Equalization, and at such meeting passed and adopted, as a Board of Equalization, a resolution reading as follows:

" 'Whereas, on July 15th, 1929, the Board of Supervisors sitting as the Board of Equalization made its resolution raising the assessment of certain lands mentioned therein, and being in the Santa Margarita Rancho y Los Flores, and

" 'Whereas, that portion of the original resolution raising the assessment 10% on those lands adjacent to West Fallbrook, "the Moro" and other places, which were specified by Tax Factors, Inc., as dry farming lands. is incapable of definite ascertainment, and the said lands not being classified by Tax Factors, Inc., as "dry Farming" lands, said portion of the original resolution is hereby rescinded.

" 'Whereas, the resolution as written did not correctly state the intention of this Board, it is, therefore on motion of Supervisor Hurley, seconded by Supervisor Aul ordered that said resolution, be, and the same is hereby corrected, in order to state the true intention of this Board, to read as follows:

" 'Whereas, The lands of the Santa Margarita Rancho y Los Flores, have been assessed for taxation purposes by the County Assessor, and

" 'Whereas, Such assessment was made upon a basis of discounting any available water service or supply possible for the coast lands of reasonable immediate development, and

" 'Whereas, This Board, acting as a Board of Equalization has reviewed the lands of said Rancho and made particular inquiry and examination into values at which these lands may be readily sold, and gathered testimony and data showing that the same are greatly undervalued, and has heard the testimony of the witnesses herein, and having considered

the same. It is the opinion of this Board that if the lands were handled with regard to the highest utility, the assessed values of certain land over that figure placed by the County Assessor, should be greatly increased therefore

" 'Be It Resolved: That that portion of the coastal plane within the boundaries of the Santa Margarita Rancho lying between the Southeasterly boundary of said Rancho on the South, the Pacific Ocean on the West and the Orange-San Diego County line on the North, and more particularly described as follows: Sections 4, 5, 6, 8, 9, 10, 11, 14, 15, 16, 22, Twp. 11 South, Range 5 West, containing 3260 acres of arable land, within Oceanside School District, as shown on the Assessor's books of San Diego County, be raised the sum of $64.00 per acre, assessed value, or a total assessed valuation of $208,640.00. That lands lying along the Pacific Ocean within the Santa Margarita Rancho, and more particularly described as follows: Sections 18, 19, 20, 29, 30, 31, 32, 33, Twp. 10 South, Range 5 West, and Sections 2, 3, 4, 10, 11, 12, 13, 14, 23, 24, 25, Twp. 10 South, Range 6 West, containing 7640 acres arable land, within West Fallbrook De Luz and Libby School District, as shown on the Assessor's Books of San Diego County, be raised the sum of $46.00 per acre assessed value, or a total assessed valuation of $351,440.00.

" 'That land lying along the Pacific Ocean within the Santa Margarita Rancho, and more particularly described as follows: Sections 19, 29, 30, Twp. 9 South, Range 6 West, and Sections 13, 14, 15, 22, 23, 24, 25, Twp. 9 South, Range 7 West, containing 1370 acres arable land, within San Onofre School District, as shown on the Assessor's Books of San Diego County, be raised the sum of $58.40 per acre, assessed value, or a total assessed valuation of $80,008.00.

" 'Be It Further Resolved, That the proper authorized official be, and is hereby authorized to make such computations and adjustments as will be necessary to conform to the order as above set forth, and apportion the amounts to the various sections listed as hereinabove set forth, in accordance with the arable lands suitable for subdivision, as they may appear upon the records of the classification of such lands as prepared for this Board by Tax Factors, Inc.'

"X. That subsequent to the adoption of said resolution of July 22, 1929, no alterations were made or entered in said assessment book or assessment roll relating to any parcel of real property of the plaintiff and no change or alteration in said assessment roll or assessment book concerning valuations of any parcel of said real property of the plaintiff was made by the Clerk of the Board of Supervisors of said county or by any other person, upon the authorization of said resolution of said Board of Equalization, other than said alterations made on said 17th day of July, 1929, as herein found, pursuant to said resolution of July 15, 1929.

"XI. That the alterations and changes made in said assessment book or assessment roll of the assessments or assessed valuations of the various parcels of real property of the plaintiff described in said Schedule No. Two (2) of said Exhibit 'A' from the amounts and valuations shown under the heading 'Valuation by Assessor' to the amounts and valuations shown under the heading 'Valuation by Board of Equalization,' made on, to wit, the 17th day of July, 1929, as herein found, are discriminatory, lacking in uniformity, and illegal, and were made pursuant to a systematic, arbitrary, wilful and intentional scheme and method adopted by said Board of Equalization of discriminating against said parcels of real property of the plaintiff and in favor of other real property of like character similarly situated.

"XII. That neither under the terms of said resolution of July 15, 1929, and July 22, 1929, nor of any other act or order of said Board of Equalization for the year 1929, did said Board equalize or attempt to equalize, the valuation of the parcels of real property of the plaintiff, mentioned in said Schedule No. Two (2) of said Exhibit 'A', that is to say, said Board did not compare the individual assessments of said real property of the plaintiff appearing upon said assessment roll with the assessments upon the roll of like property similarly situated and make them equal with each other, but, on the contrary, said Board of Equalization, according and pursuant to a systematic arbitrary, wilful and intentional scheme and method adopted by it to re-assess said properties of plaintiff at greatly increased valuations, and for the purpose of increasing the assessed valuation of the real property of the plaintiff in an amount in excess of Six Hundred Forty Thousand Dollars ($640,000.00), caused certain real properties of the plaintiff to be divided into four groups or zones, three of said groups or zones consisting of real property lying contiguous or adjacent to the Pacific Ocean in said County, and the fourth group or zone lying in the vicinity of the City of Fallbrook in said County.

"That said Board of Equalization, pursuant to said scheme and method, arbitrarily apportioned said sum in excess of Six Hundred Forty Thousand Dollars ($640,000.00) among said four zones or groups as follows:

"1. Against certain real property lying in Zone No. 1, situated within the Oceanside School District in said County, consisting of approximately eleven (11) sections, the sum of approximately Two Hundred Eight Thousand, Six Hundred Dollars ($208,600.00).

"2. Against certain real property lying in Zone No. 2, situated within the West Fallbrook, DeLuz and Libby School Districts in said county, consisting of approximately (20) sections, the sum of Three Hundred Fifty-one Thousand, Four Hundred Dollars ($351,400.00).

"3. Against certain real property lying in zone No. 3, situated within the San Onofre School District, in said county, consisting of approximately ten (10) sections, the sum of Eighty Thousand Dollars ($80,000.00).

"4. Against certain real property in Zone No. 4, situated within the Moro and West Fallbrook School Districts, in said county, consisting of certain parcels of dry farming lands of the plaintiff at no time definitely ascertained or identified by said Board of Equalization, a sum of money incapable of definite ascertainment from the evidence in the case.

"XIII. That before adopting said resolution of July 15, 1929, providing for said increased assessment on said parcels of land of the plaintiff described in said Schedule No. Two (2) of said Exhibit 'A', the said Board of Equalization determined to increase the valuation placed by said Tax Factors, Inc. upon the real properties of the plaintiff described in said Schedule No. One (1) of said Exhibit 'A', and commonly known as the Santa Margarita Rancho, in an amount in excess of One Million, Six Hundred Thousand Dollars ($1,600,000.00) and to increase the assessment placed by the County Assessor upon said real properties of the plaintiff in an amount in excess of Six Hundred Forty Thousand Dollars ($640,000.00).

"XIV. That the amount of taxes levied by the said County of San Diego upon the said assessments of all of said real property described in said Schedule No. One (1) of said Exhibit 'A' is the sum of Fifty-two Thousand, One Hundred Thirty-two and 09/100 Dollars ($52,132.09).

"That the amount of taxes levied by said County of San Diego upon the said assessments appearing in said Schedule No. Two (2) of said Exhibit 'A', under the heading 'Valuation by Board of Equalization' is in the amount of Twenty Thousand, Four Hundred Seventy Nine and 25/100 Dollars ($20,479.25) in excess of the amount of taxes that would have been levied by said County of San Diego, upon the said assessments made by said County Assessor and appearing in said Schedule No. Two (2) of said Exhibit 'A' under the heading 'Valuation by Assessor.'

"That by reason of said changes and alterations made, as herein found, in the assessed valuation of the County Assessor of said properties of the plaintiff described in said Schedule No. Two (2) of said Exhibit 'A' the amount of taxes levied by said county against said properties of the plaintiff was increased in the amount of Twenty Thousand, Four Hundred Seventy Nine and 25/100 dollars ($20,479.25).

"XV. That heretofore, to wit, on or about the 18th day of November, 1929, at a time after said assessment book had been received by the Tax Collector of said county and the taxes upon said properties of the plaintiff had become payable, the plaintiff herein, against whom said property was assessed, claiming that said assessment was void in part, that is to say, that that portion or part of said taxes in the sum of Twenty Thousand, Four Hundred Seventy Nine and 25/100 Dollars ($20,479.25) was void, paid to said Tax Collector of said defendant under protest in writing, specifying that a part of said assessment was void, and indicating said portion claimed to be void and specifying the grounds upon which such claim was founded, said assessment, in the sum of Fifty-two Thousand, One Hundred Thirty-two and 09/100 Dollars ($52,132.09). That contemporaneously with the payment of said sum of Fifty-two Thousand, One Hundred Thirty-two and 09/100 Dollars ($52,132.09), plaintiff filed said protest in writing with said County Tax Collector. That a copy of said 'Payment of Taxes Under Protest' is attached to said complaint, marked 'Exhibit A', and made a part thereof. That reference is hereby made to said protest marked Exhibit 'A' and by such reference, the same is incorporated in these findings and made a part hereof as though in this paragraph fully set forth.

"XVI. That no part of said sum of Twenty Thousand Four Hundred Seventy-Nine and 25/100 Dollars ($20,479.25) has been paid or refunded by said defendant to plaintiff.

"Conclusions of Law.

"From the foregoing facts, the court concludes as a matter of law:

"1. That the resolutions of the Board of Equalization, dated July 15, 1929, and July 22, 1929, are void.

"2. That the plaintiff is entitled to judgment against the defendant in the sum of Twenty Thousand, Four Hundred Seventy-Nine and 25/100 Dollars ($20,479.25).

"3. That the plaintiff is entitled to its costs incurred herein.

"Let Judgment be entered accordingly.

"October 24, 1930."

The theory of plaintiff's case is that the action of the assessor was legal, but that the action of the board of equalization in adopting the resolutions of July 15, 1929, and July 22, 1929, is illegal, because the evidence shows that the board by its action attempted to reassess the property; that they delegated to another person the powers which the board

alone is authorized to exercise; that the evidence shows that the plan of the board of equalization was to reassess the property without regard to the assessed value of like lands similarly situated; that they assessed against plaintiff, property not listed on the assessment roll; and that, as stated in respondent's brief, the changes made in the assessor's figures, "pursuant to the direction of the resolutions, result in wholesale discriminations among like properties similarly situated, so considerable (in some instances where the parcels are contiguous) as to shock one's sense of justice and conception of equality and to make the inference irresistible that the discrimination is the result of 'unfairness and oppression, either through design or through such gross error or negligence as to amount to the equivalent of fraud.'"

Defendant contends that neither the complaint states facts sufficient to constitute a cause of action, nor does the evidence prove one. It appears that the Rancho Santa Margarita, up to the time of the assessment in question, had never been accurately surveyed. It had been assessed for many years by arbitrary sections established by "Guesswork." No map of the rancho, arbitrary or otherwise, was in the assessor's office. In the past the owners had acquiesced in this method of assessment and admitted that no owner knew just how many acres there were in the entire rancho. The portion involved here comprised about 17½ miles of land along and adjacent to the Pacific Ocean. The number of acres shown in these fractional sections bordering on the ocean, on the 1929 assessment roll differ from the number of acres shown in these same sections on the map made by Tax Factors, Inc. It is admitted by appellant that "the assessor used the Tax Factors valuation of these fractional sections as found by Tax Factors, but did not correct his roll to show the number of acres in each fractional section as found by the Tax Factors." Consequently some of the fractional sections included in the resolution of July 15, 1929, contain a larger acreage than appears on the assessment roll, as made up by the assessor. It is also admitted that three fractional sections were included in the resolution which were not upon the assessment roll. It is conceded by appellant that inequalities do exist by reason of the raise in assessed valuation of this land, but that such inequalities, when compared to the large quantity of land covered by the resolution of the board of equalization, are insufficient to sustain a charge of fraud against the board and render their action void.

[1, 2] It is a fundamental rule that a tax, to be valid, must be equal as to its burdens and uniform as to its operation. Property must be assessed according to a just and uniform standard of value and the rate must be levied uniformly. In considering the validity of a revenue law it is immaterial whether the inequality or lack of uniformity in the levy is the result of design, accident or inadvertence.

"What the taxpayer is entitled to is the exercise of good faith and fair consideration on the part of the taxing power in assessing his property, at the same rate and on the same basis of valuation as that applied to other property of like character and similarly situated. Inequality of taxation is produced as surely by inequality of valuation as by inequality of the rate of tax." Birch v. County of Orange, 186 Cal. 736, 741, 200 P. 647, 649.

Referring to the last paragraph of the resolution of the board of equalization of July 15, 1929, we find: "That the proper authorized official be and is hereby authorized to make such computations and adjustments as will be necessary to conform to the order as above set forth, and apportion the amounts to the various sections listed as hereinabove set forth in accordance with the arable lands suitable for subdivision, as they may appear upon the records of the classification of such lands as prepared for this Board by Tax Factors, Inc." Appellant urges that this reference only required certain mathematical calculations for the clerk to make the changes ordered on the assessment roll because all the evidence and records were before the board of equalization at the hearing. Respondent contends that the board of equalization did not determine the amount to which the assessment would be increased in each of the 40 sections affected, but delegated this power to one Richard W. Miller to exercise his own judgment and discretion respecting the amount of arable lands and the amounts suitable for subdivision purposes in each of the sections concerned. Mr. Miller was a civil engineer employed by the board of supervisors as their agent on the contract of Tax Factors, Inc., to see that the specifications covering the work were properly executed. He had also been made a deputy county assessor. He testified that he made the computations referred to in the last paragraph of the resolution of July 15, 1929, not at the request of the county clerk or any deputy county clerk, but pursuant to this resolution which he had assisted in preparing. How he made these computations and arrived at the figures which he entered on the assessment roll therefore becomes material. Referring to his testimony we find he only used the classification plats of Tax Factors, Inc. On these plats the soil types were shown but no reference was made to arable lands or lands suitable for subdivision purposes. As to the first paragraph of the resolution dealing with definite sections (Zone

1) he testified that although section 6, township 11 south, range 5 west, was not included in the assessment roll, he did apportion a part of the increase of $208,640.00 covering Zone 1 to this section. Taking up next the third paragraph dealing with definite sections (Zone 3), he stated that although sections 22 and 25, township 9 south, range 7 west, were not shown on the assessment roll, yet they were included in the apportioning of the increased assessed valuation amounting to $80,008 for this zone. His testimony as to the second paragraph of the resolution dealing with definite sections (Zone 2) shows that in figuring the increase in valuation as to section 29, township 10 south, range 5 west, he figured on 640 acres at $46 an acre when the assessment roll shows for this section 629 acres. For section 30, township 10 south, range 5 west, the assessment roll shows 576.7 acres and he figured the increase of $46 per acre on 590 acres. For section 31, township 10 south, range 5 west, the roll shows 195 acres and the increase of $46 per acre he figured on 251 acres. For section 4, the roll shows 148½ acres and the increase was figured on 210 acres. For section 10 the roll shows 191.75 acres and the increase of $46 per acre was figured on 320 acres. Section 14, the roll shows 268 acres and the increase was figured on 365 acres. Section 24, the roll shows 250.5 acres and the increase was figured on 490 acres. Section 23, the roll shows 3.6 acres and the increase was figured on 22 acres. In Zone 1, there was 72 acres in section 9 of township 11 south, range 5 west, known as the Tidal Marsh, and he figured the $64 per acre increase on the 72 acres because he felt it was suitable for subdivision purposes. In section 13—9—7 (Zone 3), although it was listed as containing 252 acres of arable land on the plat, yet he figured the increase of $58.40 per acre on only 68 acres because he felt only the lands adjacent to the coast line were to be included, i. e., only those lands which he felt were subject to the "coast influence." Quoting his testimony:

"Q. In other words, in determining what lands you would place this additional valuation upon, you considered whether they were located close to the coast, or far from the coast, or whether they would be affected by what you call the 'coast influence'? A. Yes."

As to section 14—9—7 (Zone 3), 439 acres were shown as arable lands and the increase was figured on only 289 acres for the same reason as before. Other examples of where he was called upon to exercise his own judgment and discretion were as follows:

"Q. Isn't it a fact you included 41 acres of non-tillable washout? A. It might be that I did; I couldn't say. I may have just lumped the whole section, not discounting these little areas in there.

"Q. So that in that section it would look as tho you assessed non-tillable washouts at $46 an acre, plus the 80 cents, that they were uniformly assessed at thruout the county? A. It probably would; yes, sir. * * *

"Q. Would you kindly examine that classification plat and state how many acres in Section 3, Township 10 South, Range 6 West, according to the classification plat, have a soil type classification? A. 315.

"Q. Now, will you please turn to Exhibit No. 4, copy of your pencil notations, and state how many acres in that particular section you increased in assessed value at the rate of $46 an acre? A. 382.

"Q. So that there were 67 acres in this section, that had no soil type classification, that were increased in assessed valuation, were there not? A. Apparently so, yes.

"Q. And that would be 67 acres of 'Rough Stony Land' or 'Rough Broken Land,' would it not? A. Yes; it would be this 'Rough Broken Land.' * * *

"Q. Now will you please state the number of acres in that section that, according to the Tax Factors' classification plat, were given a soil type classification? A. If I have added them up correctly, there are 479.

"Q. Now, if you will please turn to Exhibit No. 4, copy of your pencil notations, and state how many acres in that section were increased by you $46 per acre, pursuant to the directions of the resolution? A. 570.

"Q. So that would be approximately 90—between 90 and 95—let us say 90—acres that were increased, that had no soil type classification, would it not? A. 91; 90 or 91 acres.

"Q. Then, in that instance, you placed a valuation of an additional $46 on about 90 acres of 'Rough Broken Land' in this particular section, did you not? A. Apparently.

"Q. Why did you do that, Mr. Miller? A. I couldn't say. It may have been an error."

The appraised value placed by Tax Factors, Inc., on nontillable washouts throughout the county was $2 an acre so that the assessed valuation fixed by the county assessor of 40 per cent. thereof would be 80 cents an acre. Rough broken land was appraised by Tax Factors, Inc., at $5 an acre, which would therefore have a uniform assessed valuation throughout the county of $2 an acre. Irregularities also appear as to sand dunes, creek lands, and a lagoon, all uniformly assessed throughout the county at $2 an acre, which were assessed at a rate of $48 an acre.

The evidence therefore conclusively shows that the assessed valuation of portions of the land in question was increased by Richard W. Miller, relying upon the classification plats of Tax Factors, Inc., and his individual knowledge, judgment, and discretion as to arable lands and lands suitable for subdivision purposes, through the action of the board of equalization in referring the matter to him by their resolution of July 15, 1929. Furthermore the method followed of increasing the assessed valuation by a certain amount per acre without regard to value of land nullified the equalization as between the sections.

[3, 4] Taxation of real property is a very serious matter, and a fair, just, and uniform method must be followed in raising or lowering the assessed valuation of lands in a county. We feel that the evidence in this action supports finding XI of the trial court that the valuations fixed through the resolution of the board of equalization were "discriminatory, lacking in uniformity and illegal." A portion of the resolution of July 15, 1929, to wit, Zone 4, was rescinded by the resolution of July 22, 1929, because of being too indefinite and not capable of identification. After reviewing all of the evidence, we must concede that there was evidence to justify the trial court in concluding that the board of equalization had agreed upon some definite system or plan to raise the assessed valuation of respondent's land by a definite amount per acre. Without question, the method employed does not display an attempt to equalize and make uniform the assessed valuations of these lands with like property similarly situated. No matter what the evidence may have been before the board of equalization, we have before us the method adopted upon which to base the increase of the assessed valuation. Officials may act honestly and in good faith, and yet where their method of increasing assessed valuations shows serious discriminations and a lack of uniformity, their action will be deemed equivalent to fraud.

"* * * While it was not claimed that there was an actual fraud or corrupt intent on the part of the officials making and sustaining the assessment in question, there was, nevertheless, such a violation of plain duty on the part of such officials as to constitute 'fraud' or 'something equivalent to fraud,' within the meaning of those terms as used in the decisions relative to the review of the action of assessing officers, entirely regardless of the motive actuating them in the matter of such an assessment." Mahoney v. City of San Diego, 198 Cal. 388, at 397, 245 P. 189, 193.

Under the aforegoing statement of the law we therefore hold that the evidence sustains the finding of the trial court that the action of the board of equalization resulted in inequalities of taxation constituting "fraud" or "something equivalent to fraud," as those terms have been used in the decisions relating to the action of assessing officers and boards of equalization.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

126 Cal.App. 48

ABELS et al. v. FREY et al.

Civ. 8536.

District Court of Appeal, First District, Division 1, California.

Sept. 16, 1932.

1. Wills ⇐355.

Allegation that no notice of probate proceedings was given to plaintiffs, or any of them, *held* to authorize inferences that order admitting will to probate and order granting decree of final distribution were made on proper notices (Code Civ. Proc. §§ 1303, 1304, 1633).

This was so, since, in support of judgment, it was required to be presumed that notice of time and place of hearing was given in accordance with provisions of Code of Civil Procedure (see Code Civ. Proc. §§ 1303, 1304, 1633), and the allegation did not negative the presumption that, in absence of plaintiffs' allegations to contrary, each notice was duly given in manner and at time provided by law.

2. Courts ⇐198.

Jurisdiction of probate court is in rem, res being decedent's estate.

3. Wills ⇐269.

Under statutory notice in probate proceedings, probate court acquires jurisdiction over all persons interested in estate (see Code Civ. Proc. §§ 1303, 1304, 1633).

In such case, every person who may assert any right or interest in the estate is required to present his claim to the court for its determination, and whether he appears and presents his claim, or fails to appear, the action of the court is equally conclusive on him, subject only to being reversed, set aside, or modified on appeal.

4. Wills ⇐355.

Judgment admitting will to probate is conclusive after expiration of six months, except as to minors and lunatics, and cannot be attacked on ground of intrinsic fraud (Code Civ. Proc. § 1908).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

5. Executors and administrators ⇐315(6).

Decree of distribution of decedent's estate is conclusive after expiration of six months, except as to minors and lunatics, and cannot be attacked on ground of intrinsic fraud (Code Civ. Proc. § 1908).

6. Judgment ⇐443(1).

Judgment can be vacated for fraud only where fraud is extrinsic or collateral to matter tried by court.

7. Wills ⇐355.

Allegations of children of testatrix' deceased daughter seeking to establish interest in testatrix' estate *held* not to state case of extrinsic fraud in proceedings for probate of will which omitted such children.

Complaint alleged that shortly after the death of testatrix one of the defendants stated to plaintiffs who were children of daughter predeceasing testatrix that testatrix left will, wherein she had devised all of her property to her living children; that such defendant represented to plaintiffs that under the law of California, plaintiffs were entitled to none of the estate; and that as a result of such statement plaintiffs were led to believe that they could take nothing from testatrix' estate and did nothing about the matter until more than two years after will was admitted to probate and over a year after decree of final distribution was granted.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Doris Abels and others against Anna Frey and others. From an adverse judgment, plaintiffs appeal.

Affirmed.

Augustin Donovan and James R. Agee, both of Oakland, for appellants.

Snook, Snook & Chase, of Oakland, for respondents.

LAMBERSON, Justice pro tem.

The appellants have taken this appeal from a judgment against them as plaintiffs, following an order of the trial court sustaining a demurrer of the respondent Elizabeth Vanier, and a separate demurrer of the other respondents to the second amended complaint of appellants, entered after the latter had declined to avail themselves of the order of the court granting them leave to amend their complaint, if so advised.

The second amended complaint sets forth in substance that one Catherine Leveroni died May 22, 1927, and was a resident of Alameda county at the time of her death; that she left a will dated February 5, 1927, in which she named her daughter, Ursula Mangini, executrix of her will; that the will was admitted to probate on June 13, 1927, and by it the testatrix gave all of her property to six children, including Ursula Mangini, who has since deceased to be by them taken share and share alike; that Catherine Leveroni had, in all, seven children, one of whom, Rose Leveroni, who was not named in the will, died about August 15, 1921; that six children survived her, one of whom, Richard Leveroni, died about May 15, 1926, leaving two children, William Leveroni and George Leveroni, who are minors and represented herein by guardians ad litem; that shortly after the death of Catherine Leveroni, defendant Elizabeth Vanier stated to plaintiffs that Catherine Leveroni left a will by which she left all of her property and estate to the five living children of said deceased, share and share alike; that plaintiffs thereupon asked said defendant "if plaintiffs or the mother of plaintiffs" were mentioned or provided for in said will; that defendant answered in the negative; that plaintiffs thereupon asked said defendant why this had not been done; "that said defendant answered that she and her living brothers and sisters had employed one of the best lawyers in the city of Oakland, State of California, to prepare and draw said will, that said lawyer had thereupon prepared said will and had brought the same to the bedside of said Catherine Leveroni where is was signed and executed by her and that the law of the State of California at that time provided that a dead child of a decedent did not need to be mentioned or provided for in the will of said decedent; said defendant further stated that the law of said state formerly required that something had to be left by a parent to a dead child even though it was only the sum of one dollar but that said law had been changed and now provided as aforesaid and that the law now was that under the circumstances as aforesaid stated the plaintiffs were entitled to none of said estate; that as a result of these said statements plaintiffs were led to believe and did believe that they could take nothing from the estate of said Catherine Leveroni; that in reliance upon said statements so made as to the law plaintiffs did nothing further at that time; that said statement of the law as aforesaid was not correct but in truth and in fact said law provided at all times since the year 1872 that a testator's child or issue of a deceased child of the testator should be mentioned or provided for in the will of said testator and that in the absence thereof such child or such issue of a deceased child took that share of the testator's estate to which he, she or they would have been entitled had no will been left by said testator. That plaintiffs received no advice of any kind concerning the above save and except from defendant Elizabeth Vanier, as aforesaid, until the time and in the manner hereinafter in this

paragraph alleged: That on the 8th day of July, 1929, plaintiffs consulted the attorneys who are the attorneys for the plaintiffs in this action concerning their rights in and to the estate of a deceased aunt." That on August 16, 1929, plaintiffs employed attorneys, who commenced this action on September 18, 1929; that no notice of the probate proceedings was ever given plaintiffs or any of them; that the petition for letters testamentary omitted all mention of said plaintiffs; that no paper or pleading on file in said probate proceedings ever mentioned the plaintiffs, and none of them were ever mentioned, or ever appeared in said proceedings held therein, and the court was never informed of the existence of the plaintiffs, or any of them, or of the "deceased mother of the plaintiffs" (the complaint undoubtedly referring to Rose Leveroni, who was the greatgrandmother of the minors represented in this action); that on May 4, 1928, the respondent executrix filed a petition for final distribution, and on May 14, 1928, the court granted such petition and distributed to each of the six children named therein, an undivided one-sixth of the property, which was all real property; that none of said property has changed hands or ownership since the distribution, except as a change has been occasioned by the death of Ursula Leveroni, and also excepting a deed of trust executed by the respondents to certain banking and trust corporations named as defendants.

The second amended complaint further alleges that plaintiffs are entitled to a share of the estate in accordance with the laws of succession of California; that they have no adequate remedy at law; and ask that the court declare the interest of each in and to the real property described in the complaint, and to the rents, issues, and profits thereon, which have been enjoyed by the respondents since the distribution of said property to them. The complaint does not set up the final decree of distribution.

The demurrers are upon the ground that the amended pleadings do not state facts sufficient to constitute a cause of action in favor of any of the plaintiffs, and that the minors, greatgrandchildren of Catherine Leveroni, are improperly joined as parties to the action; it being contended that they are not issue of Catherine Leveroni within the meaning of section 1307 of the Civil Code.

[1] The amended complaint does not allege affirmatively that the various notices provided for by law were not given as required by statute, and the allegation that no notice was ever given to the plaintiffs or any of them does not negative the presumption that in the absence of plaintiffs' allegations to the contrary, each notice was duly given in the manner and at the time provided by law. The inferences are, from the pleadings, that the order admitting the will to probate, and the order granting the decree of final distribution, were made upon proper notice. In support of the judgment, it must be presumed that the notice of the time and place of hearing was given in accordance with the provisions of the Code of Civil Procedure (see Code Civ. Proc. §§ 1303, 1304, 1633). Clavey v. Loney, 80 Cal. App. 20, 251 P. 232; Estate of Davis, 151 Cal. 318, 86 P. 183, 90 P. 711, 121 Am. St. Rep. 105; Hanley v. Hanley, 114 Cal. 690, 46 P. 736.

The presumption being that proper notice has been given when there is no allegation to the contrary, it is the duty of the person notified to make inquiry as to the proceedings pending. Langdon v. Blackburn, 109 Cal. 19, 41 P. 814. In Miller v. Pitman, 180 Cal. 540, 182 P. 50, 51, the court said: "The law does not require personal notice to be given of the presentation and pendency of a petition for final distribution, and, the complaint in the present case failing to allege that the notice required by law was not given, it will be presumed that such notice was given." (Citing cases.)

[2, 3] The jurisdiction of the probate court is a jurisdiction in rem, the res being the estate of the decedent which is to be administered and distributed with regard to the rights of cerditors, devisees, legatees, and all the world. Warren v. Ellis, 39 Cal. App. 542, 179 P. 544; Nicholson v. Leatham, 28 Cal. App. 597, 153 P. 965, 155 P. 98. By giving the notice prescribed by the statute, the entire world is called before the court, and the court acquires jurisdiction over all persons for the purpose of determining their rights to any portion of the estate, and every person who may assert any right or interest therein is required to present his claim to the court for its determination. Whether he appears and presents his claim, or fails to appear, the action of the court is equally conclusive upon him, " 'subject only to be[ing] reversed, set aside, or modified on appeal.' " The decree is as binding upon him if he fails to appear and present his claim, as if his claim, after presentation, had been disallowed by the court. William Hill Company v. Lawler, 116 Cal. 359, 48 P. 323; Mulcahey v. Dow, 131 Cal. 73, 63 P. 158; Hanley v. Hanley, supra.

[4, 5] In a proceeding admitting a will to probate, the judgment is final and conclusive after the expiration of six months from the time it was admitted to probate, except as to minors and lunatics, and such an order may not be attacked upon the ground that intrinsic fraud was practiced on the court in procuring the probate of the will. San Diego Trust & Savings Bank v. Heustis (Cal. App.) 10 P.(2d) 158; Tracy v. Muir, 151 Cal. 363, 90 P. 832, 834, 121 Am. St. Rep. 117. The same rule applies to the decree of distribution. Smith v. Vandepeer, 3 Cal. App. 300, 85 P. 136. The stability of titles, judgments, and decrees requires a strict adherence to the

principles underlying the provisions of section 1908 of the Code of Civil Procedure. Lynch v. Rooney, 112 Cal. 279, 44 P. 565.

In Estate of Davis, supra, page 323 of 151 Cal., 86 P. 183, 184, 90 P. 711, 121 Am. St. Rep. 105, the court said: "But the procedure of this state contemplates, in the administration of the estates of deceased persons, a series of different proceedings, each of which is, as to the matters embraced within its purview, separate. And an adjudication as to each step in this series is intended to be final in its nature, and not subject to review in a subsequent stage of the administration of the estate."

A person who is interested in the estate of a deceased person, who has had the notice required by law, becomes in point of law an actor in the proceedings, and is bound by the result. Estate of Allen, 176 Cal. 632, 169 P. 364; Nicholson v. Leatham, supra.

[6] It is fundamental that a judgment or decree of a court of competent jurisdiction can be set aside for fraud only where the fraud alleged is shown to be extrinsic or collateral to the matter which was tried and determined by such court, as opposed to intrinsic or direct fraud practiced in the presentation of the proceedings coming before the court. Rountree v. Montague, 30 Cal. App. 170, 157 P. 623. As types of extrinsic fraud, the courts of appellate jurisdiction of this state have adopted the classic definition, found in United States v. Throckmorton, 98 U. S. 61, 65, 25 L. Ed. 93, in which the Supreme Court of the United States said: "But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing." See Pico v. Cohn, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; Langdon v. Blackburn, supra; Nicholson v. Leatham, supra; Rountree v. Montague, supra; McGavin v. San Francisco P. O. A. Soc., 34 Cal. App. 168, 167 P. 182. The gravamen of the rule thus expressed lies in the fact that "the unsuccessful party has been prevented from exhibiting fully his case." Bacon v. Bacon, 150 Cal. 477, 89 P. 317, 322.

The acts alleged to constitute intrinsic fraud must be such as operate to prevent the heir from appearing in the probate court, and thus contesting the proceedings then before the court, and exhibiting in its entirety his case against the action sought for being taken, whether it be the probate of a will, or a petition for final distribution; otherwise a court of equity is without jurisdiction to afford relief. Nicholson v. Leatham, supra.

[7] In the light of the authorities cited, we do not find that the allegations of the second amended complaint in the instant case state a case of extrinsic fraud against any of the respondents. The complaint alleges that shortly after the death of Catherine Leveroni, the defendant Elizabeth Vanier stated to plaintiffs that the deceased left a will; that she had devised all of her property to the living children of the deceased; that the will did not mention the "mother" of plaintiffs; that in response to the question why plaintiffs' "mother" had not been mentioned, Elizabeth Vanier told them that the living brothers and sisters had employed one of the best lawyers in Oakland to prepare and draw a will; that such lawyer thereupon prepared a will and took it to Catherine Leveroni for execution; then follow allegations as to what Elizabeth Vanier said about the laws of California relating to the omission of a child and all issue of a deceased child from the provisions of a will; also alleging that plaintiffs relied on said statements and did nothing about the matter until they consulted attorneys on July 8, 1929, more than two years after the will was admitted to probate, and over a year after the decree of final distribution was granted.

It is clear that plaintiffs knew of the death of their grandmother, and that she left an estate and a will from which they were omitted, and that they thought they had some interest in the estate, or should have been remembered. The fact that Elizabeth Vanier told them they had not been mentioned in the will and her statements as to the law, which may have been simply incorrect or willfully false, should have put them on inquiry. The facts alleged in the complaint do not disclose a condition embraced within the definition of extrinsic fraud accepted by the courts of California. The statements of Elizabeth Vanier were but conclusions on her part as to the law, and not a misstatement or concealment of any fact which operated to prevent the appellants from making inquiry in due time, or from having a trial of their cases before the court. There is no allegation that Elizabeth Vanier knew that the appellants were entitled to share in the estate, or that she knew her statements of the law were incorrect. There is no showing in the complaint that appellants

were at any time absent from the county where the probate proceedings were had, or in a position where they could not obtain advice as to their legal rights; nor is there a showing that any information in regard to the death of the decedent, the execution of the will or the terms thereof, or of the property embraced in the estate, was suppressed by any of the respondents, and particularly by the respondents other than Elizabeth Vanier. There is no allegation or showing that the other respondents connived or conspired with Elizabeth Vanier to suppress information or that they, by themselves, or through her, gave any false information to appellants, or conspired with Elizabeth Vanier, or caused her to make any of the statements ascribed to her in the amended complaint; further, there is no allegation that appellants were induced or persuaded by any of the respondents to refrain from appearing in the proceedings.

In the case of Langdon v. Blackburn, supra, it was alleged, in a complaint to enforce a trust, that certain heirs at law had conspired to defraud the plaintiff, who was a sister of a decedent who had omitted to mention her in his will, and had sent the plaintiff's son to her to inform his mother that her entire interest in the estate of her brother was only a small sum, which she accepted as her share of the estate. It was held that the complaint was subject to demurrer, because it did not show extrinsic fraud in the absence of a showing that the son said to his mother anything about the terms of the will, or the probate thereof, or advised her or suggested that it was not necessary for her to be present at the hearing of the petition for the probate of the will, or to employ counsel to represent her, or to make any inquiries about the will or the estate.

In Tracy v. Muir, supra, the court said: "It is further to be observed that the amended complaint is destitute of allegation of any act on the part of any of the alleged conspirators, the effect of which could have been to prevent the plaintiff from appearing in the probate court at any time within one year after the probate, and contesting the will upon all or any of the grounds specified in the statute, including the very ground upon which she here bases her claim, viz., that the will had never been executed by the deceased, but was a forgery. * * * This rule we take to be absolute, at least in every case where there has been no breach of duty arising from a fiduciary relation on the part of those securing the probate of the will, no such extraneous fraud as operates to prevent the heir from appearing in the probate court and there contesting the will and exhibiting fully his case against the same, and no lack of actual knowledge of the pendency of the probate proceeding operating to deprive the heir of an opportunity to so appear in the probate court and make his contest." To the same effect are McGavin v. San Francisco P. O. A. Soc., supra; Mulcahey v. Dow, supra; Nicholson v. Leatham, supra.

Our conclusion, in view of the foregoing authorities cited, must be that the appellants had due notice of the proceedings in the estate of their grandmother, or greatgrandmother, and that they did not use due diligence in ascertaining what their rights were in reference thereto. The principle underlying the law as to the charging and showing of extrinsic fraud is that there must be some end to litigation. The second amended complaint is deficient for the reason that it does not state a condition of facts or fraudulent acts sufficient to authorize a court of equity to grant the relief prayed for, and the demurrer was properly sustained upon the ground that the amended complaint does not state facts sufficient to constitute a cause of action against defendants, or any of them.

The conclusion which we have expressed being decisive of the matter before us, we desire to express no opinion as to the other questions presented in the arguments of counsel for appellants and respondents, or as to the other grounds which form the basis for the demurrer. The guardians of the respective minors, who are appellants herein, should take such action as they may be advised.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

126 Cal.App. 284

ANTICHI et al. v. NEW YORK INDEMNITY CO.

McINTYRE v. SAME (two cases).

Civ. 4598–4600.

District Court of Appeal, Third District, California.

Sept. 24, 1932.

Rehearing Denied Oct. 24, 1932. Hearing Denied by Supreme Court Nov. 21, 1932.

I. Insurance ⇐435.

Liability policy covered accident occurring while truck was being driven by insured owner substituting for hired driver named in policy.

Facts disclosed that one of authorized drivers of truck named in liability policy, while making delivery of load of turkeys, became ill, and thereafter one of insured partners took charge of truck and while driving truck accident occurred. The policy provided that, if any of drivers named therein was a hired chauffeur, "it is agreed that the policy is extended to cover while such automobiles are being driven by any

one employed as a substitute." Insurer's contention that word "employed," as used in policy, meant hired substitute, or some one other than named assured, could not be sustained, since, though word "employ" usually imports relation of master and servant, this is not universal rule, and idea of compensation is not necessarily involved, but in present tense it is applied to persons engaged in doing something, and in the past tense it is applied to persons engaged in the performance of work or duties, either busy or occupied at work.

[Ed. Note.—For other definitions of "Employ" and "Employed," see Words and Phrases.]

2. Insurance ⇐146(3).

Ambiguity in liability policy caused by insurer must be interpreted most favorably to insured.

3. Insurance ⇐514.

Automobile liability policy indemnifying against all legal liability arising from bodily injuries *held* to cover medical expenses and loss of services sustained by husband from injuries to wife.

4. Constitutional law ⇐328.

Liability insurer having refused to defend, its contention that adverse judgments violated Constitution because it did not have day in court *held* without merit.

Appeals from Superior Court, Solano County; William T. O'Donnell, Judge.

Separate actions by Gene Antichi and another, by W. J. McIntyre, and by Laura McIntyre, against the New York Indemnity Company, which actions were consolidated. From judgments for plaintiffs, defendant appeals.

Affirmed.

Hadsell, Sweet & Ingalls and Lewis N. Mitchell, all of San Francisco, for appellant.

Charles W. Haswell, of San Francisco, F. F. Marshall, of Dixon, and W. U. Goodman, of Fairfield, for respondents.

JAMISON, Justice pro tem., delivered the opinion of the court.

These cases were consolidated for trial and have been consolidated for hearing on appeal.

All three of the suits were upon a policy of insurance issued to Gene Antichi and A. E. Mallett, partners doing business under the name of Sacramento-Corning Freight Line and against the New York Indemnity Company.

One suit was brought by the said Antichi and Mallett for $1,000 attorney fees expended in defending actions brought by W. J. McIntyre and Laura McIntyre against them. The suit of Laura McIntyre is to recover the sum of $7,733.30 and $29.50 costs based upon a judgment in her favor in an action for damages for personal injuries against said Antichi and Mallett. The suit of W. J. McIntyre is for consequential damages resulting from the injuries to his wife Laura McIntyre based upon a judgment for $2,500 against the said Antichi and Mallett. Plaintiffs had judgments in all of these cases, and from these judgments defendant appeals.

The policy of insurance upon which the actions are founded was issued on June 20, 1928. The accident which gave rise to these actions occurred on February 13, 1929. The said policy contained the following provision:

"In consideration of the reduced premium rates at which this policy is written and of the statement made by the assured that he does not own more automobiles than those described in the policy and that there will not be a greater number of persons who operate such automobiles than those named in the endorsement without previous notice to the Company and payment of proper additional premium therefor, it is agreed that without previous notice to the company and payment of additional premium this policy covers the operation of the automobiles described only while such automobiles are being personally driven by Emmet Harden, Claude Strawn and R. C. McEwen or by any person when accompanied by such named drivers.

"If any of the named drivers is a hired chauffeur it is agreed that the policy is extended to cover while such automobiles are being driven by anyone employed as his substitute by reason of such chauffeur's illness or leave of absence, and by anyone employed as his successor. Notice of such successor or substitute shall be furnished the company within ten days of employment of such successor or substitute."

Emmet Harden, using one of the trucks covered by the policy and carrying a load of turkeys consigned to San Francisco, left Corning at 11 o'clock p. m. on the 12th of February, 1929, and arrived at Davis at 8 o'clock a. m. on the morning of February 13, 1929. When he arrived at Davis he telephoned Mallett that on the trip from Corning he had blown out a gasket and asked that a driver be sent to Davis. Thereupon both Mallett and Antichi went to Davis, and after the truck was repaired, Harden complaining of not feeling well, and not feeling able to drive the truck to San Francisco, Antichi took charge of the truck and drove it, and on his way to San Francisco the accident happened which caused these suits.

[1] Appellant contends that this accident was not covered by the terms of the policy; that the words, under the heading of More

Automobiles and Drivers, "if any of the named drivers is a hired chauffeur, it is agreed that the policy is extended to cover while such automobiles are being driven by anyone employed as a substitute," means a hired substitute, or some one other than the named assured.

The case of McCluskey v. Cromwell, 11 N. Y. 593, relied on by appellant to sustain his contention, is not in point. In that case the general contractor gave a bond conditioned that he would pay every laborer employed by him. The plaintiff's workers were employed by an independent contractor and the court very properly held the general contractor was not liable.

The dissenting opinion of Judge Ruggles in that case very clearly defines the word "employed" wherein he said: "A man hired to labor is employed, but a man may be employed in a work who is not hired. Materials are employed for building locks, but they are not hired; and a man who does his own work or the work of another is employed in it, although he receives no wages."

Nor is the case of Cooper v. Industrial Accident Commission et al., 177 Cal. 685, 171 P. 684, cited by appellant, in point here. In that case the widow claimed damages for the death of her husband, who was a member of a partnership engaged in mining. The accident occurred while he was engaged in business for the partnership, and it was held that the husband was not an employee of the partnership within the meaning of the Workmen's Compensation, Insurance and Safety Act (St. 1913, p. 284), although there was evidence that he had been employed by the partnership at a fixed wage.

In the instant case Antichi was not employed by the partnership of which he was a member to drive the said truck, but merely took over its operation owing to the illness of Harden.

The word "employ" is used in divers significations. Although it usually imports the relation of master and servant, or of employer and employee, this is not the universal rule, and the idea of compensation is not necessarily involved in the term. In the present tense it is applied to persons engaged in doing something. In the past tense it is applied to persons engaged in the performance of work or duties, either busy or occupied at work. 20 Cor. Jur. 1228, 1229. To engage is one of the meanings of "employ." Black's Law Dictionary, 430.

[2] The word "employed" may mean either busy or occupied at work or may mean intrusted with the management of affairs. 3 Words and Phrases, First Series, 2377. The rule is well settled that where there is an ambiguity in the policy caused by the insurer, the policy will be given an interpretation most favorable to the insured. Swift v. Zurich Gen. Acc. & L. Ins. Co., 112 Cal. App. 709, 297 P. 578; Ogburn v. Travelers Ins. Co., 207 Cal. 50, 276 P. 1004. See, also Goorberg v. Western Assurance Co., 150 Cal. 510, 89 P. 130, 10 L. R. A. (N. S.) 876, 119 Am. St. Rep. 246, 11 Ann. Cas. 801.

This policy was drawn by the insurer. It caused the uncertainty or ambiguity to exist, and it is not urged that any additional hazard was incurred by the substitution of Antichi for Harden.

We are of the opinion that the policy covered such substitution.

[3] Appellant next contends that the judgment in favor of respondent W. J. McIntyre should be reversed. This contention is founded upon the claim that damages suffered by the husband for injuries to his wife, that is to say, consequential damages, are not covered by the policy. The policy contains the following provision: "Indemnity provided by this policy applies only to the item below for which a premium charge is made. Legal liability for bodily injuries or death, one person $10,000.00. One accident $10,000.00."

In compliance with the act of the Legislature approved May 21, 1919 (Stats. 1919, p. 776), the following provision is also contained in said policy: "Bankruptcy or insolvency of the assured shall not relieve the company of any legal obligation hereunder. If any person or his legal representatives shall obtain final judgment against the assured because of such injuries, and execution thereon is returned unsatisfied by reason of bankruptcy, insolvency or any other cause, or if such judgment is not satisfied within thirty days after it is rendered, then such person or his legal representatives may proceed against the company to recover the amount of such judgment, either at law or equity, but not exceeding the limit of this policy applicable thereto."

Appellant cites the case of New Amsterdam Casualty Co. v. Nadler et al., 115 Ohio St. 472, 154 N. E. 736, decided by the Supreme Court of Ohio in support of this contention. In that case the court held that the husband could not recover consequential damages for an injury to his wife, under a policy which covered bodily injuries to a person; that it could not reasonably be held to include the kind of loss suffered by the husband. And in the case of Price v. National Surety Co., 221 App. Div. 56, 222 N. Y. S. 437, also cited by appellant, the court held that the terms "injury to person" or "injury to persons" refer to direct bodily damage to the person upon whom the injury was inflicted and did not include injury to another in loss as a consequence of such bodily injury. Appellant also cites cases from other states holding substantially the same doctrine.

But in none of the cases were the terms fixing the liability of the indemnity company similar to those contained in the policy in the instant case.

This policy provides indemnity to the assured to the extent of $10,000 against legal liability for bodily injuries. This judgment of W. J. McIntyre was for hospital bills, medical attention, and loss of services incurred by him by reason of the bodily injuries sustained by his wife in the said accident. Had the policy provided only for damages arising from bodily injuries, the authorities cited by appellant would be controlling; but it goes much farther than that and indemnifies the assured against all legal liability arising from bodily injuries. There can be no question but that the judgment of W. J. McIntyre was a legal liability against the assured growing out of the bodily injury suffered by the wife. Such being the case, the said judgment for consequential damages was covered by the policy.

[4] The final contention of appellant is that the decision of the trial court is in contravention of the Constitution of the United States and of this state, in that appellant did not have its day in court in defending against the said action brought by the McIntyres against Antichi and Mallett. Inasmuch as it admitted that appellant refused to defend the said cases after being called upon so to do, we see no merit in this contention.

Nor is there any merit in the claim that by an act of the Legislature material, or any, alterations were made in the policy. If appellant refers to the act of 1919, it is sufficient to say that this act was in force a number of years before this policy was issued.

The judgments are affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

126 Cal.App. 202

FUHRMAN v. AMERICAN NAT. BUILDING & LOAN ASS'N et al.

Civ. 8535.

District Court of Appeal, First District, Division 1, California.

Sept. 23, 1932.

1. Corporations ⇐80(6).

In buyer's action to cancel allegedly fraudulently induced stock subscription, representation regarding amount of stock subscribed or paid in is as to a material matter (Civ. Code, § 1572).

2. Appeal and error ⇐1010(1). Corporations ⇐80(12).

In buyer's action to cancel stock subscription, whether use of "substantial" as applied to amount of stock subscribed constituted representation of material matter *held* question of fact on which finding of trial court, supported by evidence, was conclusive (Civ. Code, § 1572).

> "Substantial" is relative term, the meaning of which is to be gauged by all the circumstances surrounding the transaction, in reference to which the expression has been used. It imports a considerable amount or value in opposition to that which is inconsequential or small.
>
> [Ed. Note.—For other definitions of "Substantial," see Words and Phrases.]

3. Corporations ⇐80(11).

Evidence supported conclusion that seller's representation that influential corporations and person were seller's officers were misrepresentations of material matters inducing stock subscription (Civ. Code, § 1572).

> Evidence disclosed that representations that two specified influential corporations were registrar and transfer agent respectively for seller, and that a specified influential individual was a director of the seller, were made to the buyer, which representations were untrue, and which induced the subscription.

4. Corporations ⇐80(1).

Any false statement by corporation's authorized agent concerning past or present status of corporation or material matters connected therewith, inducing subscriptions, is fraudulent representation (Civ. Code, § 1572).

5. Fraud ⇐58(2).

In action for fraudulent misrepresentations, evidence sustaining one material fraudulent misrepresentation is sufficient (Civ. Code, § 1572).

6. Corporations ⇐80(1).

Stock subscriber is justified in relying on representations of existing facts not within his knowledge or means of knowledge, but within knowledge of one making representations.

7. Corporations ⇐80(2).

Corporation is chargeable with its sales agents' actionable misrepresentations in securing stock sales.

8. Corporations ⇐306.

Directors' advertising, or permitting advertising in corporation's name, of false statements inducing stock purchases, are liable jointly with corporation to persons thereby defrauded.

9. Corporations ⇐80(1).

Hidden meanings in directors' prospectus or advertising containing deceptive state-

ments do not mitigate offense of allowing such statements (Civ. Code, § 1572).

10. Corporations ⇐306.

Test of directors' liability for deceptive statements in advertising inducing stock subscriptions is impression created by advertising literature as a whole (Civ. Code, § 1572).

11. Corporations ⇐80(12).

In action to recover money paid on fraudulently induced stock subscription, it was unnecessary to allege or prove pecuniary damage; plaintiff being entitled to recover whatever he had paid in course of transaction (Civ. Code, § 1572).

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Alfred Fuhrman against the American National Building & Loan Association and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Thomas E. Hayden, Edward A. O'Brien, and Sullivan, Roche, Johnson & Barry, all of San Francisco, for appellants.

H. W. Hutton, of San Francisco, for respondent.

LAMBERSON, Justice pro tem.

The respondent brought action against the appellant, American National Building & Loan Association, a corporation, and the other appellants as directors thereof, to recover the sum of $2,500, being the amount of a first payment made by respondent on a subscription for 100 shares of the "guarantee capital stock" of the appellant corporation, and prayed for the cancellation of the subscription agreement upon the ground that he had been induced by fraudulent representations of the appellants and their agents to sign the subscription agreement. Judgment was entered in favor of respondent for the sum of $2,500, with interest thereon at the legal rate from June 4, 1929, and it was decreed that the subscription agreement be canceled and surrendered to the respondent.

The defendant corporation was organized as a building and loan corporation under the laws of California, on February 28, 1929, with an authorized "guarantee capital stock" of $5,000,000 divided into 50,000 shares of the par value of $100 each. For the purposes of the organization, there were seven directors, to each of whom there were ostensibly allotted 10 shares of the capital stock, none of which, however, were ever issued or paid for, or have been outstanding at any time. It is admitted in appellants' brief that three of the seven so-called original incorporators were merely dummy directors, in the sense that their names were used as a matter of convenience in incorporating the company, "as indeed were the names of the other four directors, in so far as their subscription to ten shares each of the capital stock of said corporation were concerned." The last four, however, did thereafter subscribe for shares of stock in the company at $125 per share.

On March 8, 1929, the defendant corporation entered into an agreement with one V. M. Price, who was neither a director nor one of the original incorporators, wherein it was recited that the original incorporators of the appellant corporation had theretofore subscribed for 70 shares of the guarantee capital stock, thereby leaving in the treasury, unsold and not subscribed for, 49,930 shares; that the board of directors had offered said 49,930 shares for sale, and the said V. M. Price had offered the sum of $105 per share for the same, which offer had been accepted by the board. It was then agreed that the corporation sold, and the said Price bought, said shares of stock, the seller to issue certificates therefor at any time prior to March 8, 1939, for lots of one share or more, upon the payment of the purchase price of $105 per share, no dividends to accrue until such purchase price for each share had been paid, and no interest to be paid by the buyer. It appears that Price thereafter began a selling and advertising campaign, in the course of which there appeared a double page advertisement in the San Francisco Examiner, and a large advertisement in the San Francisco Chronicle, in the name of the defendant corporation, Price's name not being mentioned therein. In the Examiner advertisement appear, among others, the following representations: "Subscriptions for a limited amount of the guarantee capital can be made through any of our State agency offices listed herewith or at the main San Francisco office by mail or wire. In view of the fact that guarantee capital has been tightly held by a few of the original incorporators and directors, the management believes that this opportunity for public participation is a forward step in the policy of building and loan finance, in that it allows a large number of small investors to enjoy initial opportunity with the incorporators, instead of a limited privilege to make interest deposits or purchase investment certificates. Guarantee capital will participate in earnings." The Examiner advertisement also set forth a list of ten directors, among whom one J. C. Berendsen, a businessman of San Francisco, was named. In the Chronicle advertisement, the statement was repeated that Berendsen was a director, and this was accompanied by a laudatory recital of his experience in the business affairs of San Francisco, together with his photograph, all

of which was published without his knowledge or consent.

Within a few days after the publication of these advertisements, respondent was visited by representatives of the appellant corporation or its sales agent, and was furnished with literature apparently issued and distributed in the name of such appellant, in which the following statement was made: "A substantial part of the original authorized issue has been subscribed for and the offering, herewith, is presented as an opportunity to the public to participate by direct investment in the guarantee capital, instead of being confined to interest on deposit monies." The representation was also made in the Examiner advertisement that the Crocker First Federal Trust Company was the registrar of the defendant corporation, and that Anglo-California Trust Company was the transfer agent. The advertisements did not state the number of shares into which the capital stock was divided, or their par value, but stated that shares of appellant corporation would be available at $125 per share.

On May 23, 1929, in response to invitations from representatives of appellants or their sales agent, respondent visited the offices of the appellant corporation where he was handed an envelope which contained copies of the advertisements published in the Examiner and Chronicle, and was told by the person who gave them to him that the two advertisements contained all of the facts regarding the company. He had previously been asked to subscribe for stock, and was again solicited on May 23. After looking around the offices, examining the subscription book which was shown to him, and talking with one of the persons there who was described as a director and chief counsel of the corporation, he signed the subscription agreement for the purchase of 100 shares at a price of $125 per share, and at that time gave to the agents of appellants a check for $2,500 drawn in favor of the corporation as an initial payment on his subscription, final payment to be made July 2, 1929. It later developed that, of the amount paid by respondent, $2,000 was immediately paid to Price as his commission on the entire sale, the $500 remaining with the corporation. Up to and including May 21, 1929, a total of 1,573 shares had been subscribed for, and during the following week subcriptions for an additional 436 shares had been offered. Respondent alleges that about June 3 he discovered the falsity of the statements which had been made to him, and learned for the first time of the contract with Price, and that about June 4 he gave notice of rescission to the appellant corporation, and about June 5, in a letter addressed to one Thomas E. Hayden, who had been represented to respondent as a director and chief counsel of appellant corporation, stated in detail his reasons for believing that fraud had been practiced upon him in securing his subscription. The complaint alleges that, for the purpose of inducing the general public to subscribe for and purchase the guarantee capital stock of the defendant corporation, said corporation and the other defendants named, who were directors thereof, caused the advertisements hereinbefore mentioned to be published, and other advertisements to be sent through the mail and distributed to the public, setting forth, among other things, the matters hereinbefore stated, and that each and all of the representations so made and published were known by defendants to be fraudulent; that in truth and in fact, subscribers for stock at $125 per share did not and could not enjoy initial opportunity with the incorporators who paid only $100 per share; that seven of the incorporators had subscribed for only 10 shares each, leaving a balance of 49,930 shares in the treasury of the corporation; that on March 8 V. M. Price bought the balance of the stock for $105 per share without any interest on the agreed purchase price, and has ever since such time been the sole owner thereof; that the representations were not actually believed by defendants to be true; that such false representations were made with intent that they should be acted on by respondent; and that he relied on each of such representations, and has been damaged in the sum of $2,500.

The court found that between May 17 and May 23, inclusive, 1929, the defendants, their agents and servants, solicited plaintiff to subscribe for and purchase shares of the guarantee capital stock of appellant corporation, and did deliver certain advertising matter, and by verbal statements represented and stated to plaintiff the matters which have been heretofore outlined; that such statements and representations were false and untrue, in that subscribers for stock at $125 per share did not enjoy initial opportunity with the incorporators, because said incorporators paid nothing for their subscribed stock; that on March 8, 1929, the corporation entered into the sales contract with V. M. Price, hereinbefore mentioned; that, at the time of plaintiff's subscription, no substantial part, or more than a small fraction, of the original authorized stock had been subscribed; that Crocker First Federal Trust Company was not the registrar of defendant corporation; that Anglo-California Trust Company was not the transfer agent; that J. C. Berendsen was not a director, and never had been a director; that all matters and things so stated and represented to plaintiff to be true were material and substantial particulars in respect of the said corporation, in the conduct and supervision of its business and financial affairs; that said statements were, at the times they were made, known by de-

fendants to be untrue, and were made with intent to deceive and induce plaintiff to purchase stock of appellant corporation; that plaintiff was ignorant of their falsity, relied thereon, and was deceived thereby; that, except for such representations, plaintiff would not have subscribed for any of said shares, and would not have paid said sum of $2,500 therefor; that plaintiff discovered the fraudulent nature of the representations about June 4, 1929, and immediately rescinded his subscription; that by reason of the false representations made by defendants, and the immediate recission by plaintiff, the subscription became void and of no effect.

Between May 13 and May 24, 1929, the Crocker First Federal Trust Company, Anglo-California Trust Company, and J. C. Berendsen, respectively, notified appellant corporation in writing that they declined to act in the capacity described in the advertising matter, and the Anglo-California Trust Company requested appellant corporation to refrain from using its name in any advertising matter.

Appellants urge that the evidence is insufficient to sustain the findings of the court, and, as their first specification, object to the finding that subscribers for stock at $125 per share did not enjoy initial opportunity with the incorporators, and urge that it is contrary to the purpose and intent intended to be conveyed in the advertising matter, which was, according to appellants' argument, to draw the public's attention to the distinction existing between the former and usual practice of original incorporators of building and loan associations in tightly holding for themselves the guarantee capital stock and offering to the public only the limited privilege of making interest deposits, or purchasing investment certificates. While the statements contained in the advertising material of the company, aside from the newspaper advertisements, bear the construction claimed by appellants, the matter contained in the Examiner advertisement clearly claims the merit for the stock selling plan of the appellants, which the findings have attributed to such advertising matter, and it could easily have been inferred from the advertising material that every subscriber would be on an equal footing, both as to themselves and to the original incorporators. The corporation was apparently, at the time the subscription was signed by respondent, not actively engaged in a building and loan business, and the only purpose of the advertising and of the selling campaign was to attract investors who desired to purchase shares of the stock of the corporation, and thereby furnish a working capital for the corporation.

The next serious objection is that in which appellants take issue with the finding that no substantial part, or more than a small fraction, of the original authorized issue of stock had been subscribed. Up to May 21, 1929, a total of only 1,573 shares, or a trifle over 3 per cent. of the total issue of stock, had been subscribed. During the following week, 436 shares had been added, making a total on May 28th of 2,009 shares. When the advertising matter was first presented to respondent, less than 1,573 shares had been subscribed, and the advertising matter was not changed, nor were the representations altered at the time respondent finally made his first payment on May 23d. The word "substantial" as used in the findings is a relative term, the meaning of which is to be gauged by all the circumstances surrounding the transaction in reference to which the expression has been used. It imports a considerable amount or value in opposition to that which is inconsequential or small. We find support for the finding of the court in the fact that this representation was contained in the first advertising matter distributed by the corporation, at which time little or no stock of the corporation had been subscribed, and an examination of all of the advertising literature received in evidence indicates that the sales agents of the corporation intended to indulge in exaggeration if they found it necessary for their purpose, regardless of what the need for accurate information on the part of the prospective investor might be.

[1, 2] A representation as to the amount of capital stock subscribed or paid in is a representation as to a material matter. 14 Cor. Jur. 606. The question of whether or not the use of the word "substantial" constituted a misrepresentation of a material matter, being a question of fact for the trial court, in the light of the circumstances surrounding the entire transaction, and the conclusion of the court having support in the evidence, we cannot say that, as a matter of law, there was no evidence to support the finding.

[3-5] The next objection is that the evidence does not support the findings that the representations as to the Crocker First Federal Trust Company acting as registrar of the defendant corporation, that the Anglo-California Trust Company was the transfer agent, and that J. C. Berendsen was a director, were false and untrue, and were made with intent to deceive respondent. The fact that the representations were made is not questioned, but appellants contend they were not made with any intent to defraud, or with knowledge of their falsity, and that they were not, under the circumstances, representations as to material matters. Each of the appointments or positions specified was tendered to the respective corporations and person named, but each of them had sent to the corporation a written refusal to accept such

appointment before the 23d day of May, 1929. An examination of the entire record discloses that the appellants or their agents, in their anxiety to make an impression on the public, and to present as imposing an array of influential connections as possible, were either active in or permitted advertising and publicity matter to be published and circulated, which contained the various statements cited as misrepresentations, which were untrue, or which the appellants did not know to be true, and that there is sufficient evidence to support the conclusion of the trial court that they constituted misrepresentations of existing facts upon which the respondent relied in signing a subscription agreement to purchase stock of the appellant corporation, and in making the initial payment for the same, even though we may charitably indulge in the presumption that the directors were innocent of a desire to participate in any fraud, and that some of the representations were in the nature of mere matters of opinion or of extravagant sales talk. Any false statement by the authorized agents of a corporation in regard to the past or present status of the corporate enterprise, or material matters connected therewith, whereby subscriptions are obtained, is a fraudulent representation, and a false statement that certain individuals are officers or directors is a false representation. Vulcan Fire Ins. Co. v. Jorgensen, 33 Cal. App. 763, 166 P. 835. In an action for fraudulent representations, if the finding is sustained by the evidence as to one material fraudulent representation, it is sufficient. Beeman v. Richardson, 185 Cal. 280, 196 P. 774.

Section 1572 of the Civil Code provides in part as follows: "Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; 2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true."

[6, 7] In McMahon v. Grimes, 206 Cal. 526, the court quoted, at page 535, 275 P. 440, 443, from other authorities, as follows: "'If a party asserts that as true which he does not know to be true, it is a false representation. If he intends simply to state his belief upon information, then he should state it in that precise form, so as to apprise the other party of the true grounds upon which his statement is made. A party will always be held to make good his statement in the form in which he makes it. If he states a thing as true in general terms without qualification, then he is presumed to do so upon his own knowledge or at his peril, and must make good his assertion.'" A person subscribing for capital stock in a corporation is justified in relying upon representations concerning existing facts not within his knowledge, or his means of knowledge, but within the knowledge of the party making the representations (Hogberg v. Landfield, 99 Cal. App. 360, 278 P. 907), and, where a corporation is represented by sales agents who make actionable misrepresentations in securing sales of stock of the corporation, the corporation is chargeable with such misrepresentations. Dox v. R. E. Lomax Company, 29 Cal. App. 718, 156 P. 874.

[8-10] Directors of a corporation who have put forth, or have permitted to be put forth in the name of the corporation, false and fraudulent statements, either in equivocal language or positive affirmations, in making up their prospectus, circulars, or other advertising matter, whereby members of the public are induced to purchase its shares of stock, make themselves liable to persons thereby deceived and defrauded jointly with the corporation itself. 14a Cor. Jur. 184. Hidden or equivocal meanings, which the average person could not discern, do not mitigate the offense of allowing false or deceptive statements to be made; the true test of liability or responsibility in the case of the directors being the impression created by the prospectus or the advertising literature as a whole, and whether or not all of the material, taken together, constitutes a false representation. Churchill v. St. George Development Co., 174 App. Div. 1, 160 N. Y. S. 357; Bystrom v. Villard, 175 App. Div. 433, 162 N. Y. S. 100.

The safety and security of the investing public require that no material misstatement or concealment of any material fact should be permitted. Morgan v. Skiddy et al., 62 N. Y. 319.

The tendency of the courts is to hold promoters and directors of corporations to a strict accountability for the accuracy of their representations which are made with a view of inducing strangers to the enterprise to invest therein, and to refuse to extend immunity for false statements because they might believe them to be true, if, in fact, they were false. Bystrom v. Villard, supra.

A review of the evidence in the instant case does not indicate a suggestion that any leniency should have been granted to the appellants because they may have believed that the corporations named respectively as registrar and transfer agent, or the individual named as a director, would eventually accept the invitation of the directors to become connected with their organization in the capacities specified in the advertising matter of the

corporation. Respondent had the right to rely on the statements contained in the various pieces of advertising matter given to him and the representations made in the name of the corporation which bore upon the soundness, stability, and good standing of the corporation, and its connections in the business world, which connections the promoters were apparently anxious to form; and respondent was entitled to believe that the inferences which he drew from the advertising material and statements in regard to the acquisition by the corporation of a substantial working capital, as well as the inference that the entire sum paid by him for each share was actually to become a part of the capital of the corporation, were correct. No misrepresentation as to the manner in which the stock was issued or as to the method of organization should be countenanced.

Objection has been made by appellants that respondent did not actually rely on the statements contained in the advertisements and set forth in the complaint, but that he made his subscription in reliance entirely upon the fact that one Thomas E. Hayden was a director and chief counsel of the corporation, and that said Thomas E. Hayden assured respondent that everything concerning the affairs of the corporation was being thoroughly and honestly conducted, and that he himself had subscribed for 100 shares of the stock in the corporation. This contention has for its chief support the testimony of Hayden and the sales agents who approached respondent in regard to making a subscription for stock. The testimony of Hayden was equivocal and evasive, and it is difficult to believe that Hayden, as one of the original incorporators, could have been ignorant in any way of the facts regarding the Price contract, or of the statements which were being promulgated by the agents of the corporation. The testimony of these witnesses did nothing more than to raise a conflict in the evidence which was resolved in favor of the respondent, and the findings of the court are supported so amply that they cannot be disturbed by this court.

[11] The further contention is made that there is no showing that the fraud in this case, if any, produced any injury to respondent, and that damages, accordingly, cannot be recovered therefor. In an action upon a false representation, which formed the basis for a subscription to the capital stock of a corporation, where the circumstances are such as to entitle the subscriber to rescind, it is not necessary to allege or prove pecuniary damages. Vulcan Fire Ins. Co. v. Jorgensen, supra. Respondent was entitled to rescind and to recover whatever he had paid or delivered to the corporation in the course of the fraudulent transaction.

For the reasons stated, the trial court properly denied appellants' motion for a new trial, and we are of the opinion that the judgment should be affirmed. It is so ordered.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

126 Cal.App. 267

CONTRA COSTA COUNTY v. COWELL PORTLAND CEMENT CO.

Civ. 8527.

District Court of Appeal, First District, Division 1, California.

Sept. 24, 1932.

1. Appeal and error ⇐612(2).

Only clerk of court may authenticate judgment roll and notice of appeal.

2. Constitutional law ⇐38.

Statute is not unconstitutional, unless violative of constitutional rights when measured and construed in its entirety; mere method or order of procedure set forth therein not being controlling.

3. Nuisance ⇐77.

Police power justifies destruction or abatement of whatever may be regarded as public nuisance.

4. Nuisance ⇐64.

Owner must so use and enjoy property as not to interfere with general welfare of community.

5. Nuisance ⇐64.

Owner must submit to whatever restraints Legislature imposes on use and enjoyment of property to promote general welfare of community and is without remedy for resulting inconvenience or loss.

6. Nuisance ⇐88.

All facts enumerated in statute as prerequisites to county's lien on property for expense of abating nuisance by destroying animal pests thereon must be legally established against owner in suit wherein he is defendant before lien may be enforced (Pol. Code, § 2322a, subds. 1, 2, 5–7).

7. Nuisance ⇐88.

Statute giving county lien on property for expense of abating nuisance by destroying animal pests thereon *held* not unconstitutional as taking property without due process (Pol. Code, § 2322a, subds. 1, 2, 5–7).

8. Nuisance ⇐88.

County board of supervisors must determine to adopt statutory alternative method of procedure in eradicating animal pests to acquire and enforce lien on property for expense thereof (Pol. Code, § 2322a).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

9. Licenses ⇐8(1).

Statute requiring certificates to engage for hire in business of eradicating or controlling animal pests *held* not binding on county destroying such pests on property in exercise of police power (Pol. Code, § 2322a, subd. 8).

10. Nuisance ⇐88.

County's claim of lien on farm, operated as one unit, for abatement of nuisance by destroying ground squirrels thereon, *held* not objectionable as including several parcels in one claim (Pol. Code, § 2322a).

11. Evidence ⇐596(1).

Plaintiff must always prove his case by preponderance of evidence.

12. Nuisance ⇐88.

Defendant in county's action to establish and foreclose lien on property for expense of abating nuisance by destroying ground squirrels thereon had burden of establishing defense that horticultural commissioner extended time for eradication thereof by defendant (Pol. Code, § 2322a, subds. 1, 2, 5–7).

13. Trial ⇐193(2).

Court's submission to jury of question whether defendant was making reasonable effort to eradicate ground squirrels on its premises when county horticultural commissioner's employees commenced eradication thereof *held* not erroneous as conveying idea that defendant had taken arbitrary position (Pol. Code, § 2322a).

14. Trial ⇐374(2).

Foreclosure of lien being in equity, jury serves only in advisory capacity, and court may disregard its conclusions, if not apparently sustained by evidence or otherwise unsatisfactory to court.

15. Appeal and error ⇐1065.

Error in instruction to advisory jury in equity case is not controlling, judgment and decree being action of court.

16. Appeal and error ⇐873(1).

Question of court's authority to charge costs against defendant by judgment may be raised on appeal therefrom.

17. Appeal and error ⇐119.

Order on motion to retax costs after rendition and entry of final judgment is appealable.

18. Appeal and error ⇐873(1).

Appellant's objections to items of costs, fixed by order made after final judgment appealed from, cannot be considered, in absence of appeal from such order.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by the County of Contra Costa against the Cowell Portland Cement Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

J. E. Rodgers and A. F. Bray, both of Martinez, for appellant.

James F. Hoey, Dist. Atty., Rex L. Boyer, Asst. Dist. Atty., and Archibald B. Tinning, all of Martinez, for respondent.

GEORGE H. THOMPSON, Justice pro tem.

[1] In what is designated herein "Clerk's Transcript on Appeal," there is set forth what purports to be a copy of each of the following, viz: (1) Complaint; (2) amendment to complaint; (3) answer; (4) amendment to answer; (5) forms of special verdicts and stipulation concerning the submission of such verdicts; (6) findings of fact and conclusions of law, filed March 13, 1928; (7) judgment, dated and filed March 13, 1928; (8) clerk's certificate, dated March 13, 1928, to judgment (that it is a true copy of judgment rendered in the action and entered in Volume 30, Judgment Book of said court, at page 468, and further that the papers annexed constitute the judgment roll in said action); (9) notice of intention to move for new trial, dated March 14, 1928, and filed March 15, 1928; (10) minute order of court, dated May 7, 1928, retaxing costs on defendant's motion to tax costs, also minute order denying defendant's motion for new trial after hearing had thereon; (11) notice of appeal, dated May 7, 1928, from judgment rendered on March 13, 1928, in favor of county of Contra Costa and against defendant, Cowell Portland Cement Company, and from the whole thereof; (12) notice to prepare transcript. There is, however, no authentication of the said designated clerk's transcript; the clerk having failed to certify it. The reporter's transcript was duly certified and authenticated by the trial judge under section 953a of the Code of Civil Procedure. The latter, however, embraces only and is restricted to the testimony and proceedings at the trial which began on January 5, 1928, and ended on January 19, 1928. It is of course well understood that the clerk alone may authenticate the judgment roll and the notice of appeal. Nevertheless, we will treat the said designated transcript as a proper transcript on appeal from said judgment under notice of appeal appearing therein, and will proceed as if the clerk had duly certified and authenticated it as to all matters so appearing in said designated transcript as above mentioned.

It will thus appear that the defendant has appealed from a judgment in favor of the plaintiff in an action that was brought by

the plaintiff against the defendant under section 2322a et seq. of the Political Code for judgment and decree that the amount of the expense incurred by the plaintiff in 1927 in eradicating, controlling, and destroying squirrels constituting a public nuisance, and the amount of penalties by operation of law attached thereto, be adjudged and decreed a lien in favor of plaintiff against the described premises of the defendant, and that the said premises be sold to satisfy the amount of the lien together with costs, etc. It will also be noted that the judgment appealed from was made and entered March 13, 1928, and that the appeal is from that judgment alone so then made and entered.

[2] The first contention of defendant and appellant is that section 2322a of the Political Code—under the authority of which section the action was brought—is unconstitutional in that it causes a lien to attach without due process of law or, as otherwise stated, without any hearing or opportunity for hearing having theretofore been given. In this regard, we understand the proposition particularly contended for is that the order of procedure is material and that before the expense of the abatement entry could in any way even initiate a lienable right on the part of the plaintiff, a hearing or an opportunity for a hearing concerning the existence of the facts which under the statute would support a lien is a prerequisite and that under the Constitution, in the absence of such preliminary step, i. e., that such hearing first be had or that such opportunity for hearing first be given, there could be no initiation of any lienable right. But when statutes are measured or construed with reference to constitutional limitations, we do not think that such controlling importance is attached to the mere method of procedure or to the order of the procedure set forth in the statute. The statute is measured and construed in its entirety, and unless when so considered it is violative of constitutional rights, it is not unconstitutional. Illustrations of this rule are many. People v. Hickman, 204 Cal. 470, 268 P. 909, 270 P. 1117; Capital Traction Company v. Hof, 174 U. S. 1, 19 S. Ct. 580, 43 L. Ed. 873.

[3-6] Section 2322a of the Political Code is referable to the police power. The police power is universally considered "to justify the destruction or abatement * * * of whatever may be regarded as a public nuisance. * * *" Lawton v. Steele, 152 U. S. 133, 14 S. Ct. 499, 500, 38 L. Ed. 385. "* * * Every property owner * * * is also bound so to use and enjoy his own as not to interfere with the general welfare of the community in which he lives. It is the enforcement of this * * * duty which pertains to the police power of the state so far as the exercise of that power affects private property. Whatever restraints the legislature imposes upon the use and enjoyment of property within the reason and principle of this duty, the owner must submit to, and for any inconvenience or loss which he sustains thereby he is without remedy. It is a regulation and not a taking, an exercise of police power and not of eminent domain." 1 Lewis on Eminent Domain (3d Ed.) § 6. "* * * Statutes providing for the summary destruction of vegetation infected with contagious pests, without any preliminary judicial inquiry and without compensating the owner for the resulting loss, are perfectly constitutional so long as they themselves define what constitutes a nuisance, and there is a right to a subsequent judicial review of the action of the administrative officer." 1 R. C. L. p. 790. Said section 2322a as it read in 1927, the year when the county incurred the expenses involved herein, invested the horticultural commissioner with full authority to enter premises within his jurisdiction and to inspect the same or any part thereof, and if such premises were found infected or infested with animal pests injurious to fruits, plants, vegetables, trees, or vines, in writing to "notify the record owner or owners, or person or persons in charge or in possession of the said premises * * * that the same are infected or infested with said * * * animal pests * * * and require such person or persons, to eradicate or destroy or to control to the satisfaction of the said commissioner the said * * * animal pests * * * within a certain time to be therein specified"; provided how such notice should be made by the commissioner and recorded with the county recorder (subdivisions 1 and 2); expressly declared, "Any and all premises * * * infected or infested with * * * animal pests * * * to be a public nuisance" (subdivision 5); provided that "Whenever any such nuisance shall exist at any place within a county, and the proper notice thereof shall have been served as hereinbefore provided and such nuisance shall not have been abated within the time specified in such notice, it shall be the duty of the said commissioner to cause said nuisance to be at once abated by eradicating or by controlling, or by destroying said * * * animal pests * * *"; and that the expense thereof shall be a county charge and the board of supervisors shall allow and pay the same; that "any and all sums so paid from the date of payment shall be and become a lien on the property and premises from which said nuisance has been removed or abated"; that "notice of such lien shall be filed and recorded * * * within thirty days after the right to the said lien has accrued and a copy of said notice of lien shall be mailed to" certain mentioned persons; that "if said sum secured by such lien

be not repaid to said county within eighty days from the filing of said notice of lien," certain penalties shall be added; and that "an action to foreclose said lien shall be commenced within ninety days after the filing and recording of said notice of lien * * *" Subdivisions 6 and 7.

It will be noticed from an inspection of the provisions of the section just mentioned that the validity of any lien claimed thereunder is dependent upon the existence of a number of facts constituting a premise upon which the right of lien is based, viz., the existence as a fact of the alleged public nuisance, the service of a reasonable notice on the owner to abate, etc., the failure of the owner to abate, etc., within the reasonable time so specified, the abatement thereafter performed by the county, the expense thereof, etc., all of which enumerated facts must be legally established against the owner in a suit wherein the owner is a party defendant before such lien may be declared to be legally enforcible against his property. "* * * The lien in question here could not be enforced until after a judicial investigation and determination by a court." County of Los Angeles v. Spencer, 126 Cal. 670, 673, 59 P. 202, 203, 77 Am. St. Rep. 217. In support of its contention in this respect, the appellant has cited particularly Hutson v. Woodbridge Protection District, 79 Cal. 90, 16 P. 549, 551, 21 P. 435; but in that case it is expressly stated by the Supreme Court in the opinion that: "The assessment is by the terms of the act made an absolute lien on his property without any provision or opportunity allowed him to show its illegality or unconstitutionality. * * * The act is unconstitutional."

[7] The act we have now under consideration is not open to any such criticism, for it provides in terms that, before the alleged lien may be enforced against the property, the owner shall have his day in court, in a suit wherein he is given full opportunity to show the true facts and the illegality of the proceedings if such illegality exists, and to present all defenses which he may desire. As all property is held subject to the exercise of the police power of the state and as the abatement of a nuisance is an exercise of the police power, it would seem under the situation here presented—the defendant having been duly notified and required to abate the nuisance, the defendant's casting upon the county the work of so abating through failure to respond to and comply with said requirement, the assumption and discharge of said service by the county as to said property which the defendant should have performed—that the equitable consideration of benefit conferred and service rendered, regarded as a necessary basis for a statutory lien, is unquestionably here present, the issues on the trial having been decided in favor of plaintiff. The lien given by the statute is but for an indebtedness due the county, and the collection of that indebtedness by means of the enforcement of a lien therefor as prescribed by the statute is not obnoxious to any constitutional inhibition. County of Los Angeles v. Spencer, supra; County of Riverside v. Butcher, 133 Cal. 324, 65 P. 745; Odd Fellows' Cem. Ass'n v. San Francisco, 140 Cal. 226, 230, 73 P. 987; California Reduction Co. v. Sanitary Works, 199 U. S. 306, 26 S. Ct. 100, 50 L. Ed. 204; Reclamation Dist. No. 108 v. Evans, 61 Cal. 104; Hagar v. Reclamation District No. 108, 111 U. S. 701, 4 S. Ct. 663, 28 L. Ed. 569; In re Madera Irrigation Dist., 92 Cal. 296, 323, 28 P. 272, 279, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106. Within the purview of the controlling principles of this case, it may be properly said—as was said in the case last mentioned—defendant's property is not taken from it without process of law if it "is allowed a hearing at any time before the lien * * * becomes final."

[8] It is contended that the board of supervisors did not determine to proceed with the eradication work under the alternative method provided by section 2322a of the Political Code. Unquestionably it is the law that the board must determine in advance the method of procedure that is to be followed. County of San Benito v. Wapple, 188 Cal. 423, 205 P. 673; County of Riverside v. Title Ins., etc., Co., 202 Cal. 233, 238, 259 P. 759; Id., 252 P. 776, opinion in App. Ct. However, from an examination of the evidence bearing on this point, we think that there is substantial support for the finding of the court reading as follows: "V. That prior to the 27th day of April, 1927, the Board of Supervisors of the County of Contra Costa, State of California, had selected and determined, and did select and determine, to adopt the method and procedure provided in section 2322a of the Political Code as the method and system to be used in said County of Contra Costa, for the extermination of ground squirrels therein and had authorized and directed and did authorize and direct the said horticultural commissioner of the said County of Contra Costa, to take action and institute such proceeding under the provisions of section 2322a of the Political Code as might be necessary to eradicate and control ground squirrels on any land in the said county that was infested with ground squirrels."

[9] It is also contended that the county in this work employed persons not certificated as required by subdivision 8 of section 2322a of the Political Code (as said section read in 1927), which section provided that no person shall be permitted to engage for hire in the business of eradicating or controlling

plant diseases, insect or animal pests, or noxious weeds injurious to the plant industry of the state "who has not first secured a certificate" in the manner therein provided; and also provided that the horticultural commissioner shall have the power and authority to issue certificates to all persons whom he shall find to be duly qualified for engaging in such work. But in this case it was the county that was engaged in the work with which we are concerned, and obviously the county was under no necessity to secure a certificate or to secure a certificate for its agents or employees in the work. The county was not engaged for hire in any such business, but was doing the work as a governmental function and as an exercise of the police power of the state. Manifestly, the purpose of subdivision 8 was to require proper qualification on the part of persons who as a business engaged in and undertook the eradication of pests for the public generally, and to insure such proper qualification on the part of such persons—required them to submit to examination and to be certificated—for the protection of the public against incompetent and unqualified persons. The said subdivision does not expressly or by any necessary implication require that the horticultural commissioner shall certificate himself or any of his deputies or agents, or that any agent of the county shall be so certificated, and, such being the case, the statute must be construed as not binding on the state and its agents. Balthasar v. Pacific Elec. Ry. Co., 187 Cal. 302, 202 P. 37, 19 A. L. R. 452; Ruperich v. Baehr, 142 Cal. 190, 75 P. 782; Marin Municipal Water Dist. v. Chenu, 188 Cal. 734, 207 P. 251.

The appellant contends that the horticultural commissioner was unfair, arbitrary, and unreasonable; but, as against this contention the court found the horticultural commissioner was not "arbitrary, capricious or unreasonable," and we think the finding of the court is supported by the evidence.

[10] As to appellant's contention that it is charged with the estimated rather than the actual expense of the work, and that several parcels are attempted to be included in one claim of lien, we think the county satisfactorily showed that it had expended on behalf of the appellant the amount allowed by the court, and that as the described premises was but one farm operated as one unit, the objection is not good. Warren v. Hopkins, 110 Cal. 506, 42 P. 986.

[11-15] It appears that one of the defenses of the appellant at the trial was that the horticultural commissioner had extended the time within which the work of eradicating and controlling the squirrels by appellant on appellant's property was required to be done, and that despite such extension and while the further period so given was unexpired, the horticultural commissioner entered with his men and commenced the work of extermination on the property. In such connection the court instructed as follows: "Question 4: Did the Horticultural Commissioner extend the time for defendant to eradicate, destroy or control squirrels on the premises described in the complaint? I instruct you that the affirmative of that issue would be upon the defendant, that is to say if you were to find that the time was extended, that that would have to be established by the defendant by this preponderance of evidence."

It is shown by the reporter's transcript that the plaintiff had introduced in evidence as Plaintiff's Exhibit No. 2, the written notice to abate nuisance, dated April 27, 1927, with proof of service on that date. That written notice so given on April 27, 1927, contained the following language: "You are hereby required to eradicate, destroy, or control the said rodents (ground squirrels) to the satisfaction of the Horticultural Commissioner within ten days after the service on you of this notice." The question of whether or not such extension had been given was submitted to the jury as question 4 of the six questions that were submitted to the jury. The instruction above quoted was given by the court in connection with said question 4.

The plaintiff's case was based upon the fact that on April 27, 1927, said written notice so requiring eradication, etc., within ten days was served on the defendant (see paragraph of the complaint). Plaintiff's Exhibit No. 2 was put in as evidence of such fact. The claim of the defendant was that that notice of ten days had been extended. Appellant contends that it was error for the court to so instruct the jury, in that the law placed the burden upon the plaintiff of proving its case by a preponderance of the evidence. That a plaintiff must so prove his case is of course always true, but said defense of "extension" of time so attempted by the defendant was an affirmative defense and was no part of plaintiff's case. Question 4, so submitting to the jury the question, "Did the Horticultural Commissioner *extend* the *time*," etc. (italics ours), was, under stipulation of the parties, submitted to the jury. The defendant therefore must have used the words "extend" and "time" advisedly. Extend what? What time? Obviously, the question had reference to plaintiff's proof, Plaintiff's Exhibit No. 2, service of notice of April 27, 1927, and the ten-day limitation in that notice. Plaintiff had to establish that it had given the ten-day notice alleged in the complaint. As against such evidence, any defense on the part of defendant that the plaintiff had canceled its ten-day notice by extending the time, or by any

other act destructive of the ten-day limitation in the notice, would have to be established by the defendant. Under such a situation, there was nothing misleading or incorrect in the instruction. Objection is also made to the language of the court used when submitting to the jury question 5: "Was defendant making a reasonable effort to eradicate, destroy or control ground squirrels on the premises described in the complaint at the time the men employed by the Horticultural Commissioner on behalf of the County of Contra Costa commenced eradication work on said premises?" We have considered the instruction in the light of the objection made, but we are of the opinion that it is not fairly susceptible of the construction attached by appellant. It must be remembered that the question submitted was whether the defendant was making a reasonable effort to eradicate, etc. In the court's endeavor to show that the law is reasonable, and that what it requires is reasonable and fair action, we see nothing that would naturally give the jury the idea that the defendant had taken an arbitrary position. The foreclosure of a lien being in equity, the jury, if made use of, serves only in an advisory capacity, and it is on the findings, etc., of the court that integrity of the judgment depends. The court is not bound by the action of the jury, but is free to diregard its conclusions if they do not appear to be sustained by the evidence, or are otherwise unsatisfactory to it. In such view, error in instruction to an advisory jury is not regarded as controlling, for the judgment and decree are the action of the court and not of the jury. However, in this case the six questions submitted to the jury were answered in accordance with the allegations of plaintiff's complaint. The court found in favor of the plaintiff, and we find that the judgment and decree of the court are supported by the evidence.

[16, 17] Finally, the appellant objects to certain items of costs. As already mentioned, it appears that the judgment (which carried costs) was made and entered March 13, 1928, and that on May 7, 1928, on a motion of defendant to retax, the court struck out various items from the cost bill and ordered "that plaintiff's costs herein be and the same are hereby taxed in the sum of $507.60." From that order so retaxing costs and fixing them at $507.60, we do not find that any appeal was taken. No notice of appeal from the said order appears in the record. Neither does there appear in the record any copy of the motion upon which said order was based, or any copy of any paper or anything else made use of in connection with the hearing of said motion, or in connection with the order made thereon, or at all. Other than the setting forth of the court's order of May 7, 1928, so retaxing said costs as mentioned, the record (both clerk's and reporter's) is absolutely silent. There is nothing presented that could be regarded as operative in such connection, either as a bill of exceptions or other statement on appeal. Of course, in that the judgment of March 13, 1928, awarded costs to the plaintiff, the authority of the court so to charge the costs against the defendant would be a question that could be raised upon appeal from the judgment, for such part of the judgment so awarding costs is as much a part of the judgment subject to review on appeal from the judgment as any other part of it. White v. Gaffney, 1 Cal. App. 715, 82 P. 1088, and cases cited therein. Under the findings of court on the issues presented, any contention that the judgment should not properly carry costs would be untenable, and we do not understand that the appellant makes any such contention. The contention of appellant appears to be that the order of May 7, 1928, retaxing the costs and fixing them at a total of $507.60, was based on a computation of mileage for witnesses not warranted in law. But it is now settled that an order on a motion to retax a cost bill, made after the rendition and entry of final judgment, is appealable as a special order after final judgment. 7 Cal. Jur. § 38, p. 298; Elledge v. Superior Court of Lassen County, 131 Cal. 279, 63 P. 360; Crane v. Forth, 95 Cal. 88, 30 P. 193; Empire Co. v. Bonanza Co., 67 Cal. 406, 7 P. 810; Dooly v. Norton, 41 Cal. 439; Hennessy v. Superior Court, 194 Cal. 368, 228 P. 862; Markart v. Zeimer, 74 Cal. App. 152, 239 P. 856; Schallert-Ganahl L. Co. v. Neal, 94 Cal. 192, 29 P. 622; Quitzow v. Perrin, 120 Cal. 255, 52 P. 632; Spelling New Trial and Appellate Practice, vol. 2, § 519, pp. 1086–1089; Hayne New Trial and Appeal, vol. 2, §§ 196, 197, pp. 1001, 1016.

[18] In that no appeal appears to have been taken from said order of May 7, 1928, retaxing and fixing said costs as a total at $507.60, the said order being an order made after final judgment, we know of no authority that would now permit us to consider the objections raised by the appellant against any of the items that may have entered into said computation. It is manifest that said judgment and decree of the trial court should not be disturbed.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

FEIG v. BANK OF ITALY NAT. TRUST & SAVINGS ASS'N et al.*

Civ. 8567.

District Court of Appeal, First District, Division 1, California.

Sept. 28, 1932.

Rehearing Denied Oct. 28, 1932. Hearing Granted by Supreme Court Nov. 25, 1932.

1. Divorce ⇐168.
Where original records of divorce suit were destroyed, and husband raised no question respecting regularity of order restoring record, he could not collaterally attack original decree by showing summons was not served (St. 1906, Ex. Sess., p. 73, § 2).

2. Divorce ⇐172.
Husband could not claim property accumulated by himself and deceased wife between time of divorce and second marriage, and standing in wife's name, was community property, on ground he in good faith believed he was married then, where evidence established divorce.

3. Money received ⇐1.
Some one must have received for plaintiff money which plaintiff claims in order to raise implied promise to pay money over.

4. Executors and administrators ⇐451(2).
In action against persons who were executors for money had and received, nonsuit was properly granted as to money in bank not received.

5. Husband and wife ⇐49½(5).
Without pleading fraud, mistake, or similar ground, husband may not dispute effect of deed of gift to wife.

6. Ejectment ⇐9(1).
In ejectment action, legal title prevails.

7. Evidence ⇐390(1).
In ejectment action, plaintiff could not vary, by oral testimony, effect of deed of gift or quitclaim deed.

8. Joint adventures ⇐5(1).
Equity is ordinarily appropriate tribunal for enforcement of rights arising out of joint venture.

9. Ejectment ⇐13.
In ejectment equitable title is not sufficient as basis for plaintiff's claim.

10. Action ⇐53(1).
It is settled policy of law to prevent splitting causes of action.

11. Husband and wife ⇐273(12).
Where husband, claiming equitable title to real property in deceased wife's name and money in bank in names of trustees for deceased, accumulated as result of joint venture between time of divorce and remarriage, sued executors, husband's remedy, if any, was in equity.

12. Equity ⇐51(1).
Multiplicity of suits is ground for equity jurisdiction, and doctrine may be invoked where important part of demand is exclusively of equitable nature.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Joseph Feig against the Bank of Italy National Trust & Savings Association and another, individually and as executors of the last will and testament of Mindell Feig, deceased, and others. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Reisner & Deming, of San Francisco, for appellant.

Leo R. Friedman and James J. Harrington, both of San Francisco, for respondents.

ANDERSON, Justice pro tem.

The plaintiff, Joseph Feig, appeals from a judgment of nonsuit, and complains of the trial court's sustaining certain objections to the introduction of certain evidence. The trial was by a jury.

Plaintiff is the surviving husband of Mindell Feig, who died on July 12, 1929. Defendants, Bank of Italy and Dawson Mayer, are the executors of the last will of the deceased. At the time of the death on July 12, 1929, there was a deposit of $1,165.45 with the Anglo-California Trust Company. This deposit stood in decedent's maiden name. There was also the sum of $7,500 on deposit in the of Bank of Italy. This stood in the names of plaintiff, Joseph Feig, and defendant Dawson Mayer, as trustees for Mindell Feig, the decedent. There were also two pieces of improved real property standing in the name of the decedent at the time of her death. One tract was acquired in 1905, and it may be referred to as the first tract. The other tract, acquired in 1909, may be referred to as the second tract.

The complaint is in three counts. The first count is for money had and received by defendants for the use of the plaintiff; the demand being for the sum of $8,600. The second count charges that the plaintiff deposited with the defendant Bank of Italy the sum of $7,500, payable upon demand. The third count is in ejectment, for possession of the two tracts of real property. Defendants are sued both individually and as executors of the will of Mindell Feig. There was no demurrer for misjoinder. The answer of defendants admitted their qualification as executors. Otherwise the allegations of the complaint were denied, except that it was affirmatively alleged that the plaintiff's sole interest in the estate

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 21 P.2d 421.

of the decedent was what was left to him under her will.

The only testimony offered was that of the plaintiff and his witnesses. At the close of the testimony, a nonsuit was granted. The trial court ruled that, if the plaintiff was, under the proof offered, entitled to any relief, he should file a suit in equity. And such is respondents' position here. Having arrived at this conclusion, the trial court sustained various objections to the testimony offered by plaintiff. We next set forth a statement of the evidence, including in part quotations therefrom, and of the rulings on objections to testimony.

Plaintiff testified that he and the decedent, Mindell Feig, were married on March 23, 1889, and that the parties were without property at the time of the marriage. There was evidence that the parties were divorced on May 18, 1890, by a decree of the Superior Court in San Francisco; the decree being obtained by decedent. The record of this divorce had been burned. An order, dated March 20, 1912, restoring the record was received in evidence. It showed decedent obtained a divorce from defendant for willful failure to provide. The plaintiff testified positively that he was never served in the divorce action, and that he had no notice of the proceeding which restored the divorce record; that from the time of the first marriage on March 23, 1889, to the date of the death of his wife on July 12, 1929, they lived together continuously as husband and wife. The plaintiff and the decedent were again married on March 11, 1921, and plaintiff offered an explanation of that act. Plaintiff's counsel claimed plaintiff was not very intelligent, and that plaintiff was entitled to consideration on that ground. In any event, we are powerless to declare plaintiff's testimony was untrue or to say it represented cunning disguised as innocence. There was no cross-examination at all, and there was some corroboration of plaintiff's somewhat remarkable story.

From the direct statements in his testimony and from the circumstances, it may be inferred that plaintiff worked and earned money almost continuously during the period of the union referred to, and that as a result money accumulated and went into bank accounts in decedent's name, and thence into the purchase of real property in the decedent's name; that beyond her management of the property the decedent's contribution to the entire estate created was limited to $500, and the earnings of decedent during a period of two or three years in which she was engaged as a vaudeville actress.

On April 17, 1905, the first tract of real property mentioned in the complaint was deeded to the decedent by a third party through an ordinary grant deed. The purchase price came from a bank deposit, and there was testimony tending to show this deposit resulted from plaintiff's earnings. This was a corner lot located at Golden Gate avenue and Scott street, San Francisco, Cal. On April 24, 1905, the plaintiff executed to decedent a gift deed covering this property. On April 21, 1909, the second tract of real property involved herein was likewise deeded to the decedent by a third party through a grant deed. In this deed decedent was described as "Mindell Feig (wife of Joseph Feig)." On March 18, 1912, the plaintiff made a quitclaim deed to the decedent. This deed covered both tracts, even though the first tract had been embraced in the deed of gift. The trial court sustained an objection to questions put to plaintiff as to the source of the purchase price of the second tract.

More in detail, the plaintiff testified that he was working for the Standard Oil Company at the time of his marriage; that thereafter he was a bartender until 1919, and that he was later employed at other work; that the decedent was a vaudeville actress for two or three years after the first marriage, and thereafter had no employment other than that of housewife; that the only separation between the parties was for nine months during the Spanish American war; that he had never been served with papers, and did not know of the divorce proceeding; that about 1921 his wife advised him that there was some record indicating a divorce, and that it was agreed that they would remarry, this occurring March 11, 1921; that during the entire married life of the parties the plaintiff had worked and that decedent received all of his earnings; that he and his wife had from time to time talked about their property and its ownership; that a conversation occurred before the deed of gift was made in 1905; that his wife took care of the money which he earned; that she would consult with him when she "made a deal" or "anything came up"; that a piece of property was being purchased, and that it was said, "We will buy this piece out here"; that they talked about handling money; that he said, "You take the money and bank it and handle it to the best of your ability because if I handle it there wouldn't be nothing there"; that she said "all right, she would do the handling of the money"; that at the time of the wife's death they had the two pieces of real property referred to in the complaint; that the income from the Golden Gate avenue property was about $75 a month; that "five or six years ago" his wife gave him a blank check, saying: "Joe, here is this check; if anything happens you can get this money quick, because the book is in the trunk, the bank book"; that Mr. Mayer, defendant, had this book, and that Mr. Mayer came to him and told him that cash was needed; that Mr. Mayer filled the check in with his (Mayer's) name, and that the money was then taken to the Bank of Italy "and put it

trust in both our names and I had no chance at all with it, he had his name on the check. He got a cashier's check for it, but he never let me get my hand on it"; that Mr. Mayer became one of the executors; that he (Mayer) was in some measure active in the affairs of the decedent; that he lived at the home of the plaintiff and decedent, and that plaintiff furnished his board; that the money used to purchase the first tract, the corner property on Golden Gate avenue, was drawn from the bank by the decedent; that the decedent received $500 from her mother's estate, and no other separate estate; that various pieces of real property had been acquired and disposed of; that these properties had stood in the wife's name; that there was a conversation in regard to holding property in his wife's name; that he "just told her to go right along the way she was because she could handle it much better than I could and I always wanted her to do the handling of it." "She said she could handle it better than I could and I thought so myself. That is all the conversation; we never had much conversation about those things."

"Q. Was anything said as to whose property it was? A. * * * that it was mine and hers; she was saving up for a rainy day.

"Q. That the property was yours and hers; she was saving up for a rainy day? A. For both of us.

"Q. How often did she say that—how many times? A. I couldn't say how many times she said it, maybe once a year. We talked it over, that is all * * * if she wanted to make a deal she would come and consult with me about it."

Specifically, with respect to the first tract of real property, which was acquired in 1905, the testimony was: "Q. Do you remember what conversation, if any, you had in regard to that deed? A. Well, she thought she, we, could make a sale, see, and she says 'now you better turn that over so I can handle it' and I agreed with her."

At this stage, further testimony of the plaintiff, offered for the purpose of explaining the four deeds involved, was rejected by the court.

The plaintiff further testified that neither he nor his wife acquired any property after August 6, 1923, excepting that he (the plaintiff) received $175 out of his brother's estate; that all of the expenses of the household after said date came from the plaintiff's salary and from money in the bank, and that the plaintiff's earnings were not sufficient for all of the household expenses; that he had a conversation with his wife about the divorce; and that he had answered that they were not divorced and that he had stated that he had no papers served upon him, and the wife had suggested that to prevent others from being her sole heirs they should remarry. As indicated, the second ceremony occurred in 1921.

William J. Corlett testified that he knew of the plaintiff's employment for several years between 1914 and 1920, and that certain wages of plaintiff earned in this period were turned over to the decedent.

Mary McKay testified that she lived with the plaintiff and his deceased wife during the years from 1910 to 1917; that she knew the parties prior to 1906; that while she knew them they lived together as husband and wife; that she was present when the deed of gift referred to in the evidence was signed, and that she had talked with the decedent in regard to property, and that the decedent had said "the corner house, one was to be mine, and the other was to be dad's." She answered a question as follows: "Q. You said you had a conversation with regard to community property. What did she say about that? A. She said it was the accumulations of their money and her ability in investing it and it belonged to both of them." The witness next testified that she received sums of money from the plaintiff and that she deposited them in the bank in the name of Mrs. Feig; that these sums were earnings of the plaintiff; that the amounts varied from $75 to $100; that Mrs. Feig did not do any work while she lived with the parties; that they were getting rents from one house and living in the other—the big house; that the rent was about $60 monthly; that the rental was collected by Mrs. Feig and deposited in the bank; that Mrs. Feig always treated Mr. Feig as her husband.

Objection was sustained to questions as to whether plaintiff intended to give to his wife any of the real or personal property which was turned over, as to whether the second tract of real property was acquired from the earnings of himself and wife after marriage, as to the intention and purpose of the deeds referred to and the arrangement under which the deeds were made, and as to whether plaintiff had a conversation with his wife with reference to how the property should be held—"how the property acquired by you and your wife during the marriage should be held." The questions related to the personal property as well as the real property.

[1] Plaintiff's first contention is that he is entitled to have the evidence weighed and judged on the theory that he was the decedent's husband between the date of the divorce on May 18, 1890, and the remarriage of March 11, 1921. As has been stated, the record of the divorce decree claimed to have been obtained by Mrs. Feig in 1890 had been burned. The substance of the divorce record was restored by an order dated March 20, 1912, obtained in a proceeding instituted by Mrs. Feig under the last sentence of section 2 of the Burnt Record Act (St. 1906, Ex. Sess., p. 73). The first sentence of section 2 of said act provides for restoring the substance of the record in a suit where a certified copy cannot be had. Section 1 of the act covers the case when a certified copy exists. If there is no

certified copy, the act states in terms notice of the hearing shall be fixed by court order. The last sentence of section 2 of said act reads: "The judgment, decree, order, document, record, paper, process, or file in all cases where the proceeding is in rem, including probate, guardianship and insolvency proceedings, may be supplied in like manner upon like notice to all persons who have appeared therein, and notice by publication or postings to all persons who have not appeared for not less than ten days, as the court may order, and the same when restored shall have the same effect upon all persons who have been personally served with notice of such application as the original, and as to all other persons the same shall be prima facie evidence of the contents of such original." The order restoring the substance of the divorce record recited that due notice had been given of that proceeding, but the "judgment roll" in the proceeding showed that the only notice ordered by the court was a notice by posting for ten days in three public places. That is what the act contemplated, and it cannot be presumed that additional notice was given. Respondents' position seems to be that the recital of due notice in the order is conclusive. But the sentence quoted provides in terms that a party may show that he was not given personal notice of the proceeding. This reverses the ordinary rule with respect to collateral attack where a judgment or order recites or impliedly establishes all necessary notice. 15 Cal. Jur. pp. 56 and 60. The plaintiff was also permitted to answer that he was not served with summons in the divorce action. The latter evidence was not admissible to impeach collaterally the first record if it did exist. The act merely accorded plaintiff the privilege of showing there was no original record, notwithstanding the making of the order restoring the record. The rule against collateral attack applies to a record, the substance of which is proved. Seaboard National Bank v. Ackerman, 16 Cal. App. 55, 116 P. 91. Plaintiff seemingly makes no contention that the original decree did not exist, and he directs the court to no evidence which shows that it did not exist. No question is raised by appellant as to the regularity of the order restoring the record. The attack on the original decree made by an attempted showing that summons was not served in the divorce action is collateral.

It results that plaintiff was not in a position to claim that, in the important period between May 18, 1890, and March 11, 1921, community property was accumulated by himself and Mrs. Feig. The real property was acquired in this period. And the evidence failed to show whether any of the money in the bank was accumulated in the period between March 11, 1921, and August 17, 1923. The plaintiff testified that there were no accumulations after the latter date.

[2] The plaintiff further claims that, regardless of whether the parties were married between the time of a divorce in 1890 and a second marriage at 1921, the facts are such as to show the plaintiff acted in good faith in believing he was married to the decedent, and that the cases apply wherein the courts have divided between the parties property accumulated during such a union. But essential to such a case is good faith, and if it is established that there was a divorce decree, it cannot be collaterally avoided indirectly by plaintiff's contending he believed he was married. Flanagan v. Capital National Bank of Sacramento (Cal. Sup.) 3 P.(2d) 307. And generally relief in such cases is by an action in equity.

[3, 4] It is conceded that the evidence failed to show the defendants ever received the money on deposit with the Anglo California Trust Company, and that the nonsuit was properly granted as to that. It is essential that some person shall have received for plaintiff the money which plaintiff claims in order to raise the implied promise to pay the money over. Papeschi v. La Cava, 93 Cal. App. 209, 211, 269 P. 731; Minor v. Baldridge, 123 Cal. 187, 189, 55 P. 783. Where persons who are executors are sued for money of a third party had and received, they are not sued for particular property held by them as executors. The liability is individual upon an implied promise to pay, and the claim would not be a claim against the estate, for it is not based upon a presented claim. Golden Gate Undertaking Co. v. Taylor, 168 Cal. 94, 141 P. 922, 52 L. R. A. (N. S.) 1152, Ann. Cas. 1915D, 742. As to money, the case then concerns only the money on deposit with the Bank of Italy.

There was substantial evidence of an agreement as to common interest of plaintiff and decedent in the real and personal property involved. The evidence did not, as matter of law, show that an illicit relation between the plaintiff and decedent was a substantial element of the agreement referred to. The demand is not like a demand for housekeeping services made by a woman who has been a party to an illicit union. But in such cases, notwithstanding the union is illicit, effect may be given to an express contract to compensate for services rendered which are of a kind ordinarily paid for. Emmerson v. Botkin, 26 Okl. 218, 109 P. 531, 29 L. R. A. (N. S.) 786, 138 Am. St. Rep. 953; 13 Cor. Jur. p. 461. If the case consisted of a single demand for money, arising from a trust executed by the decedent, there would be merit in the contention that an action at law would lie for the money. Thus the facts may be such as to make a remedy at law an appropriate remedy where a principal sues to recover on account of personal property or money received by an agent. There may be no necessity for an accounting. 2 Cor. Jur. pp. 886 to 888; Sharpleigh H. Co. v. Knippenberg, 133 Cal. 308, 65 P. 621. Moreover, where the fund involved is

a trust fund, and the sole question is as to the share therein of the plaintiff, assumpsit may be the proper remedy. 21 Cor. Jur. pp. 56 and 57. An equitable title to money will support an action for money had and received. 17 Cal. Jur. p. 603. See, also, Seches v. Bard (Cal. Sup.) 8 P.(2d) 835. Had there been evidence of partnership, the plaintiff, as surviving partner, could have sued at law for possession of partnership property because the surviving partner is entitled to possession as against the estate of a deceased partner. The fact that title stood in decedent would not, if there was a partnership, affect the question. Bastjan v. Bastjan (Cal. Sup.) 12 P.(2d) 627. But there was not a particle of testimony that plaintiff had any agency to act for decedent with respect to any interest she claimed in the property involved, and such authorization is vital to the existence of a partnership.

[5-7] By his deliberate acts plaintiff placed title to the real property in the decedent. In aid of the third count of the complaint, appellant contends that, if the evidence established plaintiff was the decedent's husband through the period of the union of the parties, plaintiff's oral testimony should have been admitted for the purpose of showing the intent and purpose of the deeds received in evidence. And many cases are cited by both parties relating to the rules of evidence bearing on the extent to which oral testimony may be offered by the husband to vary the effect of deeds of grant running to a wife from a third person or running from the husband to the wife. Assuming plaintiff was the husband of decedent during the period when the deeds were made, it is, of course, settled that without a pleading of fraud, mistake, or similar ground the husband may not dispute the effect of a deed of gift made by him to his wife. Miller v. Brode, 186 Cal. 409, 411, 199 P. 531; Dale v. Dale, 87 Cal. App. 359, 262 P. 339; Donze v. Donze, 88 Cal. App. 769, 264 P. 294. There was no such pleading here. Appellant contends that a deed from husband to wife other than a gift deed is open to explanation in the same manner in which a grant deed made to the wife by a third person may be explained. See Gilmour v. North Pasadena Land & Water Co., 178 Cal. 6, 171 P. 1066; 31 Cor. Jur. p. 63; Carter v. McQuade, 83 Cal. 274, 278, 23 P. 348; Alferitz v. Arrivillaga, 143 Cal. 646, 77 P. 657, and Estate of Klumpke, 167 Cal. 415, 139 P. 1062. But plaintiff did not show he was the decedent's husband when the deeds to the real property involved were made. He offered no proof to dispute the showing made by the order restoring the divorce decree. While oral testimony may be offered to show a resulting trust where one's money is used in buying real property in the name of another, this principle does not aid plaintiff in this form of an action—an action in ejectment, wherein the legal title prevails. 9 Cal. Jur. p. 983. By a deed of gift in one case, and a quitclaim deed in the other case, he placed the acquired titles in decedent to any extent they were not already there. The suit is not an equity action for the recalling of title to real property from an agent or trustee, nor is it in the form for the enforcement of a constructive trust as where title to real property is taken by one sustaining a confidential relation to the grantor and a valid reason for recalling the title exists. Lauricella v. Lauricella, 161 Cal. 61, 118 P. 430. Plaintiff was not, in support of the third count of the complaint, entitled to vary, by oral testimony, the effect of the deed of gift or the quitclaim deed.

[8-12] Respondents urge that the only theory which the evidence supports in the slightest degree is that decedent acted as trustee for plaintiff or for the plaintiff and decedent, and that to enforce this trust requires a suit in equity. However, a court of law may enforce an equitable right to a money demand where there is nothing to suggest that an accounting is necessary to charge the shares therein, or that a discovery is necessary, or that a lien is to be enforced, or that some other additional equity must be dealt with in connection with the obligation. If the issue is merely as to what the agreement was as to shares of parties in an obligation arising from the receipt of trust funds, an action at law may lie. While viewing the money apart from the realty, there is not under the evidence exactly that "additional equity" which would make the money demand enforceable only in equity, the court cannot blind itself to the true nature of the plaintiff's entire case and ignore the fact that plaintiff in this very action is seeking the return of the whole or a part of the legal title to the realty. If the claim was confined merely to an obligation claimed to be due from a bank and to the settlement of a right thereto in accordance with the terms of an oral agreement under which the decedent held title to an interest in plaintiff's property as trustee, there would be no insuperable objection to oral testimony showing that income had been derived from real property which had been deeded to the decedent as trustee. A person who assumes a relation of confidence and trust towards another and thereby receives a conveyance of real property may not invoke the rule against oral testimony in aid of repudiation of the trust under which he has taken title or under which he has received the income thereof. 22 Cor. Jur., pp. 1259 and 1260; Nolan v. Nolan, 155 Cal. 476, 101 P. 520, 132 Am. St. Rep. 99, 17 Ann. Cas. 1056. Here death has closed the trust, if any, upon which plaintiff seeks to base his claim. The law does not favor litigation by piecemeal. Real property is involved. In an action in ejectment, the equitable title is not sufficient as a basis for plaintiff's claim. If plaintiff's testimony or his offered testimony is true, a court of equity only can grant relief as to the real property or complete relief. The evidence offered and that tendered related to the whole of the real

property as well as to moneys deposited. Defendants are sued individually and as executors, and plaintiff is seeking to have determined any claim of the estate of decedent to possession of the real property. There is no pretense that there was anything except a joint venture involving all accumulations of the parties whether in the form of real property or personal property. The demand is, from a legal point of view, an entire and indivisible demand. Equity is ordinarily the appropriate tribunal for the enforcement of rights arising out of a joint venture. Garr v. Redman, 6 Cal. 574. The real property is the subject of the third count of the complaint. It is the settled policy of the law to prevent splitting causes of action. 1 Cal. Jur. pp. 369 and 370; 1 Cor. Jur. p. 1106. Clearly the title to the real property cannot be recalled except by an action in equity. Plaintiff makes no claim that he renounces any claim to the real property. On the contrary, upon this appeal, he asks for a construction of the opinions of the Supreme Court and of the District Courts of Appeal which deal with the admissibility of oral testimony for the purpose of varying the apparent effect of the various deeds which he and third persons made to the decedent, and he invokes the cases relating to a de facto marriage to show that the real property and the money should be divided. The trial court properly treated the plaintiff's demand as entire and indivisible, and it properly ruled that plaintiff's remedy was, if he was entitled to relief, in equity. The plaintiff had no right, while continuing to assert an equitable ownership in the real property to claim the right to sue for money had and received, in effect telling the court that the same evidence was to be used in an equity action to recover the real property or an interest therein. His claim is that the trust is closed, and the circumstance that money received in trust has gone into an account should not constitute an excuse for making two cases out of the claim, when obviously a court of equity, in one action, could determine the whole case. Mann v. Higgins, 83 Cal. 66, 23 P. 206. That an action for money had and received might also lie may be no objection to a suit to charge one as trustee. 10 Cal. Jur. p. 468. Multiplicity of suits is in itself a ground for equity jurisdiction, and the doctrine may be readily invoked where an important part of the demand is exclusively of an equitable nature.

The trial court hesitated about granting the motion for a nonsuit as to the second count. Upon the meager evidence before the court in relation to the agreement or intention under which the money was deposited in the Bank in Italy in the names of the plaintiff and defendant Mayer as trustees for decedent, it would have been error to rule that any title or interest which the plaintiff had in this money was divested by the creation of a valid and effective trust exclusively for the benefit of the decedent. On the other hand, there was no clear or substantial evidence that the decedent did, through the transaction of signing the blank check by means of which the money had been withdrawn from another account, intend or accomplish any gift or transfer of any interest in this money to plaintiff. Plaintiff seems to have yielded to certain activities of the defendant Mayer which were exercised in behalf of decedent. He referred to Mayer as having intruded himself into decedent's affairs over some period prior to her death, and as having acted as her secretary. There was nothing to show decedent disavowed the act of Mayer in preventing the money, which was realized when the signed check was filled and cashed, from passing into plaintiff's control. The record wholly fails to show that decedent knew what plaintiff and Mayer did in fact do. The record fails to show that, if decedent intended plaintiff should have any cash on hand in the event of her death, adequate measures were taken to accomplish this. There is nothing to show that plaintiff's actual interest in the funds deposited with the Bank of Italy was made greater by the deposit which he and Mayer made in that bank.

The judgment of nonsuit appealed from is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

126 Cal.App. 216

JUCHERT et al. v. TENENT.

Civ. 8597.

District Court of Appeal, First District, Division 2, California.

Sept. 23, 1932.

1. Trial ⇐260(4).

Where court charged that all witnesses' interest or lack thereof could be considered in weighing testimony, refusing instruction pointing out plaintiffs' interest particularly *held* proper.

2. Appeal and error ⇐1126.

Facts authorized granting affirmance of judgment on grounds that appeal was taken for delay only and presented unsubstantial points (Supreme Court Rule 5, § 3).

Appeal from Superior Court, San Mateo County; Franklin K. Swart, Judge.

Action by Gertrude J. Juchert and another against Tony F. Tenent. Judgment for plaintiffs, and defendant appeals. On motion for an affirmance of the judgment.

Motion granted.

J. E. McCurdy, of San Mateo, for appellant.

Glensor, Clewe, Schofield & Van Dine, of San Francisco, for respondents.

NOURSE, P. J.

[1, 2] The respondents moved for an affirmance of the judgment on the grounds that the appeal was taken for delay only, and that the questions upon which the decision depends are so unsubstantial as not to need further argument. (Section 3, rule V, Supreme Court.)

The appellant's brief presents but two points—that the trial judge erred in refusing to give a proposed instruction, and that the verdict is excessive. The proposed instruction singled out the plaintiffs and directed the jury to take into consideration that they were interested in the result of the suit. The jury was instructed that as to all witnesses their interest or lack of interest in the suit could be considered, and the rule is uniform that, when this is done, it is error to pick out a particular witness and direct the jury's attention to his interest in the suit when the same test is applicable to other witnesses. 14 R. C. L. pp. 734, 735. No authority to the contrary is cited by the appellant, and hence the point raised is "unsubstantial."

On the issue of damages the appellant concedes that both the medical and lay testimony is conflicting as to the extent and probable permanency of the injuries suffered by Mrs. Juchert. The most that can be said for the point raised by appellant is that in some minds the damages awarded might appear to be unreasonably high; but there is nothing in the record to indicate that the verdict was the result of passion or prejudice, and, because there is some evidence of future pain and suffering, it cannot be said that the award is grossly disproportionate to any compensation reasonably warranted. Davis v. Renton, 113 Cal. App. 561, 563, 298 P. 834, Rohner v. Cross (Cal. App.) 9 P.(2d) 509.

The motion to affirm is granted.

We concur: STURTEVANT, J.; SPENCE, J.

126 Cal.App.(Supp.) 791

MURRAY v. OCEANIC & ORIENTAL S. S. CO. et al.

No. 224.

Appellate Department, Superior Court, City and County of San Francisco, California.

Sept. 24, 1932.

Seamen ⊂=32.

Representative of seaman, who died on voyage, could not recover amount which seaman would have earned as wages for entire voyage if he had lived, but only amount of any unpaid wages earned at time of death (Civ. Code, § 2062; 46 USCA § 541 et seq.).

Appeal from Municipal Court of City and County of San Francisco; Alden Ames, Judge.

Action by Ann Murray, as administratrix of the estate of P. J. Murray, deceased, against the Oceanic & Oriental Steamship Company and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Vincent W. Hallinan and James Purcell, both of San Francisco, for appellant.

Brobeck, Phleger & Harrison, of San Francisco, for respondents.

JOHNSON, P. J.

This is an appeal from a judgment of the municipal court in favor of defendants, entered after a general demurrer to the complaint had been sustained without leave to amend.

The action was instituted by the administratrix of the estate of P. J. Murray, deceased, to recover the sum of approximately $1,040, for which it is contended the defendants became liable as wages by reason of the employment of the decedent in the maritime service of the defendants.

The complaint alleges that on August 13, 1930, a written agreement was made between Murray and the defendants whereby Murray was employed as first assistant engineer on board the steamship Golden Tide, owned and operated by the defendants, for a term of, but not exceeding six calendar months at the rate of $175 per month with board and room. According to the contract, Murray was to serve as first assistant engineer on a voyage from San Francisco to Shanghai, and such other ports and places on the Pacific Ocean as the master might direct, and back to the United States to a final port of discharge on the Pacific Coast. It is further alleged that on August 15, 1930, while at sea en route to Shanghai, Murray was killed in the performance of his duties on board the ship, and that compensation on the basis agreed was paid to the time of death. The administratrix seeks by the action to recover an amount representing the full balance of wages for the remainder of a term of six months. There is neither any averment in the complaint, nor any contention otherwise, that Murray's death was due to any fault on the part of the defendants.

The question involved is whether the representative of the estate of a seaman, who died at sea while in the service of his ship, is entitled to recover the amount which the deceased would have earned as wages for the entire voyage if he had lived, or is entitled only to the amount of any unpaid wages earned to the time of death. While such cases are governed by admiralty law, a study of the few decisions on the subject, all found in the early reports, shows lack of harmony in the rules

applied in different jurisdictions, and there is no case in point bearing on shipping conditions of our time.

The earliest reported case in this country is Walton v. The Neptune, 1 Pet. Adm. 142, 29 Fed. Cas. page 142, No. 17,135, decided in 1800 by Judge Peters of the United States District Court of Pennsylvania. In that day, the rule, now obsolete, prevailed that the freight was the mother of wages; and, if through disaster the freight was lost, the wages were lost. Influenced by this consideration and by his interpretation of the laws of Oleron and other ancient regulations printed in the appendix of 1 Peters Adm. Dec., Judge Peters ruled that wages for the full voyage were payable to the heirs of the deceased mariner. His view was that such a rule tended to make the master considerate of his men and gave encouragement to those entering a hazardous and laborious employment. The rule was adhered to by Judge Peters in 1802 in Scott v. The Greenwich, 1 Pet. Adm. 155, 21 Fed. Cas. page 830, No. 12,531, and again in 1806 in Sims v. Jackson, which was affirmed on appeal to the Circuit Court, 1 Pet. Adm. 157, 1 Wash. C. C. 414, 22 Fed. Cas. 183, No. 12,890. In 1839 Judge Hopkinson of the Pennsylvania district applied the rule in Johnson v. Coriolanus, which was also affirmed on appeal, Crabbe 239, 13 Fed. Cas. page 737, No. 7,380.

These cases established the rule for the Third Circuit, but in the United States District Courts of South Carolina and Massachusetts, and in a decision of the United States Circuit Court in Maryland, the representatives of a deceased seaman were held entitled only to wages earned to the time of death.

In Carey v. The Kitty, Bee 255, 5 Fed. Cas. page 59, No. 2,402, which came before the United States District Court of South Carolina in 1808, Judge Bee, after commenting on the Pennsylvania cases, expressed an unwillingness to depart from the uniform practice which had prevailed in his own district, and awarded wages only to the time of death, deeming the medieval marine ordinances, as interpreted by Judge Peters, inapplicable to the changed conditions of his day.

Then in 1809 Judge Davis of the United States District Court of Massachusetts had the question before him in Natterstrom v. The Hazard, Bee 441, 17 Fed. Cas. page 1243, No. 10,055. From his critical analysis of the ancient regulations and study of the old sea laws, he reached the conclusion that their true meaning and intent were that, in case of the sickness of a seaman, there should be no deduction from his wages, and, in case of death, what he had earned up to his decease should go to his heirs. The fundamental difference between Judge Davis and Judge Peters lies in their interpretations of the language of the old regulations and of the commentators upon them.

Speaking of the ancient ordinances, Curtis in his Treatise on the Rights & Duties of Merchant Seamen says (page 63): "Whether wages were given for the whole voyage, or only to the time of the death of the mariner, is a vexed question upon the interpretation of these texts." See, also, pages 290 to 295, and 2 Labatt's Master & Servant 1491. Likewise Maclachlan on Merchant Shipping (7th Ed.), referring to the laws of Oleron which were followed by those of Wisby and the Hanse Towns, says (p. 174): "It is not clear whether the payment there directed is to be understood of a sum proportionate to the time of his service or of the whole sum that would have been earned if he had lived to the end of the voyage." And in Cutter v. Powell, [1795] 6 T. R. 320, 324, and Beale v. Thompson, [1803] 3 B. & P. 405, 427, it seems to be conceded that in England wages would be payable merely to the time of death, in the absence of an express stipulation to the contrary.

The conclusion to which Judge Davis came was in accord, as he states, with the uniform usage in Massachusetts. Such usage on the part of the early colonists is significant, since they grew to be a seafaring folk with an active commerce; and their admiralty court at Boston, which was functioning at least as early as 1740, would have been most likely to follow the British admiralty court, if a different practice had been established there.

The ruling of Judge Davis settled the law in Massachusetts, as appears in Luscomb v. Prince, 12 Mass. 576, 579, decided in the State Court in 1815, and in Hanson v. Rowell, 1 Spr. 117, 11 Fed. Cas. page 472, No. 6,043, where in 1845 Judge Sprague of the United States District Court said: "In case of death, there has been some diversity of opinion and practice, elsewhere, on the question whether wages should be paid to the end of the voyage, or only to the time of the death. In this district, the settled practice is, to allow wages only to the time of the death."

Likewise in 1812 Justice Duval of the United States Supreme Court, sitting in the Circuit Court in Maryland, held in the case of Jones v. Smith, reported in 4 Hall, Law J. 276, Fed. Cas. No. 7,497, that, where certain mariners had died on a voyage from Baltimore to Batavia and thence to Japan, their representatives should receive wages only to the time of their decease.

It is thus quite clear that no universal admiralty rule is established by any of the reported cases on the subject in this country.

In 1872 Congress passed an act in behalf of merchant seamen (17 Stat. c. 322, p. 262), which was substantially in the form of the British Merchant Shipping Act of 1854. This act of Congress was carried into the Revised Statutes as title 53 (section 4501 et seq.);

and with subsequent amendments is now embodied in 46 USCA ch. 18 (section 541 et seq.). While the act, neither in its original nor its present form, makes any provision regarding wages in case of death during the voyage, yet it does contain express regulations concerning the right to wages under other contingencies, of such character as to indicate that payment of wages for the full voyage in case of death was not in the contemplation of Congress.

That act abolished the rule that freight is the mother of wages (section 4525, R. S. U. S. [46 USCA § 592]); and among other things provided that, in case a seaman should be discharged without his fault before one month's wages were earned, he should receive, in addition to the wages earned, a sum equivalent to the wages for one month. Then in 1898, by amendments to sections 4581 and 4583, R. S. U. S. (46 USCA §§ 683 and 685), it was made the duty of the master, discharging a seaman in a foreign port, to provide him with employment on another agreed vessel, or to pay him one month's extra wages, if the discharge was not found by the consul to be due to neglect of duty, incompetency, or injury incurred on the vessel; and a like rule was made applicable on the discharge of a seaman by the consul, after being satisfied of the truth of a complaint that the voyage was continued contrary to agreement, or that the vessel was badly provisioned or unseaworthy, or that the officers were guilty of cruel treatment.

Since the compensation of a seaman wrongfully discharged, or entitled to be discharged because of just grievances, was thus limited, it is not reasonable to conclude that Congress contemplated that wages for the full voyage should be payable in case of death. And inferentially it may be said that in 1882 the United States District Court of Pennsylvania in U. S. v. Tobey, 12 F. 347, treated the rule of Judge Peters as superseded by the enactments of Congress. By sections 4538 and 4539, R. S. U. S. (46 USCA §§ 621 and 622), it was provided that, in case of the death of a seaman on a voyage, his effects should be sold at the mast, and that, upon reaching a port in the United States, the master should pay to the shipping commissioner the proceeds of sale and the balance of wages due to the deceased, less any deductions to be made therefrom.

In the case cited, a seaman had died during a voyage from San Francisco to Queenstown, and a sale of his effects at the mast had produced $49.60. The deceased had received an advance of $75 before sailing, and his earnings at the rate of $25 per month to the time of his death, one month and twenty-one days, amounted to $42.50. As he thus owed the ship $32.50, the master on arrival at Philadelphia deducted this amount from the proceeds of sale of the effects, and tendered to the shipping commissioner the balance of $17.10. No objection was raised to the limitation of wages to the time of death, but the commissioner denied the right of the master to deduct the amount due to the ship from the proceeds of sale; his contention being that deduction of any amount chargeable against the deceased could be made under the statute only from "wages due the deceased." This contention was sustained both by the District Judge and the Judge of the Circuit Court of the Eastern District of Pennsylvania, who held that the entire proceeds of the sale must be paid to the commissioner. If either the commissioner or the judges, who in a matter involving only $32.50 were studiously bent on protecting the rights of seamen, had deemed Judge Peters' rule to be still declaratory of the law as administered in their district, they would assuredly have insisted on payment of wages for the full voyage, less the advance of $75.

In the maritime world, conditions have changed enormously since the beginning of the nineteenth century. Instead of sailing vessels making long voyages, with wages depending on freight money being earned, we now have ships traveling under their own power, with great saving of time and lessening of hazards. And, under contracts with the owners or operators, the seamen are entitled to the agreed wages, regardless of the freight money, and may enforce their claims equally with employees in other occupations.

If it were shown to be the present practice in admiralty to award wages for the entire voyage in case of death in the ship's service, it would be our duty to apply such rule; but we are not acquainted with any jurisdiction in which that view now prevails. It has been the practice in this district to allow the wages of a seaman dying on the voyage only to the time of death. We are of the opinion therefore that, in the absence of the promulgation of any authoritative admiralty rule, we may properly give consideration to the policy favored by this state as expressed in its Civil Code when adopted in 1872 and still retained. In section 2062 there is this provision: "If a mate or seaman dies during the voyage, his personal representatives are entitled to his wages to the time of his death, if he would have been entitled to them had he lived to the end of the voyage."

This recommends itself as the reasonable and just rule under modern conditions, and not only one which better accords with the general principles governing the relations of master and servant, but also one that seems to have won the ascendancy in admiralty practice.

Accordingly we conclude that the demurrer to the complaint was properly sustained, and the judgment in favor of defendants is therefore affirmed.

We concur: CONLAN, J.; GOODELL, J.

216 Cal. 434

DEPARTMENT OF NATURAL RESOURCES, DIVISION OF FISH AND GAME v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 14637.

Supreme Court of California.

Sept. 27, 1932.

1. Master and servant ⇐405(2).

Evidence sustained finding that claimant appointed to oversee commercial seining operations was employee of fish and game commission as respects right to compensation for injuries (Pol. Code, §§ 373, 373a, as added by St. 1927, p. 237; § 642, as amended by St. 1927, p. 947).

Evidence disclosed that claimant was appointed as inspector or overseer to oversee commercial seining of carp and other rough fish by persons having permit from fish and game commission and to see that all game fish caught in nets were removed from nets before rough fish were either returned to lake or transported to other streams or lakes as directed by commission and that his appointment was made by a volunteer warden at request of deputy warden. Though claimant's wages were paid by persons acting under the

permit, such persons had no control over claimant's activities, and final right of removal and right to control him was in commission.

2. Master and servant ⇐361.

Feature determining existence of employer-employee relationship is degree of control exercised by alleged employer over alleged employee.

In weighing the control exercised, it is the right of authoritative control that is important and not mere suggestion as to detail.

3. Fish ⇐11.

Fish and game commission *held* authorized to employ person to oversee commercial seining operations (Pol. Code, § 642, as amended by St. 1927, p. 947)

4. Master and servant ⇐364.

That salary of employee of fish and game commission employed to oversee commercial seining operations was paid by permittees *held* not to preclude recovery for injuries as employee of commission (St. 1917, p. 831, as amended).

The rule that the Compensation Act excludes from its operation public officials serving without pay did not apply, since claimant was not serving without pay, but was receiving $6 per day, though such compensation was paid by persons having permit to carry on seining operations under claimant's supervision and inspection, and not by fish and game commission.

In Bank.

Proceeding under the Workmen's Compensation Act by Joseph L. Means, claimant, opposed by the Department of Natural Resources of the State of California, Division of Fish and Game, alleged employer. To review an award of the Industrial Accident Commission awarding compensation, alleged employer brings certiorari.

Affirmed.

Eugene D. Bennett and Ralph W. Scott, both of San Francisco, for petitioner.

A. I. Townsend, of San Francisco, for respondent Industrial Accident Commission.

PER CURIAM.

Petitioner, the Department of Natural Resources of the state of California, Division of Fish and Game, seeks by this certiorari proceeding to annul an award of the Industrial Accident Commission, directing petitioner to pay compensation to one Joseph L. Means. The basis of the award is that at the time the injuries complained of were received Means was an employee of petitioner, working in the course and scope of his employment. No question as to the extent of the injuries or the amount of compensation is presented in this proceeding.

Petitioner is a department of the state government (Pol. Code, § 373 [as added by St. 1927, p. 237]) and for the purposes of administration is organized into divisions, one of which is the division of fish and game (Pol. Code, § 373a, as added by St. 1927, p. 237).

The facts giving rise to this controversy are not materially in dispute, and are as follows:

[1] One Mabel Kayser desired to commercially seine Ellis lake, located within the city limits of Marysville, for carp and other commercial or "rough" fish. Her divorced husband, who admittedly at all times was acting as her agent, approached the mayor and members of the city council of Marysville, and secured their consent to seining the lake provided a permit was secured from the division of fish and game. Mr. Kayser thereupon secured from the division of fish and game, through N. B. Scofield, chief of the bureau of commercial fisheries, a permit running to the city manager of Marysville to "use nets for the purpose of removing carp and other rough fish from Ellis lake." The permit expressly provided "that fishermen who may engage in the seining of carp and other rough fish for sale, must first procure a commercial fishermen's license," and it is further provided that a representative of the fish and game commission must be present when seining operations are under way and that the game fish which may be caught are to be taken care of, either by returning them to the water unharmed or by transplanting them under the supervision of the representative of the fish and game commission. It is admitted by petitioner that although this permit was issued to the "City Manager of Marysville" Mabel Kayser was the real party in interest, and that the sole purpose of issuing the permit was to allow the Kaysers to engage in commercial fishing at Ellis lake. Having secured this permit Kayser proceeded to Ellis lake to commence seining operations. Joseph L. Means, applicant herein, appeared at the lake as the "representative of the Fish and Game Commission" referred to in the permit. It is the circumstances surrounding the employment of Means that present the first question to be determined in this proceeding, viz.: Was Means employed by the Kaysers, or was he an employee of the fish and game commission? The Industrial Accident Commission first held that Means was an employee of the Kaysers, but on rehearing found that he was an employee of the fish and game commission. It is the correctness

of this last determination that is challenged in this proceeding.

L. W. Dinsdale, deputy fish and game warden of Marysville, testified that he received a telephone call from S. J. Carpenter, captain of the fish and game patrol in that area, informing him that the Kaysers had a permit to seine Ellis lake, and that he, Dinsdale, should designate the representative of the fish and game commission required by the permit. Carpenter went to the lake and examined the Kaysers' permit. He was then called out of town on urgent business, and requested a volunteer warden, one Loehne, to select or designate the overseer. Loehne selected Means, and in accordance with instructions from Dinsdale, informed Means that his duty was to see that all game fish that were caught in the nets were removed from the nets before the rough fish were removed, and then either returned to the lake or transported to other streams or lakes as directed by the fish and game commission. Dinsdale also testified that it was the custom that such overseer should be paid by the commercial fisherman whose activities he was supervising. In the present case, the evidence shows, Kayser agreed to pay Means $6 per day, and in fact paid him that sum up until the time of the injury. Dinsdale also testified that the fishermen had no power to appoint or select such overseer, but that he had sole control over that; that he, through Loehne, gave Means instructions as to what he was to do; that Means' only duty was to see that no game fish were illegally removed; that he was under no duty to assist the fishermen in any other way. Means, as inspector or overseer, was supposed to be on the job whenever Kayser fished, and in this sense Kayser controlled the hours of employment of Means. On the other hand, Kayser could not fish unless and until Means was present. After supervising Kayser's activities at Ellis lake for several days, Means accompanied Kayser on an auto truck on a trip to a nearby lake for the purpose of transporting some of the game fish that had been caught to this other lake. On this trip Means received the injuries which gave rise to this proceeding. Dinsdale testified that it was part of the overseer's duties to take these trips to be sure that the game fish were in fact transported. Kayser testified that except for paying Means' wages, and designating the time for carrying on the fishing activities, he gave Means no orders; that Means got his orders from the warden or his deputy. Dinsdale testified that Means held his appointment as overseer at his, Dinsdale's, pleasure, and that, if Means' work had not been satisfactory, he, Dinsdale, would have removed him. The fish and game commission contends that this evidence shows Means was the employee of the Kaysers. It is pointed out that the Kaysers paid Means his wages and controlled his hours of work. It is contended that Means was present for the benefit of the Kaysers; that Means was merely assisting the Kaysers to perform their duties as required by the permit; that the Kaysers' permit was granted to them for their sole pecuniary gain; that the fish and game commission in no way benefited by having Means present to supervise the Kaysers' fishing activities. We do not think that this interpretation of the evidence is correct. It is obvious that Means' presence was required by the fish and game commission to assist it in performing its duties in reference to the protection of game fish. At the very time he was injured, Means was supervising the transportation of game fish from one lake to another as directed by the commission. The purpose, nature, and object of Means' appointment is repugnant to the contention that Means was employed by the Kaysers, the persons whose activities it was his duty to watch to see that game fish were not illegally removed. The mere fact that the Kaysers paid Means his wages is not determinative of the question as to who was his employer. In County of Los Angeles v. Industrial Accident Commission (Cal. App.) 11 P.(2d) 434, one Calderwood was employed as a deputy marshal of the municipal court of Los Angeles. As such deputy his salary was paid by the county of Los Angeles. In spite of this fact it was held that he was an employee of the city of Los Angeles, and that the city and not the county was liable for compensation. At page 437 of 11 P.(2d) it is stated: "The contention of the city that, from the fact that the Legislature has placed upon the county the burden of the payment of the salaries of the attachés of the municipal court, the county must be deemed the employer of the deceased, is without justification. Although, in most cases where the contract of employment exists between individuals, the source of payment as a rule is one of the indicia of the existence of the relationship, in cases involving governmental functions, this does not always seem to be true." Likewise, in Claremont Country Club v. Industrial Accident Commission, 174 Cal. 395, 163 P. 209, L. R. A. 1918F, 177, this court held that a caddy was an employee of the country club although his wage was paid by the person using him.

[2] The determinative feature in ascertaining whether the employer-employee relationship exists in any given case is the degree of control exercised by the alleged employer over the alleged employee. As was said in Western Metal Supply Co. v. Pillsbury 172 Cal. at page 417, 156 P. 491, 495, Ann. Cas. 1917E, 390: "The real test by which to

determine whether a person is acting as the servant of another is to ascertain whether, at the time when the injury was inflicted, he was subject to such person's orders and control and was liable to be discharged by him for disobedience of orders or misconduct." In weighing the control exercised, it is the right of authoritative control that is important and not mere suggestion as to detail. Stacey Bros. Gas Construction Co. v. Industrial Accident Commission, 197 Cal. 164, 239 P. 1072.

Tested by the rules set forth in these cases it seems clear to us that the Industrial Accident Commission correctly held that Means was employed by the fish and game commission. There can be no doubt that the right of authoritative control rested solely and exclusively with the fish and game commission. It was to assist that commission in protecting game fish that Means was employed—not to assist the Kaysers in removing "rough" fish from Ellis lake. While Means was performing his duties in seeing that game fish were not illegally removed the Kaysers had no control over him whatsoever. No service of any kind was being rendered for the Kaysers—the services were rendered for the benefit of the fish and game commission. In addition to these facts, the evidence shows that the right to discharge Means ultimately and necessarily rested in the commission.

[3] Petitioner also contends that admitting Means was an employee of the commission, the officers of that commission had no authority to employ him. It will be remembered that Means was employed as a result of an order given to Dinsdale by S. J. Carpenter, captain of the fish and game patrol in the Sacramento valley, to appoint some one as the representative of the commission. Section 642 of the Political Code (as amended by St. 1927, p. 947) provides in part:

"It is the duty of the fish and game commissioners: To see that the laws for the protection and preservation of wild animals, wild birds, fishes, mollusks, crustacea and all other forms of aquatic animals and plants are strictly enforced, and for that purpose from time to time to employ such deputies, with or without pay, clerks, assistants and other employees as they may need to discharge in proper manner the duties imposed upon them by law. * * * To employ persons skilled in fish and game breeding to assist them in their duties."

Under this section we think that the fish and game commission has authority to appoint employees to aid it in the performance of its duties in the protection and preservation of fish, and that Means was such an employee.

[4] Petitioner also contends that, since the fish and game commission paid Means no salary, the case comes within the rule enunciated by this court in Department of Natural Resources v. Industrial Accident Commission, 208 Cal. 14, 279 P. 987. In that case Frank Machado was drowned while acting in the capacity of a volunteer deputy of the fish and game commission, serving without pay. It was held that, although Machado was an employee of the commission his dependents were not entitled to compensation for the reason that he was not such an employee as came within the provisions of the Compensation Act (St. 1917, p. 831, as amended). It was held that the Compensation Act excluded from its operation public officials serving without pay. That case can have no application here. In the instant case Means was not serving without pay, but was receiving $6 per day. As we have already pointed out, it is immaterial who paid his wages, the important fact is that he was paid wages. For that reason the Machado Case (Department of Natural Resources v. Industrial Accident Commission), supra, is not in point here.

For the foregoing reasons the award of the Industrial Accident Commission is affirmed.

216 Cal. 408

BAIRD v. SMITH.

L. A. 11963.

Supreme Court of California.

Sept. 27, 1932.

1. Judgment ⇐103.

Plaintiff's failure to have defendant's default regularly entered is implied grant of further time to defendant in which to appear (Code Civ. Proc. § 585, subd. 1).

2. Judgment ⇐106(2).

Answer filed prior to clerk's purported entry of formal judgment upon default entered one day prior to expiration of period within which answer might have been filed *held* timely, precluding entry of judgment (Code Civ. Proc. § 585, subd. 1).

3. Judgment ⇐470.

Voidable judgments may only be attacked by appeal or by motion made within six months' period prescribed by statute (Code Civ. Proc. § 473).

4. Judgment ⇐144.

Judgment entered by clerk at time when defendant's answer was on file and upon default prematurely taken, *held* void, and could be set aside at any time, regardless of how

invalidity was brought to court's attention (Code Civ. Proc. § 585, subd. 1).

5. Judgment ⇐120.

In exercising power to enter default judgment, clerk acts ministerially and must conform strictly to statute, or judgment will be void (Code Civ. Proc. § 585, subd. 1).

In Bank.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by L. R. Baird, as receiver of the State Bank of Milton, N. D., against Tom Smith. From an order vacating a default judgment, plaintiff appeals.

Affirmed.

For prior opinion, see 7 P.(2d) 728.

F. C. Heffron, of Eugene, Or., and George H. Stone, of San Diego, for appellant.

Lewis Cruickshank, T. W. Rorke, and Donald Armstrong, all of Los Angeles, for respondent.

WASTE, C. J.

This is an appeal from an order vacating a default judgment.

The action is one to recover on a promissory note. Defendant was personally served with summons on October 1, 1927. Purporting to act under subdivision 1 of section 585 of the Code of Civil Procedure, and upon application therefor, the clerk of the court below entered the defendant's default. Such default was premature, having been improperly entered one day prior to the expiration of the period within which an answer or demurrer might have been filed. Judgment upon such premature default was not entered by the clerk until three days later, at which time the defendant's answer had been filed. Approximately two years after the entry of such judgment the defendant moved the trial court to vacate the same. From the order granting the requested relief, the plaintiff prosecutes this appeal.

[1-3] There can be no doubt as to the impropriety of the clerk's action in prematurely entering the defendant's default. Subdivision 1, § 585, Code Civ. Proc. In the absence of a default regularly entered, it was also improper for the clerk to enter a formal judgment at a time subsequent to the filing of the defendant's answer. It is well settled that a plaintiff's failure to have the defendant's default regularly entered is an implied grant of further time to the defendant in which to appear in the action. Tregambo v. Comanche Mill & Mining Co., 57 Cal. 501; Reher v. Reed, 166 Cal. 525, 528, 137 P. 263, 264, Ann. Cas. 1915C, 737; Lunnun v. Morris, 7 Cal. App. 710, 95 P. 907; Mitchell v. Banking Corp., 81 Mont. 459, 264 P. 127. In the instant case, the defendant's default never having been regularly entered, his answer filed prior to the clerk's purported entry of the formal judgment must, under the foregoing authorities, be held to have been timely filed, thus precluding the entry of such judgment. This being so, it is essential that we determine the status of said judgment. If it is merely voidable, as contended by the appellant, the vacating order here appealed from must be reversed, for it is elementary that voidable orders and judgments may only be attacked by appeal or by motion made within the six months' period prescribed by section 473 of the Code of Civil Procedure. In the present case the motion to vacate was not made within that period. If, on the other hand, the default and subsequent judgment are void, the order vacating them must be affirmed, for a judgment which is void upon its face is a dead limb upon the judicial tree which may be lopped off at any time. Such a judgment may be set aside by the court at any time, and it is immaterial how the invalidity is called to its attention. People v. Greene, 74 Cal. 400, 405, 16 P. 197, 5 Am. St. Rep. 448; Wharton v. Harlan, 68 Cal. 422, 425, 9 P. 727; Kelly v. Van Austin, 17 Cal. 564.

[4, 5] Examination of the authorities satisfies us that a judgment entered by the clerk under subdivision 1 of section 585, supra, at a time when the defendant's answer is on file and upon a default prematurely taken, is void and may be set aside at any time. The clerk in entering judgments upon default acts in a mere ministerial capacity. He exercises no judicial functions. The statute authorizes the judgment, and the clerk is only the agent by whom it is written out and placed among the records of the court. The statute is the measure of his authority. In exercising the power conferred, he must conform strictly to the provisions of the statute or his proceedings will be without binding force, and any judgment entered by him will be void. Kelly v. Van Austin, supra; Junkans v. Bergin, 64 Cal. 203, 204, 30 P. 627; Landwehr v. Gillette, 174 Cal. 654, 656, 163 P. 1018. This is well stated in Freeman on Judgments (5th Ed.) 2666, § 1283, wherein the following appears:

"Consequently in some states provision is made by statute for the entry of a default judgment by him [clerk] in such cases without the intervention of the court. But even here, as in the case of his preliminary entry of default, he acts ministerially and is confined strictly to limitations of the statute. * * *

" 'The clerk derives all his powers from the statute, and as they are special, no intendments are to be made in support of his act, but in each case it must appear that what he did was within the authority conferred on him

by the statute; and whether the act done by him be considered as purely ministerial or of a mixed nature, partaking of elements both ministerial and judicial, is of no practical importance. The question is, Had he authority to enter the defendant's default and thereupon judgment final against him as the case stood at that time?' If this question is answered in the negative, or in other words, if the clerk had no authority to enter the default, or if, having authority to enter the default, he had no authority to enter judgment thereon, then any judgment entered by him without the direction of the court is void, [citing, among others, many California cases] though there is some authority to the contrary."

Our conclusion that the judgment herein is void and may be set aside at any time finds support in Reher v. Reed, supra. In that case the plaintiff's answer to the cross-complaint, though tardily presented, was nevertheless filed prior to the clerk's purported entry of default and judgment on said cross-complaint. Though the motion to vacate was there made within thirty-five days after the entry of the default and judgment, this court, in affirming the order vacating the judgment, declared: "But it was not necessary to resort to section 473 or to determine whether or not, as an application under that section, the grounds were well stated. The clerk is not authorized to enter a default, unless no answer has been filed 'within the time specified in the summons or such further time as may have been granted.' Code Civ. Proc. § 585. When a party, after the time expressly granted for filing a pleading against him has expired, suffers further time to elapse without taking any action thereon, and in the meantime the pleading is served and filed, he, by such conduct, in effect grants the additional time and the party is not strictly in default. The clerk is not authorized to enter a default for failure to file an answer when such answer is on file at the time such default is attempted to be entered. This was expressly decided in Tregambo v. Comanche Co., 57 Cal. 501. There the time to answer expired on April 21, 1879. A demurrer was mailed to the clerk on April 20th but did not reach him until April 29th. The default was entered by the clerk on May 2d. It was held that the default was not authorized and should have been set aside by the lower court. There is abundance of authority to the same effect in the decisions of other states. * * * It follows that on the face of the record it appeared that the clerk was without authority to enter the default, and consequently without authority to enter the judgment. In such a case the court may set aside the judgment of its own motion at any time, and it is immaterial how the invalidity is called to its attention. * * *"

In announcing our conclusion herein, we are not unmindful of Gray v. Hall, 203 Cal. 306, 265 P. 246, May v. Hatcher, 130 Cal. 627, 63 P. 33, and In re Newman, 75 Cal. 213, 16 P. 887, 7 Am. St. Rep. 146, relied on by the appellant in support of his contention that the judgment here involved is voidable only, and now immune from attack. The cited cases are readily distinguishable from the case at bar. There is a marked difference between a default judgment entered by the court under subdivision 2 of section 585, supra, and one entered by the clerk under the first subdivision of the section. In the cited cases the judgments were entered by the court and not by the clerk. They were cases in which a clerk's judgment was not authorized. Having jurisdiction of the parties and of the subject-matter of the litigation, any impropriety in the court's entry of judgment constituted, at most, but an erroneous exercise of jurisdiction. In such a case there is not an absence of jurisdiction, only an irregular or erroneous exercise of it. Gray v. Hall, supra. A judgment entered by a court under such circumstances is therefore merely voidable, and not void, and can only be attacked by appeal or motion made within six months thereafter. However, where a clerk purports to enter a default and judgment prematurely, or otherwise exceeds the limited power conferred upon him by the statute, there is an entire absence of jurisdiction and his action, as already shown, is a nullity and open to attack at any time.

Spaulding & Co. v. Chapin, 37 Cal. App. 573, 576, 174 P. 334, 335, one of the authorities relied on by the appellant as supporting a contrary conclusion, recognizes that a judgment entered by a clerk in excess of his authority is void. It is there stated: "In support of this position we are reminded that the clerk in entering a judgment acts merely in a ministerial capacity, and, unless he confines himself strictly within the statute, his acts can have no binding force. It is true that the clerk exercises no judicial functions, and that no intendments can be indulged in support of the validity of his acts. The statute directs the judgment. The clerk acts as the agent of the statute. If the law does not authorize the act, the judgment is without authority and is void. If, however, in a case where the authority of the clerk is undoubted and he errs, his act is not void, but only erroneous. His error can be corrected on motion made in time or on appeal." This principle finds expression in Bond v. Pacheco, 30 Cal. 530, 534, 536, also cited by appellant. In that case the clerk in entering a default judgment erred in computing the amount thereof. In declaring the judgment to be voidable only, this court said that "There was simply an error in amount, and not a judgment in a case, or of a character, which the Clerk was not authorized to enter. * * * There is no want of jurisdiction over the subject matter, but only an error in its exercise." Such a case is dis-

tinguishable from the one at bar. In the instant case the clerk entered a default and judgment when not authorized by the statute. This constituted an excess of jurisdiction and not an erroneous exercise thereof.

Hallock v. Jaudin, 34 Cal. 167, Christerson v. French, 180 Cal. 523, 182 P. 27, and Jones v. Moers, 91 Cal. App. 65, 266 P. 821, contain nothing suggesting a conclusion other than that herein announced. None of those cases presented circumstances indicating an excess of jurisdiction on the part of the clerk in entering a default and judgment.

The judgment entered in California Casket Co. v. McGinn, 10 Cal. App. 5, 100 P. 1077, 1079, was not invalid on its face, as is the judgment here. At the time the clerk there entered the default and judgment, the affidavit of service of summons then on file indicated that the defendant's time to answer had expired. The judgment being valid on its face, the appellate court in reversing the order vacating it based its decision on the "rule of universal application that a court will not set aside a judgment valid on its face, in a case where it had jurisdiction, except the party desiring to be relieved makes at least an apparent showing of honesty and good faith, by showing that he has a defense to the action on its merits." Moreover, an examination of the opinion in the cited case clearly indicates that the appellate court did not have in mind the distinction between a default judgment entered by the clerk and one entered by the court. This is apparent upon a reading of the opinion wherein repeated reference is made to the entry of judgment by the "court," though the case was of such a nature that the judgment could have been, and probably was, entered by the clerk. Of course, if the judgment was, in fact, entered by the court the case would then fall within the rule announced in Gray v. Hall, supra, and would be of no assistance to the appellant, for reasons already stated. On the other hand, if the judgment was entered by the clerk, the decision should not be held to be binding here, for, as already stated, the appellate court therein failed to recognize or discuss the distinction above pointed out.

The fact that the clerk in entering a default and judgment is, in effect, the agent of and acting for the court, does not alter our conclusion. As already stated, he performs a purely ministerial function. He can only enter judgment upon a default duly and regularly entered. His premature entry of such default and judgment constitutes an excess of the very limited jurisdiction conferred upon him, and is a nullity. The default and judgment here entered were, as already shown, premature and void. Being void, they may properly be set aside by the court at any time, regardless of how the invalidity is brought to its attention; and its jurisdiction and duty to set such a default and judgment aside is not affected by the character of the defendant's answer to the complaint.

It necessarily follows that the order vacating the default and judgment herein must be, and it is hereby, affirmed.

We concur: SHENK, J.; SEAWELL, J.; CURTIS, J.; TYLER, Justice pro tem.; LANGDON, J.

PRESTON, J. (concurring).

I concur in the conclusion and judgment, but I think this cause serves to make clear the error the court fell into in Gray v. Hall, 203 Cal. 306, 265 P. 246, and that that case should be overruled. The attempt in the present case to distinguish the effect of a judgment prematurely entered by the clerk from one at the same time entered by the court itself does not appeal to me as having any substance in it. Jurisdiction of the same grade is wanting in each instance. My views are expressed at length in a dissenting opinion in the Hall Case, and after further deliberation I adhere to the position there taken. Happily, however, the decision here partially counteracts the injury that may hereafter result from the Hall Case.

216 Cal. 495

EVANS v. LOS ANGELES RY. CORPORATION (CITY OF LOS ANGELES, Intervener).

L. A. 13510.

Supreme Court of California.

Sept. 28, 1932.

Master and servant ⇐389.

City paying full salary to incapacitated fireman *held* entitled to reimbursement from amount of damages recovered by him from street railroad company (St. 1917, p. 833, § 3(3), as amended by St. 1919, p. 911; p. 854, § 26, as amended).

In Bank.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by William T. Evans against the Los Angeles Railway Corporation, in which the City of Los Angeles intervened. From a judgment for plaintiff and intervener, plaintiff appeals.

Affirmed.

For prior opinion, see 6 P.(2d) 559.

George W. Rochester and Howard T. James, both of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, of Los Angeles, for respondent.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Jess E. Stephens, City Atty., Erwin P. Werner, City Atty., Frederick Von Schrader, Willis L. Grafton, and Arthur W. Nordstrom, Deputy City Attys., all of Los Angeles, for intervener.

Hugh B. Bradford, City Atty., and Joseph L. Knowles, Asst. City Atty., both of Sacramento, J. LeRoy Johnson, City Atty., and Clarence A. Grant, Asst. City Atty., both of Stockton, and C. Stanley Wood, City Atty., and Homer W. Buckley, Asst. City Atty., both of Oakland, amici curiæ in support of respondent.

A. I. Townsend and Edward O. Allen, both of San Francisco, amici curiæ in support of Industrial Accident Commission.

PER CURIAM.

Plaintiff, a fireman employed by the city of Los Angeles, was injured in the line of duty by reason of the negligence of defendant's employees operating a street car. He was incapacitated, but under the terms of a city ordinance his full salary of $200 a month was paid. Medical and hospital treatment was also furnished him by the city. Plaintiff made no claim for compensation under the Workmen's Compensation Act (St. 1917, p. 831 as amended), but brought an action for damages against defendant Los Angeles Railway Corporation. The city intervened, seeking a lien upon any judgment for sums paid to plaintiff, and also seeking recovery against defendant for any future liability to plaintiff under the Compensation Act. An offer of settlement was made by defendant and accepted by both plaintiff and intervener. The sum of $3,500 was thereupon deposited in court, and releases executed and delivered to defendant. The trial court then entered judgment in favor of the city in the amount of $778.14, the amount it had already paid to plaintiff, and in favor of plaintiff for the balance. It was provided, however, that the said balance should not be paid to plaintiff until he released the city from any future liability. Plaintiff appealed.

The theory of the city is that upon injury to plaintiff in the course of his employment it incurred liability under the Workmen's Compensation Act, that the continuance of the full salary of plaintiff during the period of his disability constituted in part a payment of compensation under the said act, and that under section 26 thereof, as amended, the city as an employer was entitled to reimbursement for its expenditures out of any recovery from a third party tort-feasor. Plaintiff argues that the city is not entitled to reimbursement because there was, in fact, no payment of compensation as required by the Workmen's Compensation Act; that the payment was by virtue of a city ordinance providing that every officer or member of the fire department injured in the line of duty should receive his full salary while incapacitated. Section 3, subdivision 3, of the Compensation Act (as amended by St. 1919, p. 911), provides that the term "compensation" means "compensation under the act." It therefore follows, according to plaintiff, that such payment cannot be considered as having been made on account of compensation under the act, and that, in order for the city to justify its claim to part of the judgment, it would be necessary for it to show two distinct payments, the full salary under the ordinance and an additional sum as compensation. Language in Jackson v. Wilde, 52 Cal. App. 259, 198 P. 822, tends to support this view, but, since it results in obvious double recovery for the employee, the conclusion may well be questioned.

The problem is essentially one of construction of the ordinance. The payments made by the city should, in plaintiff's opinion, be deemed to be in compliance with the ordinance; and, in intervener's opinion, in fulfillment of the obligation incurred under the Compensation Act. The assumption made by plaintiff is that it must be one or the other, but we see no reason why this should be so. It is true that the ordinance requires the payment of a larger sum than the state law (the full salary instead of a certain percentage thereof), and that, in the absence of the state law, the salary would still have to be paid. But, to the extent of the sum required to be paid as compensation, the payment is just as much a compliance with the state law as with the ordinance, and can be so considered. To take a contrary view would mean that the city, having for a certain period paid the full salary of an employee, who did no work during such period, would in addition be liable to him for a further sum as compensation for his incapacity. Plaintiff suggests that under section 69a the act should be liberally construed in favor of the employee, but nothing in that section nor in the general policy of the law sugests the propriety of a double payment for a single injury, or a larger payment for an incapacitated employee than for one rendering services. The proper and reasonable construction of the ordinance, it seems to us, is that it fulfills the obligations of the city as an employer under the act. That it goes further and provides for a greater amount than the act requires is doubtless justified by the peculiarly hazardous character of the fireman's work.

In the case of private employments, it has been held, in accordance with the practice of the Industrial Accident Commission, that payment of full wages to an injured employee constitutes the giving of compensation, operating, e. g., to toll the statute of limitations on the right to file a claim. London G. & A. Co. v. Ind. Acc. Com., 92 Cal. App. 298, 268 P. 670. Sacramento v. Central Cal. Traction Co., 78 Cal. App. 215, 248 P. 307, takes the same view as to a public employment, and

substantially supports the conclusion hereinbefore expressed. There a fireman was injured by collision of the fire truck and a street car operated by defendant, and the city sued, seeking reimbursement for expenditures. The injured employee had received full pay, under the provisions of an ordinance. The court held that the city could recover, regardless of the fact that no formal demand for compensation had been made, and regardless also of the fact that the amounts actually paid were in excess of those required under the act. The court said (page 220 of 78 Cal. App., 248 P. 307, 309): "We deem it immaterial * * * out of what particular fund the payments may have been made or in response to what particular demand the moneys were so paid. * * *" City of Oakland v. Lyckberg, 95 Cal. App. 71, 272 P. 606, following the preceding case, also held that the municipality, having paid the salary of the injured employee, a policeman, was entitled to recover the amount from the third party tort-feasor.

The case of Jackson v. Wilde, supra, states that a fireman is a public officer and that his salary is annexed to his office and payable whether he is rendering services or not, and that therefore this payment cannot be considered compensation. We deem it unnecessary to discuss the conflict of authority on the question whether firemen are "public officers" rather than employees, since such a characterization does not solve the fundamental problem of the proper interpretation of the ordinance and the state law. Regardless of what he may be called, the state law requires payment to a fireman of compensation upon his becoming injured or disabled in the course of his employment; the ordinance of the city of Los Angeles requires payment of his full salary during the period of his incapacity; and, in the absence of an express contrary statement in the ordinance, a reasonable interpretation must be followed. Under this interpretation part of the salary received is to be deemed a performance of the obligation to give compensation. Jackson v. Wilde, supra, in so far as it makes a contrary holding, is overruled.

The judgment is affirmed.

216 Cal. 463

RIP VAN WINKLE WALL BED CO. v. HOLMES et al.

L. A. No. 11191.

Supreme Court of California.

Sept. 27, 1932.

Patents ⇐209(1).

Where contract provided one purchase price, for purchase of two patents and license agreement, payable in installments, seller could recover installments after one patent was declared invalid as against defense of total failure of consideration.

In Bank.

Appeal from Superior Court, Los Angeles County; H. S. Gans, Judge.

Action by the Rip Van Winkle Wall Bed Company against Verne Holmes and others, individually and as copartners, doing business under the firm name and style of the Holmes Bed Manufacturing Company, in which defendants filed a cross-complaint. From the judgment, defendants appeal.

Affirmed.

For prior opinion, see 9 P.(2d) 258.

Francis D. Adams, of Hollywood, and Flint & MacKay, W. A. Bowen, Edward L. Compton, and Earl Curtis Peck, all of Los Angeles (Henry P. Leavitt and Virgil G. Lewis, both of Los Angeles, of counsel), for appellants.

Loeb, Walker & Loeb, Earl C. Adams, and Herman Selvin, all of Los Angeles, for respondent.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Fourth Appellate District. Upon further consideration of the opinion of Mr. Presiding Justice Barnard, we are satisfied that it correctly determines the issues involved in the appeal, and hereby adopt it as the opinion of this court. It reads as follows:

On April 15, 1921, plaintiffs' assignors entered into a contract with the defendants whereby they agreed to sell them a certain patent covering a wall bed, another patent covering a gas stove on swinging doors, a certain license agreement with another party permitting that party to operate under the first patent, upon the payment of $1 for every wall bed sold, together with any patents that might be issued in any foreign countries upon these same devices. The defendants agreed to pay for these things the sum of $20,000 payable in varying installments on the 1st day of January of each year up to and including the year 1930, it being also agreed that the sellers should place the necessary assignments in escrow in a bank, to be delivered when the final payment was made. Such assignments were placed in escrow as agreed and the payments were made up to and including the one due January 1, 1926. On November 22, 1926, by a decision of the United States Circuit Court of Appeals, the patent on the wall bed first above mentioned was declared invalid, as lacking in novelty. The

defendants failed to pay an installment of $2,000, which by the terms of the contract became due on January 1, 1927, and this action was brought for the purpose of compelling payment of the same. Two defenses to this suit were interposed. By answer and cross-complaint it was sought to reform the agreement by inserting one word therein in order to comply with the alleged intention of the parties and, as so reformed, it was claimed that the contract gave to the defendants an option to cease making further payments, and that such option was exercised by their failure to make one of the payments provided for. As a second defense it was alleged that there was a total failure of consideration, in that the first patent referred to had been declared invalid. After trial, the court refused to reform the contract and gave judgment for the plaintiff, from which judgment this appeal has been taken.

The first point raised is that the evidence is not sufficient to support certain findings to the effect that the contract, as written, expressed the true intention of the parties thereto and that it was not the intention of the parties to give to the appellants an option to terminate the agreement by failing to make payments thereunder. The contract contained the following paragraph:

"It is further provided that in the event of a default by the said parties of the second part in the payment of any of the payments hereinabove provided for, then and in that event the said parties of the first part, within thirty (30) days after said default shall have occurred, cancel and terminate this contract, and shall declare any and all moneys theretofore paid hereunder forfeited and shall retain the same as and for liquidated damages, and in full of any and all claims arising or to arise hereunder."

The appellants sought to reform this portion of the instrument by inserting the word "shall" between the word "occurred" and the word "cancel" in this paragraph. It may first be observed that the reformation asked for, if granted, would not have had the effect claimed by the appellants. Wilcoxson v. Stitt, 65 Cal. 596, 4 P. 629, 52 Am. Rep. 310; Burg Bros. v. Bercut, 73 Cal. App. 114, 238 P. 166. However, the court found that the contract as written did not fail to express the true intention of the parties and that the parties did not intend said written agreement to give to the appellants an option to terminate the same by failing to make the payments provided for. The respective parties set forth in their briefs some sixty pages of evidence relating to this subject. It would serve no useful purpose to summarize this evidence here, but it fully appears that while the evidence is conflicting, it is amply sufficient to support the findings attacked. Incidentally, these appellants brought a former action to reform this same contract and to insert another word therein (Holmes v. Anderson, 90 Cal. App. 276, 265 P. 1010), and a question naturally arises as to why a mistake of the importance of the one here claimed was overlooked at that time.

The only other point raised is that the respondents cannot recover in this action for the reason that there was a total failure of consideration because the first patent mentioned was declared invalid. The court found that the consideration had not failed either wholly or in part; that the invalidity of the one patent did not constitute a total or partial failure of consideration; and that such invalidity did not constitute a defense to this action. While we think the finding that there was not a partial failure of consideration is erroneous, this is not material, as the only issue raised by the pleadings and disclosed by the theory upon which the case was tried, is that there was a total failure of consideration. The appellants rely on a number of cases from federal courts which are claimed to establish the rule that the invalidity of a patent sold on deferred payments is such a total failure of consideration as will relieve the purchaser from a further performance of the contract. Conceding, but not deciding, that this is the correct rule, it is not determinative of the case before us, since the contract here in question provides one purchase price, payable in installments, for the purchase of a number of things. In Imperial Livestock, etc., Co. v. Tracy, 208 Cal. 205, 281 P. 50, 54, the court said: "While it is true that the answer pleaded that no consideration passed for execution of the note, yet defendant offered no proof to show that the stock was valueless. On the contrary, the clear inference from the evidence is that it is of considerable value. Under well-settled rules of law, defendant could not keep the stock and resist payment of the note in toto without offering evidence to show that the stock was entirely without value."

While the facts and issues in that case were somewhat different from the one at bar, the principle set forth has an application here. A total failure of consideration was here pleaded and is now relied on. There is here more than an inference that the appellants received something of value. Not only did they have the use for about six years of the patent which was later declared invalid, but it appears that for some time, the extent of which is not shown, they received the royalties on the license agreement with another party which they were to receive under the contract and an assignment of which was placed in escrow in a bank. They further received all of the benefit of the other patent referred to which was never declared invalid. Appellants argue that this second patent had

expired by lapse of time before the first patent was declared invalid and, therefore, that they had nothing of value at the time the payment came due on January 1, 1927. This contention is without merit. The contract provided for one purchase price payable in installments, for several things, and even if one of them had been valueless from the beginning, this would not have shown a total failure of consideration. It can neither be told what portion of the purchase price covered either patent nor what portion thereof covered the respective years during which it was contemplated either patent would be in force. Not only was a partial failure of consideration not pleaded, but upon the objection of the appellants the court refused to admit any evidence as to the respective values of what had been received and what had not been received. The appellants may have profited greatly or slightly by the things they actually received under the contract, but, under the pleadings and the evidence, the court could not find as to the respective values nor as to what portion of the consideration had failed. The appellants rely on the following quotation from Gibbs v. Hersman, 73 Cal. App. 732, 239 P. 350, 352: "It is a fundamental rule of contracts that where, from the nature of the contract, it is evident that the parties contracted on the basis of the continued existence of the thing to which it relates, the subsequent perishing or destruction of the thing will excuse the performance. * * *" See, also, La Cumbre G. & C. Club v. Hotel Company, 205 Cal. 422, 271 P. 476.

It neither appears here that all of the things concerning which these parties contracted were subsequently destroyed, nor does it appear from the nature of the contract that the installment payments, which varied in different years, were so differentiated between the things sold or so related to the values to be received during the respective years, as to excuse, in the absence of any other evidence, the payment of any further installment, in the event of the destruction of the utility of one of the things sold.

It may well be that the appellants have suffered a partial failure of consideration, although this was neither pleaded nor presented during the trial of this action. It does not appear, however, that any injustice will result from the judgment appealed from, since three additional installments of the purchase price, amounting to $7,500, have matured since this action was filed. If other suits are filed to recover those installments, by proper pleading and proper presentation of the matter any rights of the appellants can be protected and full justice done.

The judgment appealed from is affirmed.

MANUEL v. HICKS IRON WORKS et al.

Sac. 4573.

Supreme Court of California.

Sept. 27, 1932.

Rehearing Denied Oct. 27, 1932.

1. Limitation of actions ⇐24(2).

Action for contribution is not founded on written instrument, on which parties were originally liable, and hence is barred two years after plaintiff's payment of amount due (Code Civ. Proc. § 339, subd. 1).

2. Limitation of actions ⇐197(1).

Evidence *held* not to show that note was extinguished by guarantor's payment thereof, so as to render two-year, instead of four-year, statute of limitations applicable to his action thereon against maker and coguarantors (Code Civ. Proc. §§ 337, 339, subd. 1).

The evidence showed that corporate maker of note was in difficulties; that plaintiff's coguarantors requested him to take over note, which he did; that he received assignment of note and claim against deceased guarantor's estate; that corporation subsequently executed chattel mortgage to plaintiff as additional security; and that contemporaneous agreement, reciting that plaintiff purchased note in consideration of coguarantors' guarantee of payment and promise to continue liable with plaintiff for principal, if not paid by corporation, was executed.

3. Guaranty ⇐104.

Estate of deceased guarantor of corporation's note, purchased by coguarantor, *held* liable on guaranty, irrespective of other guarantors' agreement with purchaser to guarantee interest and continue liable for principal, if not paid by maker.

4. Guaranty ⇐104.

Guarantor of note, whose liability is secondary and on independent contract, may purchase note.

In Bank.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Action by M. H. Manuel against the Hicks Iron Works, John T. Scott, and others. Judgment for plaintiff, and defendants Scott and another appeal.

Affirmed.

Carr & Guiler, Sterling Carr, F. P. Walsh, Charles S. Wheeler, Charles S. Wheeler, Jr., and Walter Slack, all of San Francisco, for appellants.

Edw. R. Solinsky, of San Francisco (Charles P. Snyder, of San Andreas, of counsel), for respondent.

PER CURIAM.

This is an action by one of several guarantors of a promissory note, against the maker and other guarantors, to recover on the same after payment. On December 17, 1920, defendant Hicks Iron Works executed the note in question, for the sum of $12,881, to Portuguese American Bank of San Francisco, payable on demand. At the same time a guaranty was executed on the back of the note by seven persons: Plaintiff, Manuel, defendants Bandy, Scott, Demarest, Solinsky, and Levy, and P. George Gow, now deceased. On February 25, 1922, the note was assigned to Pacific Securities Corporation, without recourse. It was not paid by the maker. Gow having died on June 8, 1921, a claim was presented against his estate. On December 7, 1922, plaintiff, Manuel, paid the entire amount of the principal and accrued interest, and took an assignment of the note from Pacific Securities Corporation, together with an assignment of the claim against the estate of Gow. On December 12, 1922, defendant maker executed to plaintiff a chattel mortgage upon certain of its property, as additional security; and, on the same day, all of the other guarantors save the deceased, Gow, signed an agreement acknowledging their continued liability on the note.

On December 12, 1924, plaintiff commenced this action against the other living guarantors and Wells Fargo Bank & Union Trust Co., executor of the estate of Gow, seeking recovery of the principal and interest thereof, together with costs and attorney's fees. By amended complaint foreclosure of the mortgage was sought. A demurrer by defendant Scott was overruled, as was his motion to strike. Several other defendants filed answers. At the trial it appeared that the mortgaged property had no realizable value, and judgment was entered as follows: Against defendant Hicks Iron Works, maker of the note, for $26,211.44, principal and interest, and $1,000 attorney's fees; against the other guarantors and the executor of the estate of Gow, each for one-seventh of the amount of the said judgment. Defendants Scott and Wells Fargo Bank & Union Trust Company appealed. The maker and the other nonappealing defendants are apparently insolvent.

[1] It is contended by appellants that, when plaintiff paid the note, the obligations represented by it and by the contract of guaranty were extinguished, and that plaintiff's sole remaining right against the other guarantors was upon their implied obligation to contribute in proportion to their liability, under the rule of such cases as Yule v. Bishop, 133 Cal. 574, 62 P. 68, 65 P. 1094; Bailes v. Keck, 200 Cal. 697, 254 P. 573; Id., 200 Cal. 800, 254 P. 577; Marston Co. v. Fisheries Co., 201 Cal. 715, 258 P. 933; Both v. Friedman, 82 Cal. App. 174, 255 P. 222. But the action for contribution is not founded upon an instrument in writing, and the applicable statute of limitations is two years from the date of payment. Cal. Code Civ. Proc. § 339, subd. 1; Bray v. Cohn, 7 Cal. App. 124, 93 P. 893. The note was paid by Manuel on December 7, 1922, and this action was brought December 12, 1924. Hence, if this contention of defendants is correct, plaintiff's cause of action is barred.

Plaintiff takes the position, however, that he purchased the note, that no discharge thereof resulted, and that he brings this action on the note as a holder, in which case the statute of limitations is four years (Code Civ. Proc. § 337). Plaintiff concedes that he cannot escape his own obligation as to one-seventh of the amount due, and seeks to recover only this same proportion from the other guarantors.

[2] The parties have discussed at length the question whether the rule of the cases of Yule v. Bishop and others cited above applies to guarantors as well as to joint obligors on the note, such as comakers. Conceding, without deciding, that it would apply in the ordinary case of payment by a guarantor, we are of the opinion that the special circumstances here leave no room for the implication that the note was extinguished by plaintiff's payment. The corporation was in difficulties, and the other guarantors, with the exception of Gow, requested plaintiff to take over the note, which he did. It is clear, moreover, that all of the parties considered the transaction to be a purchase of the same and not a satisfaction and discharge. Three important facts appear in this connection: First, plaintiff received an assignment of the note and of the claim theretofore presented to the estate of Gow; second, the corporation subsequently executed a chattel mortgage to plaintiff as additional security for the note; third, at the time of the giving of the chattel mortgage, an agreement was executed, in which plaintiff was designated as party of the second part, and the other guarantors as parties of the first part. This agreement provides: "The said party of the second part theretofore purchased and acquired the said promissory note expressly upon the promise and agreement upon the part of the parties of the first part that they would execute and deliver this agreement to the party of the second part. * * * The said parties of the first part do hereby promise and guarantee the payment to the party of the second part of the monthly interest upon said promissory note at the time and in the manner as therein specified; and the parties of the first part do further promise, agree and guarantee that as to the principal of the said promissory note in the event that the same, or any part thereof, should not be paid by the said Hicks Iron Works as and when the same shall become due and payable that the said parties of the

first part and M. H. Manuel shall together be and shall continue to be jointly and severally liable for the payment of the said entire principal sum, or such part thereof, as shall not be paid by the said Hicks Iron Works."

[3, 4] Taken together, these facts are inconsistent with the view that the note was discharged when Manuel paid it. The record shows positively that the parties understood it to be a purchase. It is objected that the above agreement is not binding upon Gow because he was not living at the time it was signed. However, this suit is not upon the agreement but upon the note and guaranty; and the agreement is relevant only in tending to show that Manuel purchased the note, and, if he did, then the estate of Gow is liable because of the original guaranty, irrespective of the agreement. Nor can we see any sound reason why a guarantor, whose liability is secondary (Bank of Italy v. Symmes (Cal. App.) 5 P.(2d) 956), and on a contract independent of the note itself (Adams v. Wallace, 119 Cal. 67, 51 P. 14; Murphy v. Hellman Com. T. & S. Bank, 43 Cal. App. 579, 185 P. 485), cannot purchase a note. Normally, perhaps, his payment would be construed as a satisfaction thereof, leaving him with only a right to contribution. But the record shows that this is not a normal case, and it fully sustains the conclusion of the lower court that the note was purchased by plaintiff.

The judgment is affirmed.

216 Cal. 420

CHAPMAN et al. v. GREAT WESTERN GYPSUM CO. et al.

L. A. 11657.

Supreme Court of California.

Sept. 27, 1932.

Rehearing Denied Oct. 27, 1932.

1. Landlord and tenant ⇐81(1).

Mortgage on lease containing option to purchase fee *held* to cover option as well as lease (Civ. Code, § 2926).

2. Landlord and tenant ⇐81(1).

Option to purchase fee contained in mortgage of leasehold *held* mortgagable interest (Civ. Code, § 2926).

Such an option covenant in the lease is a real covenant running with the land which passes with a grant of the lease, and therefore, under Civ. Code, § 2926, providing that a mortgage is a lien on everything that would pass by a grant of the property, is subject to the lien of the mortgage.

3. Landlord and tenant ⇐76(2).

Covenant against assignment contained in lease is not violated by giving mortgage on lease.

Such covenant is not violated by giving a mortgage on the lease, since mortgaging a lease does not constitute a technical assignment of the lease, and since only technical assignments are prohibited by covenant against assignment contained in a lease.

4. Landlord and tenant ⇐76(1).

Covenants limiting free alienation of property such as covenants against assignment must be strictly construed.

5. Mortgages ⇐137.

Mortgage does not transfer title, but simply creates lien.

6. Landlord and tenant ⇐53(2).

Option to purchase contained in lease containing covenant against assignment *held* covenant running with reversionary interest, so that any lien thereon binds lessor's grantees and assigns taking with notice of mortgage on lease.

7. Landlord and tenant ⇐81(1).

Mortgage of lease containing option to purchase fee *held* to attach to fee of assignee of lease exercising option to purchase with knowledge of mortgage (Civ. Code, § 2926).

In Bank.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by Theodore S. Chapman and others for declaratory relief against the Great Western Gypsum Company and others. From the judgment for plaintiffs, defendants appeal.

Affirmed.

For prior opinion, see 8 P.(2d) 486.

Neil S. McCarthy, Earl L. Banta, and George J. Stoneman, all of Los Angeles (William A. Barnhill, of Los Angeles, of counsel), for appellants.

Gibson, Dunn & Crutcher and Henry F. Prince, all of Los Angeles (Herbert F. Sturdy, of Los Angeles, of counsel), for respondents.

PER CURIAM.

Defendants appeal from a judgment in an action for declaratory relief, decreeing that a certain mortgage held by plaintiffs constitutes a lien on certain described real property prior to any claim of defendants. The facts are not materially in dispute, and are as follows:

In 1922 the Southern California Chemical Company, a California corporation, owned certain real property in the city of Los An-

geles. On May 1 of that year the chemical company leased the property in question at a stipulated monthly rental for a period of three years to the Great Western Gypsum Company, an Arizona corporation. The lease contained the following provision:

"The Chemical Company hereby agrees that the Gypsum Company shall have, and does hereby give an option to purchase the herein demised premises at the dates, and for the sums following, to-wit:

"For the sum of $22,000.00 cash if said option is exercised on or before May 1, 1923;

"For the sum of $23,000.00 cash if said option is exercised on or before May 1, 1924; and

"For the sum of $24,000.00 if said option is exercised on or before May 1, 1925."

The lease expressly provided that the lessee should not let the premises nor assign the lease without the written consent of the lessor. Another clause provided that the lease should be binding upon and inure to the benefit of the successors and assigns of the parties, provided that no assignment should be made without the written consent of the lessor. The lease was properly recorded December 7, 1922.

In 1924 the lessee, the Great Western Gypsum Company, executed certain promissory notes in favor of Theodore S. Chapman, H. H. Merrick, E. M. Chapman, T. L. Chapman, J. Gorin, and J. H. Eaton, and simultaneously therewith, on August 5, 1924, executed, as security for said notes, a mortgage upon certain real and personal properties in this state and in the state of Nevada. Among the other properties included within the terms of the mortgage was "all of the right, title and interest of the mortgagor, in and to that certain Indenture of Lease made the first day of May, 1922, by Southern California Chemical Company * * * to the mortgagor herein, granting a leasehold estate with option to purchase that certain lot or parcel of land described as follows: [Here follows a detailed description of the leased premises.]" At the end of the provision containing the list of the properties included within the mortgage appears this clause: "It being the intention of the mortgagor to mortgage to the mortgagees, all of the property of the mortgagor now held by it, of whatsoever nature, real, personal or mixed, and wheresoever situate." This mortgage was properly recorded in Los Angeles county both as a real and chattel mortgage on August 16, 1924.

On August 9, 1924, H. H. Merrick, one of the mortgagees, conveyed and assigned all of his right, title, and interest in and to the mortgage to De Witt-Blair Realty Company. This assignment was properly recorded August 16, 1924.

On February 13, 1925, just a few months before the lease of the gypsum company was to expire, that company assigned, with the written consent of the lessor, all of its interest in and all of its rights under the lease to the De Witt-Blair Realty Company. This assignment was properly recorded on February 13, 1925. The realty company was now one of the mortgagees of the lease, and was also the assignee thereof. The trial court found, and under the circumstances there can be no doubt of the correctness of said finding, that the realty company at the time it accepted the assignment "had notice, actual and constructive, of the said mortgage of August 5, 1924. * * *"

On February 16, 1925, before the option contained in the lease had expired, De Witt-Blair Realty Company exercised the option, and secured from the lessor chemical company a conveyance of the fee. This conveyance was properly recorded April 17, 1925. On February 17, 1925, the realty company, conveyed the property to L. M. Boughton, who in turn, on February 26, 1925, conveyed the property to John T. Martin. The trial court found that neither Boughton nor Martin paid anything of value for the property, and that both had "actual and constructive notice of the said mortgage of August 5, 1924, and of the fact that said mortgage was a lien upon the indenture of lease of May 1, 1922, and upon the option to purchase contained therein."

Based on these facts, the trial court held that the mortgage of August 5, 1924, constituted a lien on both the lease and option; that, when the De Witt-Blair Realty Company with full knowledge of all the facts exercised the option and secured a conveyance of the fee, the mortgage became a lien on the fee title prior to any claim of the realty company; that Boughton and Martin secured no greater rights than were held by the realty company. It is the correctness of the conclusion that the mortgage constitutes a lien on the fee that is challenged on this appeal.

Stripped of all unnecessary facts, the problem involved can be simply stated as follows: An owner of a lease containing an option to purchase the fee mortgages the same to secure a debt. Thereafter the lessee-mortgagor assigns the lease to a third party who has full knowledge of the mortgage. The third party exercises the option and secures a conveyance of the fee. The ultimate legal question to be determined is whether or not under such circumstances the lien of the mortgage attaches to the fee in the hands of the third party or those who take with notice, from the third party.

[1, 2] Before this question can properly be determined it is necessary to determine sev-

eral preliminary problems, viz.: First, did the mortgage cover the option as well as the lease? Second, was the option a mortgagable interest? Both of these questions must be answered in the affirmative.

We have no doubt of the correctness of the trial court's conclusion that the mortgage did in fact include, and was intended to include, the option as well as the leasehold interest. The language above quoted from the mortgage, both in the clause specifically describing the lease and in the general covering clause, can leave but little doubt that the parties intended to include the option when the lease was mortgaged. Even if this were not the fact, the same result would follow from the proper application of section 2926, Civil Code. That section provides that "a mortgage is a lien upon everything that would pass by a grant of the property." In Blakeman v. Miller, 136 Cal. 138, 68 P. 587, 89 Am. St. Rep. 120, a lessee assigned a lease containing an option to purchase without specifically mentioning the option. The court held that the assignment of the lease carried with it the option to purchase. It therefore follows that, since the option would pass by a grant or assignment of the lease, by virtue of the provisions of section 2926 of the Civil Code, supra, the option became subject to the lien of the mortgage.

Considerable portions of the briefs of counsel are devoted to a discussion of the question as to whether or not an option is an "interest in land." There are apparently two lines of authority on this subject, one holding that before its exercise the owner of an option based on a consideration has an equitable interest in the land; the other line of cases holding that the owner of such an option before its exercise has no interest, equitable or otherwise, in the land. The existence of these two lines of authority was recognized by this court in the case of Smith v. Bangham, 156 Cal. 359, at page 365, 104 P. 689, 28 L. R. A. (N. S.) 522. We do not find it necessary to decide in this case whether or not an option to purchase real property unconnected with an interest in property such as a lease would give the holder thereof an interest in the land which could be mortgaged, for the reason that we are of the opinion that, when an option to purchase is contained in a lease of the property, such option covenant is a real covenant running with the land. Since this is so, the option covenant, as all other real covenants contained in the lease, would pass by a grant of the lease, and therefore under section 2926 of the Civil Code, supra, such a covenant becomes subject to the lien of the mortgage. That an option covenant contained in a lease is a real covenant running with the land is well settled in this state. In the early case of Laffan v. Naglee, 9 Cal. 662, 70 Am. Dec. 678, the lessees assigned their interest in a lease. The court stated that "the first and most important question arising in this case is whether, by the legal effect of the assignment, the right to purchase the fee of Smith and wife passed to Laffan and Naglee?" On page 678 of 9 Cal., the court answered this question as follows: "As the covenant in reference to this pre-emptive right of purchase constituted an essential part of the lease itself, and, therefore, ran with the land, the several assignments * * * were ample to carry to the assignees, respectively, this right." See, also, Hall v. Center, 40 Cal. 63, and Blakeman v. Miller, supra. These cases establish the proposition that an option in a lease is a covenant running with land, passing to an assignee of the lease, and enforceable in equity against the lessor or his assigns. In Standard Oil Company v. Slye, 164 Cal. 435, 129 P. 589, the court held that a covenant to renew contained in a lease was a covenant running with the land. Such a covenant is not legally distinguishable in nature from a covenant to convey the entire fee. In that case, as in the instant case, the covenant was not made expressly binding on heirs and assigns, but that fact did not prevent this court from holding that the covenant ran.

[3-5] Appellants seek to distinguish these cases on the ground that, although ordinarily an option to purchase constitutes a real covenant running with the land, it cannot be so classified in the instant case, because here the lease contained a stipulation against assignment without the consent of the lessor. It is contended that the mortgage of the lease which apparently was made without the consent of the lessor violated this provision, and that the effect of such a provision is to make the covenant a personal one. We do not believe that either of these conclusions is correct. In the first place, we do not believe that a covenant against assignment contained in a lease is violated by the giving of a mortgage on the lease. It hardly needs citation of authority to the principle that covenants limiting the free alienation of property such as covenants against assignment are barely tolerated and must be strictly construed. Thus it has been held that a covenant against assignment is not violated by an assignment from one cotenant to another. Randol v. Scott, 110 Cal. 590, 42 P. 976. Likewise a covenant against assignment is not violated by a subletting. Cross v. Bouck, 175 Cal. 253, 165 P. 702; Stevinson v. Joy, 164 Cal. 279, 128 P. 751. These cases and many others that might be cited establish the rule that it is only a technical assignment that is prohibited by such a covenant. A mortgage of the lease, of course, does not constitute a technical assignment thereof. In this state a mortgage does not operate to transfer the title to the mortgaged property; it simply creates a lien thereon. The decisions in other states where

the lien theory of mortgages prevails clearly hold that a covenant against assignment is not violated by the giving of a mortgage. Riggs v. Pursell, 66 N. Y. 193; Crouse v. Michell, 130 Mich. 347, 90 N. W. 32, 97 Am. St. Rep. 479; Dunlop v. Mulry, 85 App. Div. 498, 83 N. Y. S. 477, 1104; Badger Lumber Co. v. Parker, 85 Kan. 134, 116 P. 242, 35 L. R. A. (N. S.) 901.

Moreover, even if the mortgage did violate the covenant against assignment, we do not see how that fact could operate so as to make the option covenant a personal one. The assignment of a lease in violation of a covenant against assignment without the consent of the lessor is nevertheless a binding assignment which passes the leasehold estate, and with which runs all covenants touching the land. Such an assignment in violation of the covenant is, however, subject to the option in the lessor to forfeit the lease. The only remedy for the breach of such a covenant would be the exercise by the lessor of his option to forfeit the lease. Buchanan v. Banta, 204 Cal. 73, 266 P. 547; Garcia v. Gunn, 119 Cal. 315, 51 P. 684; Randol v. Tatum, 98 Cal. 390, 33 P. 433; Baker v. Maier & Zobelein Brewery, 140 Cal. 530, 74 P. 22. See, also, Sexton v. Chicago Storage Co., 129 Ill. 318, 21 N. E. 920, 923, 16 Am. St. Rep. 274. It would only serve to unduly extend this opinion to further discuss this phase of the case. From the foregoing discussion we take it that the following two propositions have been fully established.

1. That the mortgage of the lease included the option and constituted a lien thereon. This result follows either because the option was specifically or impliedly included within the mortgage, or because the covenant of option ran with the leasehold interest.

[6] 2. That the option covenant, inasmuch as it does not involve personal trust, confidence, or credit, is a real covenant running with the reversionary interest, and any lien thereon binds the grantees and assigns of the lessor who took with notice of the mortgage.

[7] Now we turn to a discussion of the final and most important question involved, and that is whether or not the lien of the mortgage on the option attached to the fee when the De Witt-Blair Realty Company acquired the fee by exercising the mortgaged option, and had actual, as well as constructive, knowledge of the mortgage held by plaintiffs. It must be remembered that, although the De Witt-Blair Realty Company was not one of the original mortgagees, it became a mortgagee shortly after the execution of the mortgage by virtue of the fact that on August 9, 1924, H. H. Merrick, one of the mortgagees, assigned all of his right, title, and interest in the mortgage to that company. Later that company also became the owner by assignment of the mortgaged lease and option. When the De Witt-Blair Realty Company exercised the option and secured the fee, it had actual as well as constructive knowledge of the existence of the mortgage lien on the option. Under such circumstances we can see no escape from the conclusion that both from the standpoint of law and equity the lien of the mortgage attaches to the fee. No case directly in point seems to have been decided in this state, but we are not without analogies in this state and cases from other jurisdictions. It has twice been held by this court that the lien of a mortgage on a contract to purchase real property attaches to the fee acquired by the completion of the contract of purchase by an assignee of the mortgagor with notice of the mortgage. Benedict v. Peppers, 58 Cal. 618; Tripler v. McDonald Lumber Co., 173 Cal. 144, 159 P. 591. In both of these cases a mortgage was executed on premises when the mortgagor held simply a purchase contract. Thereafter the purchase contract was assigned by the mortgagor to those who took with notice of the mortgage. Such assignees completed the contract and secured the fee. In each instance the lien of the mortgage was held to attach to the fee in the hands of such purchasers. Appellants contend that these cases are not authority on the point under discussion, for the reason that a vendee under a contract to purchase has an "interest in land," while an optionee has not. The phrase "interest in land" is meaningless, unless the total of the rights included therein is defined. It is true that a contract to purchase land is bilateral in the sense that it may be enforced by either party, while an option contract is enforceable only by the holder thereof, and the option holder cannot be compelled to buy. But in both cases the owner of the land has parted with one of the rights incidental to ownership—the right to convey the property to any but the vendee or the optionee. Whether this constitutes bestowing on the optionee an "interest" in the land we deem to be immaterial. We are of the opinion that the two situations are sufficiently analogous, so that the above two cases are some authority for the proposition that, when the assignee of a mortgaged option contained in a lease, with knowledge of the mortgage, exercises the option and secures the fee, the lien of the mortgage attaches to the fee.

In cases from other jurisdictions it has been held that a lien on an option or pre-emptive right attaches to the fee title acquired by the exercise of the mortgaged right, whether such mortgaged right is exercised by the mortgagor or by his assignee with notice. In Boon v. Kent, 42 N. J. Eq. 131, 7 A. 344, 345, one Thompson owned certain riparian lands. These lands carried with them a statutory option or pre-emptive right to require a lease or conveyance by the state of certain adjoining submerged lands. Thompson conveyed

the riparian lands to Subers. Subers gave Thompson a mortgage on the riparian lands, which was recorded. Subers then conveyed the riparian lands to D. Kent, who thereupon exercised the option or pre-emptive right, and secured the fee to the submerged lands from the state. D. Kent then conveyed the riparian and submerged lands to E. S. Kent. Boon by various assignments became the holder of the note and mortgage. Boon sought to foreclose the mortgage and to impose the lien thereof on both the riparian and submerged lands. E. S. Kent contended "that the land conveyed by the grant from the state should not be included in, but should be excluded from, the sale of the mortgaged premises under any decree of foreclosure and sale which may be made in this suit; and that the title thereto did not pass by the deed from Thompson to Subers, but was in the state; and he insists that the complainants ought not in equity to have the benefit of the subsequent purchase of the state's title by Daniel H. Kent." The court held, however, that the mortgage was a lien on both the riparian land and on the option or pre-emptive right, and that, upon an exercise of the pre-emptive right by an assignee with notice of the mortgage, the lien of the mortgage attached to the fee.

In Mackenzie v. Building & Loan Association, 28 Canada Supreme Court Rep. 407, Austin and Arthurs leased certain lands to Thompson for a period of twenty-one years with an option to purchase any time within the first ten years. Thompson mortgaged the lease to the Building & Loan Association. Thereafter, by mesne assignments, the lease was transferred to Mackenzie, subject to the mortgage. Mackenzie exercised the option and secured the fee from one Britton who had acquired the interest of the lessors. Under the law of Ontario, where the land was located, the fee owner can collect rents from either the lessee or the mortgagee of the lease. Mackenzie sought by this action to collect rents from the Building & Loan Association on the theory that it was only a mortgagee of the term. The mortgagee contended that the lien on the lease and option attached to and became a lien on the fee when the option was exercised by one with notice of the mortgage. The court affirmed the contention of the mortgagee Building & Loan Association, and held that the mortgage lien on the lease and option became a lien on the fee, prior to any claim of Mackenzie, when the option was exercised by one with notice of the mortgage.

In Harsh v. Sutton, 180 Ill. App. 651, one McDavid, the owner of certain real property, gave to the Glovers an option to buy the property. This option, based upon a consideration, is referred to by the court as a "bond." The Glovers assigned the bond or option to A. W. and Joseph Sutton, who gave back a note and mortgage. This mortgage was recorded. A. W. and Joseph Sutton then assigned the bond or option to Frank Sutton. Frank Sutton exercised the option and secured the fee. Frank then conveyed the fee to Martin and Fleming. In the meantime the mortgage and note had been transferred to Harsh. Harsh sought to foreclose his mortgage on the theory that, although when it was given it amounted to no more than a lien on the bond or option, it became a lien on the fee when the option was exercised. At page 656 the court said:

"Upon the contention that A. W. Sutton and Joseph Sutton had no title at the time they executed the mortgage in question, Frank Glover, who was the original owner of this bond assigned the bond prior to the date of this mortgage to A. W. Sutton and Joseph Sutton, they thereby became the equitable owners of these premises subject to the payment of the amount due McDavid for the balance of the purchase money due him, and the mortgage which they gave at that time became a lien and attached to their equitable interest, whatever it may have been, and if thereafter they had obtained the title from McDavid by the payment of the amount due McDavid and obtained a deed therefor, their mortgage contained [containing] the words mortgage and warrant would have attached to and become a lien on the title which they then acquired, and Frank Sutton who obtained the bond by assignment from them after this mortgage was placed upon record could obtain no greater rights in the premises than they had at the time that it was assigned to him. And by completing the payment of the amount due on the McDavid bond he obtained his title through the specific performance proceeding from McDavid, subject to the mortgage executed by A. W. Sutton and Joseph Sutton; and the contention that A. W. Sutton and Joseph Sutton had no interest in the premises which could be made subject to a mortgage at the time they executed this note and mortgage is not tenable. * * * To permit the assignee of the original bond to secure these premises with this lien of record thereon merely by paying the amount due on the original bond would be inequitable and unjust. The record discloses that the present owners of the premises purchased the same with this mortgage on record and they were required to take notice thereof, and cannot be heard to say that they did not know this mortgage was not paid, the title they took was subject to it, it was their duty to ascertain the rights of the parties therein."

In Bank of Louisville v. Baumeister, 87 Ky. 6, 7 S. W. 170, Mrs. Bullitt, the owner of land, executed to Spalding a lease with option to purchase. Spalding mortgaged the lease and option to one Olds. Spalding thereupon exercised the option, paying part of the purchase price in cash, and gave back a pur-

chase-money mortgage to Mrs. Bullitt to secure the balance. After acquiring the fee subject to the purchase-money mortgage, Spalding mortgaged his interest to the Bank of Louisville, and later gave another mortgage to Baumeister. On foreclosure, all parties being joined, the court decreed the priority of the various liens as follows:

(1) The purchase-money mortgage of Mrs. Bullitt. All parties apparently conceded that this lien was entitled to priority over all the other liens. (2) The lien of Olds on the lease and option became a lien on the fee when the option was exercised. (3) The lien of the Bank of Louisville was declared subject to the lien of Olds. (4) The lien of Baumeister was declared subject to the other three liens. On appeal, the Bank of Louisville contended that Olds had no lien on the fee, for the reason that all he had was a lien on an option. The court held, however, that the lien of Olds on the lease and option became a lien on the fee when the fee was acquired by the exercise of the option by one with knowledge of the mortgage.

In Yellow Chief Coal Company v. Preston, 166 Ky. 669, 179 S. W. 602, the court held that, when the holder of an option which he knows to have been mortgaged exercises it, the lien of the mortgage on the option attaches to the fee. After first stating the rule that a mortgage on land to be acquired in the future is ordinarily void against bona fide purchasers, the court stated (page 602 of 179 S. W.): "But the rule has no application here; for the corporation did have such an estate in the land as could be conveyed by mortgage. It was the owner by assignment of the option contracts, and, as expressly held in the case of Bank of Louisville v. Baumeister, supra, a contract for an option to purchase real estate at an agreed price within a specified time may be sold, assigned, or mortgaged. Section 2341, Kentucky Statutes. When the contract was completed, and the legal title taken, it inured to the benefit of the mortgagees, who are the bondholders in this case." See, also, Shooters Island Shipyard Co. v. Standard Shipbuilding Corp. (C. C. A.) 293 F. 706; Owens v. Hughes, 188 Wis. 215, 205 N. W. 812; Point Breeze Ferry & Imp. Co. v. Bragaw, 47 N. J. Eq. 298, 20 A. 967.

From the reasoning in the above cases it clearly follows that the trial court herein correctly held that the mortgage constituted a lien on the option, and that, when the option was exercised by the De Witt-Blair Realty Company, with actual and constructive knowledge of the mortgage, the interest acquired by the realty company by the exercise of the option became subject to the lien of the mortgage. The transferees of the realty company likewise having actual and constructive knowledge of the mortgage, of course, stand in no better position than the realty company.

The appellants with some confidence rely on the case of Ludy v. Zumwalt, 85 Cal. App. 119, 259 P. 52, as establishing a contrary rule in this state. In that case Zumwalt owned a bare option to purchase certain real property. This option was unconnected with any other interest in the property. While the option was still alive, but before it was exercised, Zumwalt entered into a contract with a canal company to supply the land with water. This contract created a lien on the interest of Zumwalt and was recorded. Zumwalt later exercised the option, acquired the fee, and gave back a purchase-money mortgage to the optioner. Having defaulted on the purchase-money mortgage, the holders thereof sought to foreclose. The canal company contended its lien was prior to that of the purchase-money mortgage. The court found that the purchase-money mortgagee had no actual notice of the contract lien, and held that a bare option was not such an interest in land so that a recorded lien thereon would give constructive notice thereof. Consequently the court properly held that the purchase-money mortgage had priority. On rehearing the appellate court stated, at page 133 of 85 Cal. App., 259 P. 52, 58: "If the Zumwalts, at the time of executing the contract with the appellant, were connected in any way with the record title to the property, then the position of appellant here would be impregnable; but, as stated, it is clear to our minds that at the time mentioned the Zumwalts had no more connection with the title to the property than any other person having no transaction with the owner of the land regarding said property." This quotation clearly indicates the distinction between the Zumwalt Case and the instant case. In the instant case the foregoing discussion has clearly indicated that the respondents were connected with the record title. In the instant case no question of constructive notice is involved. Here the Realty Company had actual as well as constructive notice of the mortgage. In the Zumwalt Case the controversy was between the optioner who held a purchase-money mortgage and the lienholder. In the instant case the controversy is between the optionee and the lienholder. The entire basis of the Zumwalt Case was that, when Zumwalt executed the contract with the canal company, he had no title to the property. By his contract he attempted to create a lien on property which he did not own. This could not serve as constructive notice to the real owners of the property. The case did not hold that the lien of the canal company did not attach to Zumwalt's interest—it merely held that the purchase-money mortgage had priority. For the above reasons the Zumwalt Case is not authority on the question here involved. Whatever was said in that case as to the na-

ture of an option unconnected with a lease or other interest in land can have no application to a case where the option is so connected.

For the foregoing reasons, the judgment appealed from is affirmed.

216 Cal. 375

COWART et al. v. UNION PAVING CO. et al.

L. A. 11053.

Supreme Court of California.

Sept. 23, 1932.

1. Municipal corporations ⇐538.

Court decreeing assessments for completed street improvement void must direct reassessment, though proceedings leading to original assessment were without jurisdiction (St. 1911, p. 746, § 28, as amended by St. 1923, p. 118, § 7).

2. Municipal corporations ⇐407(1).

Statute authorizing reassessment for street improvement is not unconstitutional as setting aside judgment declaring former assessment, for which Legislature had original power to provide, invalid (St. 1911, p. 746, § 28, as amended by St. 1923, p. 118, § 7).

3. Municipal corporations ⇐280(1).

Legislature may provide for municipal street improvement without requiring petition or providing for protest (St. 1911, p. 746, § 28 as amended by St. 1923, p. 118, § 7).

4. Municipal corporations ⇐407(1).

Statutes providing for reassessment, where property owner's consent, required by statute, to improvement is lacking, are constitutional; there being no fundamental obligation to obtain owner's consent or acquiescence (St. 1911, p. 746, § 28, as amended by St. 1923, p. 118, § 7).

5. Municipal corporations ⇐407(1).

Due notice of or hearing in original street improvement proceeding is unnecessary to render reassessment statute valid (St. 1911, p. 746, § 28, as amended by St. 1923, p. 118, § 7).

6. Municipal corporations ⇐514(1).

Remonstrance against proposed municipal improvement or failure to obtain sufficient initial petition does not affect right to reassessment (St. 1911, p. 746, § 28 as amended by St. 1923, p. 118, § 7).

7. Constitutional law ⇐68(4).

All questions respecting reassessment for street improvement, except that of due notice, are solely legislative; reassessment being independent proceeding resting on taxing power (St. 1911, p. 746, § 28, as amended by St. 1923. p. 118, § 7).

8. Municipal corporations ⇐514(2).

Phrase "any cause" in act providing for reassessment, where improvement assessment is void or unenforceable for any cause, includes jurisdictional defects (St. 1911, p. 746, § 28, as amended by St. 1923, p. 118, § 7).

[Ed. Note.—For other definitions of "Any," see Words and Phrases.]

9. Constitutional law ⇐68(4).

Exercise of taxing power can be limited only by Constitution, and court cannot inquire into policy of tax or limit Legislature's authority, exercised within such limitations.

10. Municipal corporations ⇐514(1).

Essentials of jurisdiction to order reassessment for municipal improvement are making of public improvement, imposition of or attempt to impose assessment, and nonpayment thereof (St. 1911, p. 746, § 28, as amended by St. 1923, p. 118, § 7).

11. Municipal corporations ⇐514(1).

Legislature has power to legalize and enforce moral obligation of property owners, benefited by municipal improvement, to pay therefor, and equitable right against their property, by providing for reassessment, where original assessment is void (St. 1911, p. 746, § 28, as amended by St. 1923, p. 118, § 7).

12. Constitutional law ⇐42.

Objections that reassessment act is unconstitutional and that original improvement proceedings were not conducted fairly because of departure from statutory requirements are unavailable to owners of property reassessed after performance of work (St. 1911, p. 746, § 28, as amended by St. 1923, p. 118, § 7).

13. Municipal corporations ⇐514(11).

Reassessment for municipal improvement is not limited to lands originally assessed, but may include benefited lands in enlarged district (St. 1911, p. 746, § 28, as amended by St. 1923, p. 118, § 7).

14. Municipal corporations ⇐426.

School lands *held* subject to municipal assessment for street paving (St. 1911, p. 730, § 20g, as added by St. 1929, p. 1658, § 11).

15. Municipal corporations ⇐425(1).

City may assess railroad property, used as part of railroad's general system, for street improvements in district wherein located by same method as in assessing other lands in district.

In Bank.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by F. W. Cowart and others against the Union Paving Company and others. Judgment for plaintiffs, and defendants appeal.

Affirmed in part, and reversed in part.

For prior opinion, see 296 P. 945.

Brittan & Brittan, of Bakersfield, and Arthur M. Ellis and James H. Howard, both of Los Angeles, for appellants.

Erwin P. Werner, City Atty., Frederick Von Schrader, Asst. City Atty., William H. Neal, Asst. City Atty., Robert J. Stahl, Deputy City Atty., and Loren A. Butts, Deputy City Atty., all of Los Angeles, amici curiæ, for appellants.

Dorsey & Campbell, J. R. Dorsey, Emmons & Aldrich, and Aldrich & Mack, all of Bakersfield, for respondents.

H. A. Postlethwaite, of San Francisco, amici curiæ, for Associated General Contractors of America.

Gibson, Dunn & Crutcher and John M. Chamberlin, all of Los Angeles, amici curiæ.

TYLER, Justice pro tem.

This action was brought to enjoin defendants from proceeding to collect assessments levied under proceedings instituted under the Improvement Act of 1911 (St. 1911, p. 730), and from issuing any bonds under the Improvement Bond Act of 1915 (St. 1915, p. 1441).

The work was done under a district plan, and was fully and properly completed, and the expense thereof was placed against an assessment district. The city of Bakersfield took its initial step to make the improvements in August, 1924, by passing a resolution of intention, No. 499, for the paving of M street for the full length of four blocks. A protest was filed, and the city abandoned the proceedings without making any express finding as to whether or not the protest filed was by the owners of a majority of the area of the land within the proposed assessment district. Thereafter, the city council on October 27th passed a new resolution of intention concerning the work. This resolution was numbered 503. The work and the district was substantially different and distinct from that provided in and by the resolution of intention, No. 499. A protest was again filed, against the latter resolution. The city council found that it was not a protest of the owners of more than one-half of the area of the property to be assessed. The work was thereafter performed, no attempt being made to enjoin it. After completion of the work, an assessment was filed and a hearing was had upon it. Protests were filed by the owners of certain lands affected thereby on the ground that the assessment was so excessive as to be confiscatory. The protests were overruled by the city council, and the present action followed. After trial, the court found, in accordance with the contentions of plaintiffs, that the city council had no power to initiate the proceedings whereby the improvements were made and assessments levied, by reason of the prohibitory clause of the Improvement Act which abated the proceedings for a period of six months under the protests filed to the original resolution of intention. It further found that a full hearing had been denied plaintiffs, and also that the assessment as to certain parcels of land was arbitrary and confiscatory. Judgment went in favor of plaintiffs, and the court issued a permanent restraining order against defendants, enjoining them from issuing any bonds in payment of the assessments on the property of plaintiffs, and from levying or collecting any part of such assessments, or from asserting any claim by reason of the proceedings taken under and following resolution of intention, No. 503. A reassessment was denied defendants on the ground that the city council had no jurisdiction to order the work by reason of the protest to the original resolution of intention.

It is respondents' contention that the judgment must be affirmed for the reason, as the trial court found, that the protest to the original resolution was regular, and, as further proceedings could not be instituted for a period of six months thereafter by reason of section 6 of the Improvement Act (as amended by St. 1915, p. 1465, § 3), the council was without jurisdiction to order the work at the time it did. They further claim that the assessment, being confiscatory, is therefore void.

Defendants frankly concede that the improvements have not produced immediate results commensurate with the amounts of the assessments, and that as to certain of the lots the assessments are confiscatory, and that justice requires that a reassessment be made by reducing the amounts thereof. It is their claim that, even conceding the assessments to be void, the provisions of the Improvement Act are unequivocal, and that they insure a reassessment under the circumstances of the case. In this position they are joined by certain amici curiæ, including the legal representatives of the city of Los Angeles, who assert that city is vitally concerned in the question because of the fact that it has, through its board of pension commissioners, invested several millions of dollars in improvement bonds issued under reassessments of its fire and police pension funds, and such funds will be jeopardized if a reassessment is denied under the facts of this case.

Plaintiffs claim that a reassessment may not be had for the reason that the board had no jurisdiction to order the work. They argue that, if a reassessment can be had under the circumstances here presented, then any protest is but an idle act.

[1] We are of the opinion that the statutory mandate compels a reassessment to be had, and that this is so, regardless of the fact that the proceedings from which the original assessment came were without jurisdiction. We will not, therefore, discuss the validity of any of the proceedings leading up to the assessment, as these questions, considering our conclusion, become moot. With the wisdom or justice of the rule requiring a reassessment where the work has been performed we are not here concerned, as the statute requiring a reassessment is clear, specific and mandatory. The provisions of the statute prescribed for making the reassessment constitute an independent proceeding which rests on the basis of benefits arising inevitably from the existence of a completed improvement. Our statute upon the subject is emphatic and all-embracive upon the subject. Section 28 of the Improvement Act, as amended in 1923 (St. 1923, p. 118, § 7), reads as follows: "Whenever any assessment heretofore issued or which may be hereafter issued is or shall be void, or unenforceable, for any cause * * * then, in any of such events a reassessment therefor may be issued. The true intent and meaning of this section is to make the cost and expense of work or improvement made through an attempted compliance with this act, payable by the real estate benefited by such work or improvement by making a reassessment therefor. * * * A reassessment shall be ordered under any one of three circumstances: * * * Third—Whenever any court of competent jurisdiction in any suit to set aside the lien of any assessment or of any bond representing any assessment, * * * or bond shall in its judgment decree such assessments or bonds to be void, or unenforceable, then it shall in and by its decree direct the making of a reassessment to cover the assessments involved in such suit. * * *"

It will thus be seen that, by the express provisions of the statute, a reassessment issues, regardless of the fact that the proceedings from which the original assessment came were without jurisdiction, and the court must under such circumstances direct in the same decree the making of a reassessment to cover the assessments involved in the suit.

[2, 3] Plaintiffs raise the objection that the statute is unconstitutional. A statute authorizing another assessment for the same improvement is not objectionable as setting aside a pre-existing judgment declaring a former assessment invalid. Under the unlimited exercise of authority on questions of tax or assessments, the Legislature in the first instance could have provided that the work should be done without the requirement of any kind of a petition or without any provision for a protest. Spencer v. Merchant, 125 U. S. 345, 8 S. Ct. 921, 31 L. Ed. 763. The rule is well established that the mere fact that a judgment of a court has pronounced an assessment void will not preclude the Legislature from making provision for a reassessment on such property if it had the original power to provide for such assessment.

[4-9] Reassessment statutes have been uniformly upheld as constitutional where the consent of the property owner required by statute is lacking. Jones v. Town of Tonawanda, 158 N. Y. 438, 53 N. E. 280. So also, where a remonstrance was ignored. Kansas City v. Silver, 74 Kan. 851, 85 P. 805; Frederick v. City of Seattle, 13 Wash. 428, 43 P. 364; Page and Jones on Taxation, vol. 2, § 962. There is no fundamental obligation that the consent or acquiescence of the taxed property owners be obtained at all. Nottage v. City of Portland, 35 Or. 539, 58 P. 883, 76 Am. St. Rep. 513; Blount v. City of Janesville, 31 Wis. 648; City of Elkins v. Harper, 82 W. Va. 377, 95 S. E. 1033. Neither is it necessary that there should have been due notice or even a hearing in the original proceeding. Nor does it make any difference that the owners of the property affected by the assessment made objection to the original proceedings as they progressed. The matter of remonstrance against a proposed work or the obtaining of a sufficient initial petition are not matters affecting the right to reassessment. Brown v. City of Silverton, 97 Or. 441, 190 P. 971, where the authorities are extensively discussed. See, also, Bellingham Bay, etc., Co. v. New Whatcom, 172 U. S. 314, 19 S. Ct. 205, 43 L. Ed. 460. The matter of giving property owners any right of protest whatsoever against a proposed improvement is purely a statutory concession. There is no constitutional requirement that this be done. A reassessment is an independent proceeding in itself. It provides its own notice and gives its own hearing. It rests upon the taxation power for its support, and all questions relative to it are solely legislative, except the single one as to whether the reassessment act gives due notice. The basis for a particular reassessment is the existence of a completed improvement, which is of a kind for which a special assessment might properly have been laid, but where the attempted assessment falls for any cause. There can be no question that the Legislature intended that a reassessment should be made in every instance where the work had actually been completed and an assessment had been filed. The positive statutory provision cannot be evaded. The phrase "any cause" includes jurisdictional defects, and in fact any cause that could work the result in question. The exercise of the taxing power can be limited only by constitutional restriction, and here, as stated, there is none. All the authorities go to the extent of deciding that courts cannot inquire into the policy of the tax, or undertake to limit the authority of the Legislature, so long as it is exercised within constitutional limitations, and so long as it appears that it is a proper exercise of the taxing power. Nottage

v. City of Portland, supra; Richman v. Board of Supervisors, etc., 77 Iowa, 513, 42 N. W. 422, 4 L. R. A. 445, 14 Am. St. Rep. 308; Kansas City v. Silver, supra.

[10-12] The purpose of the reassessment act is that land benefited by an authorized public work shall not escape the payment of its proportionate share of the expense thereof. The essentials of jurisdiction to order a reassessment are that a public improvement has been made, that an assessment has been imposed or attempted, and that payment thereof has not been had. There is a moral obligation resting upon the property owners benefited by the improvement and an equitable right against the property itself, which the Legislature has power to legalize and enforce. Getty v. City of Syracuse, 129 Kan. 106, 281 P. 883. The California decisions uphold this view. Ferry v. O'Brien, 188 Cal. 629, 206 P. 449; Hall v. Fairchild-Gilmore-Wilton Co., 66 Cal. App. 615, 227 P. 649; California Land Co. v. Town of Corte Madera, 97 Cal. App. 393, 275 P. 866. These cases are based upon the decision of Seattle v. Kelleher, 195 U. S. 351, 25 S. Ct. 44, 49 L. Ed. 232, which is cited and discussed at length in the Ferry Case, supra, together with the case of Voigt v. Detroit City, 184 U. S. 115, 22 S. Ct. 337, 46 L. Ed. 459. These authorities squarely hold that the basis of the tax is the existence of a completed work, and upon this basis the Legislature may proceed as it sees fit, since its power to that end is unrestricted so long as a hearing is given upon the matter of fixing the amount of the reassessment itself. The objections, therefore, that the act is unconstitutional, and that the original proceedings were not conducted fairly, there being a departure from the statutory requirements, can avail plaintiffs nothing, where, as here, the work has been performed and a reassessment is to be made. Schneider Granite Co. v. Gast Realty & Investment Co., 245 U. S. 288, 38 S. Ct. 125, 62 L. Ed. 292.

[13] Respondents present the further argument that, even conceding a reassessment to be mandatory, it could only apply to the lands involved in this suit, and therefore there could be no possible change in the situation here presented. But a reassessment is not limited or confined to the lands embraced in the original assessment, but, if justice demands, it may be upon an enlarged district where benefits accrue. Stats. 1923, p. 119; Cline v. City of Seattle, 13 Wash. 444, 43 P. 367; People v. Judson, 233 Ill. 280, 281, 84 N. E. 233; State ex rel. v. District Court of Ramsey County, 95 Minn. 503, 104 N. W. 553; Eggerth v. City of Spokane, 91 Wash. 221, 157 P. 859; Schneider Granite Co. v. Gast Realty Co., supra. In levying a reassessment, all lands benefited by the improvement may be included though originally omitted. The improvements here involved were, as heretofore stated, performed under a district plan. The improvement is of a through street which may benefit large areas at either end of it.

[14] Then, again, certain school lands were omitted from the assessment on the theory that they were not taxable. The ground of omission was contrary to the express provisions of the statute. Improvement Act of 1911, § 20g (added 1929), Stats. 1929, p. 1658.

[15] A portion of the right of way of the Southern Pacific Railway Company lying in the street was also omitted upon the same theory. In levying an assessment for street improvements in a certain district, a city has the authority to assess railroad property in the district which is used as a part of the general system of the railroad, where the method is the same as that employed in assessing other lands in the district. Rutledge v. City of Eureka, 195 Cal. 404, 234 P. 82; McNeil v. City of South Pasadena, 166 Cal. 153, 135 P. 32, 48 L. R. A. (N. S.) 138; Southern Pacific R. R. Co. v. Stibbens, 103 Cal. App. 664, 285 P. 374; Los Angeles Pacific Co. v. Hubbard, 17 Cal. App. 646, 121 P. 306.

In conclusion it may again be stated that the reassessment may attach to all the property found to be benefited by the improvement, whether included in the original district or not. The judgment of the court below, in so far as it declares invalid the assessment as made against the properties of plaintiffs upon the ground that it is confiscatory, is affirmed; in other respects said judgment is reversed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

SHENK, J.

I concur in the judgment and the legal conclusions on which it is based. But I do so reluctantly because the result is a plain indication that the rights of the property owners have by the Legislature, supported by the opinion, just about been reduced to nothing. The theory of our laws imposing upon property owners the obligation to pay for paving proceedings has been and is that they shall have some voice in determining whether the work shall be done. Now apparently they have none. The proceedings may now be initiated without their consent or the opportunity to object thereto, and, however irregular the conduct thereof, even to the extent of entire invalidity, and even though their property was not included within the assessment district, such property may now be brought in and subjected to an assessment. They should be accorded some rights under the statute. It seems to me highly desirable that the Legislature take the necessary steps to accord the property owners some voice in these in invitum proceedings and adequately to safeguard the rights so accorded, since the courts under present law are powerless to afford an adequate remedy for obvious abuses.

216 Cal. 397

In re LANCES' ESTATE.

BROWN v. BAKER.

Sac. 4553.

Supreme Court of California.

Sept. 23, 1932.

Rehearing Denied Oct. 21, 1932.

1. Wills ⇐324(1).

In determining whether evidence produced by contestant is sufficient to require submission of will contest to jury, same rules apply as in civil cases.

2. Trial ⇐156(3), 178.

Nonsuit or directed verdict may be granted only when, disregarding conflicting evidence and giving plaintiff's evidence proper value, and indulging in every legitimate inference deducible therefrom, evidence is insufficient to support verdict for plaintiff.

3. Trial ⇐139(1), 140(1).

Although trial court may weigh evidence and determine credibility of witnesses on motion for new trial, it may not do so on motion for directed verdict.

4. Wills ⇐163(2).

Proof showing confidential relation between testator and beneficiary and that beneficiary actively participated in procuring execution of will raises presumption of undue influence.

5. Evidence ⇐591.

Contestant calling proponent of will as witness under statute could rely on his favorable testimony, but was not bound by his adverse testimony (Code Civ. Proc. § 2055).

6. Wills ⇐324(3).

Whether will was result of undue influence on part of sole beneficiary who stood in confidential relationship to testator and who actively participated in procuring execution of will *held* for jury.

In Bank.

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Application by Abner B. Baker for the probate of the will of William Lances, also known as Billy Lances, deceased. From an order admitting the will to probate, John Brown, contestant, appeals.

Reversed.

For prior opinion, see 6 P.(2d) 572.

C. A. Degnan, of Fresno, Vincent S. Brown, of San Francisco, and S. P. Galvin, of Merced, for appellant.

H. H. Carleton, of Mariposa, Andrew R. Schottky, of Merced, and Marshall Nuckolls, of San Francisco, for respondent.

SHENK, J.

This is an appeal from an order admitting to probate the will of William Lances, deceased. The order was made following a contest of the will, before a jury. After the presentation of all of the evidence, the court directed the jury to answer special interrogatories favorably to the proponent of the will and dismissed the contest.

William Lances was an unmarried, illiterate, but rather shrewd American Indian, and at the time of his death on April 1, 1930, was of the age of about 50 years. He had no children and lived on real property owned by him in Mariposa county westerly from the entrance to Yosemite valley. A portion of his land was leased to the Associated Oil Company under a twenty-year contract at an annual rental of $1,000. He left an estate consisting of land, a few hundred dollars in cash, and other personal property, all of which is said to be of the value of approximately $25,000. After his death, the respondent, Abner B. Baker, filed for probate a will purporting to be the will of the decedent, and in which Baker was named the sole beneficiary, and executor without bond. John Brown, claiming to be the uncle of the decedent, filed a contest of and objections to Baker's petition for the probate of the will on the grounds that the will was not executed in the manner and form required by law and that the execution of said will was the result of undue influence on the part of the proponent Baker. The question involved on the appeal is as to the correctness of the action of the trial court in so directing the jury.

[1] In determining whether, in a proceeding to contest a will, the evidence produced by the contestant is sufficient to require the submission of the case to the jury, the same rules apply as in civil cases. Estate of Arnold, 147 Cal. 583, 82 P. 252; Estate of Caspar, 172 Cal. 147, 155 P. 631.

[2, 3] It has become the established law of this state that the power of the court to direct a verdict is absolutely the same as the power of the court to grant a nonsuit. A nonsuit or a directed verdict may be granted "only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given." Newson v. Hawley, 205 Cal. 188, 270 P. 364; Perera v. Panama-Pacific Int. Exp. Co., 179 Cal. 63, 175 P. 454; Estate of Sharon, 179 Cal. 447, 177 P. 283; Estate of Gallo, 61 Cal. App. 163, 175, 214 P. 496; 24 Cal. Jur. pp. 912–918.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Unless it can be said as a matter of law that, when so considered, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury. Umsted v. Scofield Eng. Const. Co., 203 Cal. 224, 228, 263 P. 799. A motion for a directed verdict "is in the nature of a demurrer to the evidence, and is governed by practically the same rules, and concedes as true the evidence on behalf of the adverse party, with all fair and reasonable inferences to be deduced therefrom. * * * Even though a court might be justified in granting a new trial, it would not be justified in directing a verdict on the same evidence. * * * The power of a court in passing upon such motions is strictly limited. It has no power to weigh the evidence, but is bound to view it in the most favorable light in support of the verdict. The right of a court to direct a verdict is the same as the right of a court to grant a nonsuit. This can be done only when, disregarding conflicting evidence and giving plaintiffs' evidence all the value to which it is legally entitled, including every legitimate inference which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such verdict was given. * * * If, in the opinion of the court, the evidence is unreliable, it is its duty to grant a new trial, and it may grant such a trial even where there is substantial evidence to sustain the verdict, if it believes that the evidence preponderates against the verdict." Hunt v. United Bank & Trust Company of California, 210 Cal. 108, 291 P. 184, 188. In other words, the function of the trial court on a motion for a directed verdict is analogous to and practically the same as that of a reviewing court in determining, on appeal, whether there is evidence in the record of sufficient substance to support a verdict. Although the trial court may weigh the evidence and judge of the credibility of the witnesses on a motion for a new trial, it may not do so on a motion for a directed verdict.

Considering the evidence in the light of the rules of law to be applied, the record discloses the following facts in support of the contestant's cause: The proponent, Abner B. Baker, is an attorney at law, but during all of the times involved in this controversy was not engaged in active practice. He has at all times, however, maintained his status as a member of the State Bar on the inactive list. He and the decedent owned and occupied neighboring properties and had been on friendly terms for some twenty years. The decedent was accustomed to consult with the proponent on business and legal matters from time to time. The proponent neither charged nor received from the decedent any attorney fees for legal advice, but the decedent assisted the proponent in performing work about the latter's place at various times and at "hog killing" time. A few days prior to December 19, 1929, the date on which the purported will was executed, the proponent had occasion to go from his home to San Francisco to purchase and take delivery of an automobile. He requested the decedent to convey him in the decedent's car to Oakland for that purpose. This was done, and on the journey together from Mariposa county to Oakland the two talked about the execution of a will by the decedent in which the proponent was to be the sole beneficiary, and it was agreed at the decedent's request that the will should be prepared by the proponent and that it should be signed by the decedent upon their return to their homes. The decedent returned in his own car some time in advance of the proponent, who arrived at his home about noon on December 19, 1929. After his noonday meal, the proponent obtained a pen, ink, and paper, and, in the absence of the decedent, and in his own handwriting, indited the will in question on a table in his own home. At about 2 o'clock in the afternoon of that day the decedent appeared at the proponent's home, and in the presence of the two subscribing witnesses signed the document which was complete in form and which named the proponent as sole beneficiary thereunder and as executor without bond. The subscribing witnesses signed as such in the presence of the decedent and in the presence of each other in all respects as required by law.

The foregoing evidence was uncontradicted. Under this state of the evidence there was no basis for the claim, alleged in the document of contest, that the will was not executed in the manner and form prescribed by law. But we are of the opinion that the showing thus made was sufficient as against a motion for a nonsuit with reference to the other ground of contest. It was therefore also sufficient as against the motion for a directed verdict.

We are satisfied that, at the time the decedent consulted with and requested the proponent to prepare the will and thereafter at the time of the execution of the will under the proponent's direction, a confidential relation existed between the two men. There can be no question but that at those times the decedent reposed special confidence in the proponent as one learned in the law. In the preparation and in directing the execution of the will the proponent displayed expert knowledge in the undertaking. In performing it, the proponent, as an attor-

ney at law, assumed a duty to the decedent which he was bound to discharge in good conscience and to the best of his ability whatever might be the terms of the will. In that behalf he was not a scrivener, as he contends, merely writing out the document at the dictation of the decedent. It was not essential, we think, that the proponent should have received a cash or other specific consideration for his service in that respect in order to charge him with the relationship of trust and confidence in the transaction. He assumed the position and must be deemed bound by it.

There is next brought home to the proponent an uncontradicted showing that he unduly profited by the terms of the will. He was to receive the whole of the estate, representing a very substantial amount and to the prejudice of the heirs of the decedent. In this respect the case is distinguishable from Estate of Morey, 147 Cal. 495, 82 P. 57, and Estate of Shay, 196 Cal. 355, 237 P. 1079, where it was held that under the wills there in question it could not be said that the beneficiaries named in the wills would unduly profit thereunder.

[4] In addition to the foregoing there was in the present case active participation on the part of the proponent in the execution of the will. He drew the will, prepared it in his own handwriting, and presented it to the decedent and the subscribing witnesses for execution. It has been said that the drawing of the will by a beneficiary thereunder who was at the time the attorney for the testator, coupled with the latter's age, suffering, and disease, raised the implication or presumption that the will was procured by the undue influence of the attorney. Estate of Morey, 147 Cal. 495, 508, 82 P. 57. Here we have no sufficient showing that the decedent was mentally weak or incapable of performing the testamentary act, but we have the active participation on the part of the beneficiary in the execution of the will. Where one who unduly profits by a will sustains a confidential relationship to the testator and actively participates in procuring the execution of the will, the burden is upon him to show that the will was not induced by his undue influence. Estate of Shay, 196 Cal. 355, 363, 237 P. 1079; Estate of Gallo, 61 Cal. App. 163, 214 P. 496. This is but another way of saying that upon the concurrence of the elements just mentioned, a presumption of undue influence has arisen which must be overcome by the proponent. Whether it was overcome was a question, in the first instance, for the jury to determine.

[5, 6] The proponent was called as a witness by the contestant under section 2055 of the Code of Civil Procedure. When so called, the contestant was entitled to rely on his evidence which was favorable to the contestant's claim and was not bound by any adverse testimony which the witness might give. Smellie v. Southern Pacific Company, 212 Cal. 540, 299 P. 529. The proponent testified that several months before the will was signed the decedent expressed a desire to leave all of his property to the proponent's minor daughter, and that he (the proponent) told the decedent "to forget it." He further testified that a day or so before the will was signed the decedent told him that he desired to leave all of his property to him; that after the will was signed and duly witnessed it was handed to the decedent with the suggestion by the proponent that he place the document in the hands of another lawyer for safe-keeping; that upon the death of the decedent the proponent visited the dwelling house of the decedent and found the will in a suitcase in one of the rooms. The proponent's counsel stresses this evidence as showing that the decedent had the will in his possession for many months after it was signed, and invokes the language used in Estate of Morey, 147 Cal. 495, 82 P. 57, to the effect that, if any undue influence was exercised by the proponent in the execution of the will, the decedent had it within his power during the intervening period to destroy the same. But the contestant was not bound by this adverse testimony. The credibility of the proponent was so impeached by witnesses for the contestant in rebuttal as to justify the jury in disregarding his testimony. The evidence on this vital point was such that it became a question of fact for the jury to determine whether the proponent was telling the truth. The testimony of the subscribing witnesses as to the circumstances occurring at the time the decedent signed the will and they subscribed as witnesses thereto was undoubtedly entitled to credit. One of them, an old acquaintance of both the proponent and the decedent, testified that in the morning of December 19, 1929, the decedent told him he was having Mr. Baker prepare some papers for him and he wanted the witness to look them over, tell him if they were all right, sign as a witness, and be at the proponent's home at about 2 o'clock in the afternoon; that at the appointed time the witnesses appeared as suggested; that the proponent then read over the will to the decedent, after which the decedent said that it was all right, "that is the way I want it"; that, when the will was signed, the decedent was of sound and disposing mind; and that there was nothing in his appearance that was unusual or out of the ordinary. The other subscribing witness testified to the same effect. This testimony apparently had great weight with the trial court, but, as above indicated, the contestant was not bound by it, and it could not be considered as deter-

minative by the trial court in the face of substantial evidence in favor of the contestant's case. Under these circumstances we conclude that the issue of undue influence was one for the determination of the jury.

The order is reversed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; TYLER, Justice pro tem.

216 Cal. 506

JOHNSTON v. COURTIAL et al.

S. F. 14365.

Supreme Court of California.

Oct. 10, 1932.

As Modified Oct. 21, 1932.

1. Evidence ⇐419(9).

Extrinsic evidence respecting first year's rental on oil lease, differing from consideration mentioned in written lease, *held* admissible, since true consideration may be shown by extrinsic evidence (Code Civ. Proc. § 1856, and § 1962, subd. 2).

2. Appeal and error ⇐1047(2).

That no ruling was made on appellant's objection to evidence and motion to strike *held* not to require reversal, where evidence was admissible and considered by court.

Inadvertent failure of court to make a ruling on admissibility of such evidence did not require reversal, since, if court had ruled at time, or later, on objection and motion, its rulings could properly have been only one way; that is, in favor of appellant's adversary.

3. Mines and minerals ⇐78(7).

Evidence supported finding that drilling for oil on leased premises was not commenced within specified time, nor rental paid; hence lease was forfeited.

4. Quieting title ⇐44(4).

In quiet title action, plaintiff's title, acquired by distribution decree in decedent's estate and admitted in answer, *held* sufficiently established.

In Bank.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Annie T. Johnston, also known as Annie Johnston, against Alexis W. Courtial, A. M. Gilstrap, and others. From a judgment in favor of plaintiff, defendant Gilstrap appeals.

Affirmed.

Jo Lawrence and Richard Liebman, both of Oakland, and M. H. Peterson, of San Francisco (F. P. Harrington, of Los Angeles, of counsel), for appellant.

Donahue, Hynes & Hamlin, of Oakland, for respondent.

SHENK, J.

Appeal from a judgment in favor of the plaintiff in an action to quiet title.

On the 23d of September, 1929, the plaintiff was the owner of 2,743 acres of land in Alameda county. On that day, as lessor, she executed a lease of the premises to the defendant Alexis W. Courtial, and Walter S. Kingsbury as lessees. The lease recites "that the lessor, for and in consideration of ten dollars to her in hand paid, the receipt whereof is hereby acknowledged, leases to the lessees" the land which is particularly described, and further provides in respects pertinent to this controversy that "this lease is for a period of one year from the date hereof and no longer unless the further conditions as to extensions of time by additional rental payments have been complied with by said lessees, or the drilling for oil has been commenced and continued within the first one year period in good faith, and all other conditions and covenants of this lease are fully complied with by said lessees, and said lease shall be on the following terms and conditions * * * (3) the lessees agree to start the drilling of a well for oil upon the premises herein leased within one (1) year from the date of this agreement, and to faithfully continue the work of drilling said well, after commencing the same, with due diligence. * * * If said lessees have not complied with paragraph three (3) within the first year of this lease, viz.: if said lessees have not commenced the drilling of a well for oil upon the premises herein leased within one (1) year from the date of this agreement, and shall not have continued the work of drilling said well after commencing the same, with due diligence * * * then * * * said lessees may extend the period of commencing the first well for an additional period of four (4) years by paying to the lessor, in advance, upon the fifteenth day of September, 1930, and upon the fifteenth day of September of each year thereafter until said four (4) years shall have elapsed, a rental of $2743 per annum, which shall be rental paid in advance for each year of said four (4) year period, which said rental shall cease when drilling operations are commenced in good faith and continued with due diligence in good faith as provided in paragraph three (3) * * * (20) Any breach of any of the terms or conditions of said lease by the lessees or their assigns before discovery of oil upon said premises * * * in paying quantities * * * or if the said lessees or their assigns shall fail to pay the

rent of $2743 per annum as herein provided when due, shall absolutely, without notice, terminate, annul, set aside and forfeit this lease, and said lessees or their assigns shall have no further right or interest of any kind whatsoever in and to said premises, and all of said premises shall immediately, without notice, revert to said lessor, and all interest of said lessees or their assigns shall be forfeited, annulled and said lessees hereby absolutely agree without any qualification to said forfeiture and waive all notice in event of any breach or failure to pay rent as aforesaid."

Under date of October 17, 1929, Courtial and Kingsbury, the lessees, assigned said lease to George H. Shank, George K. Kolls, and John W. Luter. On January 31, 1930, Shank, Kolls, and Luter assigned said lease to the Alameda Petroleum Company, a corporation whose articles of incorporation were filed in this state by Courtial, Shank, and W. A. Edwards, as incorporators. On May 28, 1930, Kingsbury and Shank again assigned all of their right, title, and interest in and to said lease to the defendant A. M. Gilstrap.

Concluding that neither the lessees nor their assigns had started the drilling of a well for oil upon the premises prior to September 29, 1930, and that the rental of $2,743, due on September 15, 1930, had not been paid, the plaintiff commenced this action on October 27, 1930, to quiet her title as against the recorded lease and the assignments thereof. The defendants named were Alexis W. Courtial, A. M. Gilstrap, Alameda Petroleum Company, a corporation, and numerous fictitious defendants. Courtial and the corporation defendant defaulted. Gilstrap answered, admitting his alleged claim of interest in said lease, affirmatively alleging an interest therein by the assignment to him from Kingsbury on May 28, 1930, and alleging full performance by him of the terms of the lease. The action was dismissed as to the fictitious defendants.

The court found that the drilling for oil on said premises had not been commenced within the specified time and that the rental required in order to extend the lease beyond September 15, 1930, had not been paid. Judgment was entered accordingly. Gilstrap alone appealed, and he will be referred to as the defendant.

[1-3] It appears without contradiction in the evidence that the defendant Courtial was the one who negotiated with the plaintiff for the execution of said lease; that the plaintiff at all times prior to the execution of the lease demanded a rental of $1 per acre per annum until oil in paying quantities was discovered; that the negotiations for the lease were concluded on or about July 30, 1929, on which day Courtial paid to the plaintiff the sum of $1,000 as a deposit on a lease to be prepared by William H. Donahue, one of the plaintiff's attorneys; that thereafter and on or before the execution of the lease the plaintiff was paid the further sum of $1,743. The plaintiff introduced evidence which, if admissible and properly in the record, established beyond dispute that the $10 recited in the lease as having been paid upon the execution of the lease on account of the first year's rental, was not paid in that specific amount; that the first year's rental was at the rate of $1 per acre and the whole of the sum of $2,743 was paid to the plaintiff on or before the execution of the lease as and for the rental for the one year ending September 23, 1930. The defendant objected to this evidence on the ground that it tended to vary the terms of the written contract which recited the sum of $10 as the consideration for the first year's rental, relying upon section 1856 of the Code of Civil Procedure and authorities to the same effect, viz. that, when the terms of a contract are reduced to writing, it is to be considered as containing all of the terms of the agreement, except in the cases excluded by the section itself, none of which is here present. The plaintiff relies on subdivision 2 of section 1962 of the same Code as supplying a further exception to the general rule urged by the defendant, viz. that the truth of the recital in a written instrument of the consideration thereof is not conclusive, but that the true consideration may be shown by extrinsic evidence. The position of the plaintiff in this respect is well supported, both by the Code section and by the authorities. Royer v. Kelley, 174 Cal. 70, 161 P. 1148; 6 Cal. Jur. p. 197 et seq., and cases therein cited. The plaintiff's evidence as to the true consideration for the first year's rental was therefore admissible, and is properly in the record. It must be held that the rental required on September 15, 1930, was not, under the evidence, paid within time or at all, and the failure of those interested in the lease to comply with its terms in this respect terminated their rights thereunder unless it should be said that the further finding of the court that the lessees, their successors and assigns, did not "commence the drilling of a well for oil upon the premises" within one year from the date of the lease is without evidentiary support. The evidence on this point was from several sources. The plaintiff testified that she inspected the premises on September 30, 1930. She saw a boy on the place and no one else and nothing on the property indicating any activity under the lease except some old lumber in disorder and some tools on the ground. Her brother, Luke B. Carr, also inspected the premises in October, and all he saw was some old twisted iron, old lumber, some wooden wheels, and a little tank. By the testimony of other witnesses, including the defendant himself, it is conclusively established that no drilling for oil was commenced prior to September 23, 1930, nor in

fact prior to the trial. We conclude that the finding was amply supported by the evidence.

During the course of the trial the plaintiff contended that the defendant obtained nothing by the assignment to him from Kingsbury and Shank on May 28, 1930. There is much force in the contention. Kingsbury had assigned to Shank, Kolls, and Luter on October 17, 1929. These three had joined in the assignment to the Alameda Petroleum Company on January 31, 1930. These assignments, if valid, vested in the corporation the title to the lease, and Kingsbury and Shank had nothing to assign in the following month of May. The assignment to the corporation has not, we think, been successfully impeached, but we need not base an affirmance on that ground, for the reason that the findings and judgment are otherwise supported.

[4] It is further insisted by the defendant that in this class of actions the plaintiff must prevail, if at all, on the strength of her own title and not on the weakness of the defendant's title, and that in this case she failed to establish title in herself. It sufficiently appears that the plaintiff acquired her interest in said real property by decree of distribution in the matter of the estate of George Johnston, deceased. Furthermore, the plaintiff's title, alleged in the complaint, is admitted in the defendant's answer.

We find no error in the record. The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; TYLER, Justice pro tem.; SEAWELL, J.; LANGDON, J.

125 Cal.App. 652

PEOPLE v. ACHAL.

Cr. 1199.

District Court of Appeal, Third District, California.

Sept. 6, 1932.

1. Criminal law ⇐865(1).

Instruction in murder prosecution, where jury convicted of manslaughter, urging jury to reach decision and to avoid new trial, *held* not to have forced compromise verdict.

Such instruction was to effect that jurors could have evidence re-read, and though they had been deliberating for some time, it was extremely important to both the people and the defendant that the trouble and expense and delay of a new trial be avoided if it could be done fairly under the evidence, with justice to both sides.

2. Homicide ⇐189.

Where, in murder prosecution, enmity between decedent and defendant claiming homicide was in self-defense, was shown, defendant's testimony showing reason for enmity *held* properly rejected as immaterial.

Facts disclosed that decedent and defendant were both members of the Hindu race, that defendant testified he had refused to assist decedent, alleged to be a spy, in securing the deportation of a third Hindu, and instead threatened to expose such matters to a Hindu religious organization; that such threat caused decedent's attempted attack; and that the excluded testimony went to show the purpose of the Hindu organization and the scope of its activities.

3. Homicide ⇐339.

Striking out testimony in murder prosecution showing decedent's occupation was that of blackmailer and stool pigeon *held* not prejudicial.

4. Witnesses ⇐372(2).

Refusing cross-examination of state's witness, in murder prosecution, regarding whether named individual told witness how to testify, *held* not error.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

S. Achal, also known as Bhagat Singh, was convicted of manslaughter, and he appeals.

Affirmed.

Ray Manwell and W. P. Rich, both of Marysville, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PRESTON delivered the opinion of the court.

Defendant was charged with the crime of murder, and upon a trial, following his plea of not guilty, a jury returned a verdict finding the said defendant guilty of the crime of manslaughter. A motion for a new trial was denied and judgment rendered directing the imprisonment of the defendant for the term provided by law. Defendant appeals from the said judgment and from the order denying a new trial.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

We find it unnecessary to detail the facts of the admitted homicide, though in discussing the grounds urged on the appeal, such features of the case as will serve to throw light upon the arguments made will be detailed.

The points urged for a reversal total four in number.

[1] First, appellant contends that the trial judge forced a compromise verdict by an instruction given the jury. The case had been given to the jury at about 10 o'clock in the morning, and about 9 o'clock p. m. of the same day the jury requested the reading of certain testimony. After this testimony was read the jury again retired, and about 9:30 a. m. of the next day the jury again returned into court and reported little likelihood of an agreement. At this time the court below gave the instruction or suggestion complained of. The trial judge said: "There has been an agreement reached by juries after having been out a longer period than you have been out. The facts of the case are all before you. It has been quite a protracted trial, and the essential features of it have been covered by many different witnesses. The evidence is here available for you if you desire to hear any of it re-read, and it appears to me you ought to be able to reach an agreement on due consideration. There is no desire on the part of the court to punish the jury nor influence you in any way in any prolonged session. It is extremely important that the case be determined. You haven't been out twenty-four hours yet, and this is a murder case, the highest type of case known to the law. It is both important to The People and the defendant that the trouble and expense and delay of a new trial be avoided, if it can be done fairly under the evidence, with justice to both sides." It is the concluding portion to which appellant most strenuously objects.

We find no merit in the point. Appellant cites People v. Miles, 143 Cal. 636, 77 P. 666, 669. A careful reading of the opinion in the cited case supports the record as being free from error. We might quote, however, the words of Judge McFarland in affirming the judgment, as follows: "I desire to say further that while upon the record in this case it appears that appellants were not prejudiced by the guarded expressions of the court to the jury on the subject of their efforts to agree, still such expressions are hazardous, and it would be better for the court to say nothing on that subject. There might be cases where such remarks would be construed by the jury as urging an agreement to convict." As said in Frandsen v. C., R. I. Co., 36 Iowa, 372, what the court said was abundantly true and practical, and ought to have occurred to the jury without the necessity of having it said to them by the court. Quoting further from People v. Miles, supra: "The point is that it was proper for the court to urge the importance of reaching a verdict, and, as it intimated no opinion of its own or suggested how the verdict should go, the defendants were not prejudiced."

[2] The second contention is as follows: The court erred in restricting a witness, M. S. Sigera, from testifying to very material and explanatory matters in behalf of the defendant. The parties to the fatal affray, defendant and decedent, were of the Hindu race. The defense was that of self-defense, based on the claim that decedent was the aggressor, and that defendant himself, without fault, was compelled, in the necessary defense of his person, to slay his assailant. It developed that there exists several factions among the Hindus, and that there are amongst them certain individuals marked as spies for the British government, whose alleged sphere is to check up the propaganda circulated throughout this country in aid of interests or organizations opposed to the British rule in India. It seems that the decedent was accused of being one of these agents or spies, and had attempted to induce the defendant to aid him in some way in turning in or securing the deportation of a third Hindu. The defendant, refusing to become a party to the affair, alleged that he was threatened with bodily harm by the decedent, and that he (defendant) had told decedent that the matter would be brought to the attention of the central Hindu organization in Stockton, which organization was known as and called the "Sikh Temple." It was in the record that this organization was a religious and social organization. The defendant's testimony was to the effect that decedent was extremely fearful lest the whole affair be "aired out" before the organization, and that defendant's threat to do so was the cause or motive of decedent's attack. Defendant sought to show, by the witness referred to, the purpose of the organization of the "Sikh Temple," and the scope of its activities. The trial court sustained objections to this line of testimony. The reasons assigned by the trial court were as follows: "We can't go into the details of the quarrel or disagreement between defendant and the deceased. The material fact is that they did have some quarrel. We have the defendant's account of what the decedent said to him and the matters that led up to the final quarrels or culmination of the dispute." And in the same discussion the learned trial judge very aptly pointed out that if two men disagreed about the policies of the dominant political parties, it would be hardly material to try out the merits of the platform of the respective parties. We agree with the conclusions of the trial judge. The material fact of enmity or ill will being shown, the reason for that feeling was immaterial, particularly in so far as it might affect the motives of the decedent.

If decedent was the aggressor, and had unlawfully attacked defendant, the latter's right of self-defense was in no wise strengthened by the fact that decedent's malice was ill founded; and surely the right of self-defense would or could not have been abridged through the fact of decedent's ill will having been well earned by defendant.

[3] The third ground of appeal is as follows: "The court erred in striking out certain testimony of one Hindu Singh, in reference to the occupation of the deceased among his countrymen prior to the date of the homicide." The testimony stricken out may be detailed. The witness had stated that he knew decedent for four or five years, and was then asked if he knew his occupation, to which latter question the witness answered in the affirmative. Then being asked the occupation of decedent, the witness replied: "Blackmail and stool pigeon." This is the evidence that was stricken. We deem it useless to argue this out with appellant. Little or no authority is cited. It may suffice to say that there is no open season on blackmailers or stool pigeons, and the terms are too general to mark traits of character, particularly those traits that are involved in a proceeding as the one before us. If the decedent had pursued his alleged occupation along lines contacting directly with defendant, there probably would have been no exclusion of evidence disclosing the specific acts complained of. Without further discussion, we can find no prejudicial error in the ruling.

[4] The last ground urged is stated as follows: "The court erred in depriving counsel for defendant, in cross-examining one Kishan Singh, a witness for The People, the right to determine the character of his testimony as hearsay, and as an interested witness." The witness was asked if he was a good friend of one Sur Singh, to which he replied that he was. He was then asked if Sur Singh told him what to say. To this latter question The People interposed an objection which was sustained. The point merits little discussion. Nothing is before us to show what interest, if any, Sur Singh might have in the case, and we are not even informed if such a person as Sur Singh has any real existence. No evidence was offered to show Sur Singh's connection with the witness. It would have done no harm to allow the question, merely as a preliminary question, but if the facts as testified by the witness were true, it would make little difference who, if anyone, told him to so testify. The harm in approaching or coaching a witness lies in the intent to put forth false testimony. If the witness had approached one of his countrymen and detailed his observations, there would be no wrong in the latter advising the witness to go into court and testify.

In conclusion we may adapt the old saying that "faint praise but damns" to fit the instant case, with the change that "faint criticism but commends."

After a long, hard-fought trial, wherein defendant had the aid of two very able and experienced counsel, it surely reflects upon the fairness of the proceeding when the said counsel can find nothing prejudicial to the rights of their client other than the claims urged. The trial judge, upon the return of the verdict, expressed a mild surprise that the verdict did not carry the extreme penalty, and the record is convincing to the end that this surprise was not entirely feigned.

The order denying defendant a new trial is affirmed. The judgment is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

126 Cal.App. 535

ADAMS v. POLICY HOLDERS' LIFE INS. ASS'N et al.

Civ. 4627.

District Court of Appeal, Third District, California.

Sept. 29, 1932.

1. Insurance ⇐291(3).

Life insurance applicant's answer that she knew of no disease in her system could not invalidate policy, unless applicant knew she had disease.

2. Insurance ⇐256(2).

Where applicant makes positive statement regarding material matters, whether misrepresentation was intentional, accidental, or honest, is immaterial.

3. Insurance ⇐253.

Where applicant's answers are limited by expression clearly showing intention to qualify answers, effect will be given to such extent.

4. Insurance ⇐665(3).

Evidence supported trial court's finding that applicant was in good health when applying for life insurance.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by Olin Harvey Adams against the Policy Holders' Life Insurance Association and others, dismissed as to all defendants ex-

cept named defendant. Judgment for plaintiff, and named defendant appeals.

Affirmed.

Hugh Martin Young, of Los Angeles, for appellant.

Roy B. Maxey, of Modesto, for respondent.

JAMISON, Justice pro tem., delivered the opinion of the court.

On the 10th day of August, 1929, the defendant insurance association issued its policy of life insurance in the sum of $1,500 to Annie Perkins, in which policy the plaintiff was named as beneficiary to the amount of $750. Annie Perkins died on June 6, 1930, and thereupon the said association refusing to pay to plaintiff the amount specified in said policy, to wit, the said sum of $750, this action was commenced.

The action was dismissed as to all of the defendants except the said association and judgment was rendered in favor of plaintiff and against it, and from this judgment the association has appealed.

Appellant argues as a ground for reversal that the said Annie Perkins in her application for membership in said association made certain false statements regarding her health and physical condition and that these statements were warranties and, being untrue, they rendered the policy void; the said alleged false statements being as follows:

"Q. Have you knowledge that any physical or mental disease exists in your system? A. No.

"Q. Are you now in good health? A. Yes."

She further stated in said application as follows: "I am in good health and so far as I know have no disease or other condition which would prevent me from obtaining life insurance. I agree to the terms, conditions and provisions of the certificate of membership that this application become a part of such certificate and that any false statement, misrepresentation or concealment of any material fact shall make void my membership."

The policy also provides that it shall be void if the insured has made any false statement, misrepresentation, or concealment of any material fact in her application.

Dr. J. K. Ransom, a physician and surgeon, who had practiced as such for many years, and who represented the association in the medical examination of applicants for membership, testified that he examined the said Annie Perkins for admission as a member of the association and found nothing wrong with her physical condition and passed her as a first-class subject for membership; that there were no indications from the examination he made that she had myocarditis nor any symptoms of that disease.

Three witnesses testified that they were intimate acquaintances and neighbors of Annie Perkins; that she was a dressmaker by occupation; that they had known her for from seven to ten years prior to her death and that during all of that time her health was good; that she had never complained of any illness prior to March, 1930.

Respondent testified that he had boarded at her home from 1923 until March, 1930; that during all of that time her health was good; that she never had any illness nor occasion to call in a physician.

Dr. Fred R. De Lappe, a witness for appellant, testified that he first met Annie Perkins in April, 1930. She was, at that time, a patient in the county hospital; that an examination of said patient disclosed that she was suffering from chronic myocarditis and marked oedema of the legs and thighs; that from said examination he formed the opinion that the said patient had been ill from myocarditis for over a year, and he was also of the opinion that the said patient knew that she was suffering from this trouble during the year prior to his said examination. He further stated that this disease is apparent, that it generally follows some other type of infection, and the patient usually knows when it begins.

[1-3] If we assume that the representation of the assured in her application for membership that to her knowledge she had no disease at the date of said application was a warranty, then before we can determine that the policy is void for that reason it must appear that she knew that she was suffering from disease. Where an applicant makes a positive statement as to a material matter, it is immaterial whether the misrepresentation was intentional or accidental, or honestly made. O'Connor v. Grand Lodge A. O. U. W., 146 Cal. 484, 489, 80 P. 688; Bacon on Benefit Societies, § 210. But where the answers of the applicant to the questions in the application are limited or qualified, by any particular or general expression, clearly showing an intention to so limit or qualify his statements, effect will be given to such extent. Bacon on Benefit Societies, § 205a; Northwestern Mutual L. Insurance Co. v. Gridley, 100 U. S. 614, 25 L. Ed. 746.

It was held in this last-named case that where the question was whether certain relatives of the applicant had been afflicted with any hereditary disease and he replied, "Not to my knowledge," that the affirmation was narrowed down to what the applicant personally knew touching the subject.

In the instant case the answer to the question, "Have you knowledge that any physical or mental disease exists in your system?" was, "No," and she further qualified this statement by stating in her application that she was in good health as far as she knew.

Is it a reasonable supposition that where Dr. Ransom, a physician and surgeon of wide experience, in making the examination of Annie Perkins for the said membership, and whose duty it was to ascertain whether or not she was suffering from any disease, could find even no suspicion of anything of the kind, that under these circumstances the said Annie Perkins would have knowledge of the existence of disease?

If myocarditis was so apparent in the system of Annie Perkins at the date of said examination, as testified by Dr. De Lappe, that she must have been aware of it, then in that event it would seem that Dr. Ransom would not have failed to discover it at the time he made his examination of her.

[4] We are also of the opinion that there being a conflict in the evidence as to whether or not Annie Perkins was in good health and free from disease at the time she made her said application for membership, and there being substantial evidence to support the finding of the trial court that she was in good health and free from disease at that date, the judgment must be affirmed, and it is so ordered.

We concur: R. L. THOMPSON, J.; PLUMMER, Acting P. J.

126 Cal.App. 337

GINSBERG et al. v. FARAONE et al.

Civ. 7784.

District Court of Appeal, First District, Division 1, California.

Sept. 27, 1932.

Rehearing Denied Oct. 27, 1932.

1. Pleading ⇐248(1).

Complainant cannot abandon entire case made by original complaint and make new case by amendment.

2. Appeal and error ⇐880(1).

Defendants named in original complaint could not object to joinder of additional defendants in amended complaint on ground amendment was filed beyond time for instituting mechanic's lien suit (Code Civ. Proc. § 1190).

3. Pleading ⇐236(1).

Allowance of amendment is discretionary, but great liberality should be permitted.

4. Limitation of actions ⇐127(9).

Where complaint in mechanic's lien foreclosure suit alleged contract was made with owners, amended complaint alleging contract was made with contractors as owner's agents *held* not barred by limitations, since not changing cause of action (Code Civ. Proc. § 1190).

There was no change in the cause of action, since in both the original and the amended complaint it was sought to foreclose the identical lien for the identical work, labor, and materials arising out of the identical transaction and covering the same property, and it was therefore clear that the cause of action set up in the original and that set up in the amended complaint was the same obligation sought to be enforced.

5. Limitation of actions ⇐127(9).

Where cause of action was not changed by amendment in suit to foreclose mechanic's lien, time to which statute of limitations runs *held* filing of original complaint (Code Civ. Proc. § 1190).

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by H. Ginsberg and S. Ginsberg, copartners doing business under the name and style of the Ginsberg Tile Company, against Salvatore Faraone and another. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Anthony S. Devoto, of San Francisco, for appellants.

I. M. Peckham, of San Francisco, for respondents.

LANDIS, Justice pro tem.

The action as originally commenced on May 25, 1926, was entitled "Ginsberg Tile Company, a copartnership, against Salvatore Faraone and Jennie Faraone, his wife," alleging that certain work had been done by the plaintiff upon the improved property of the defendants under an agreement between them whereby plaintiff was to be paid $593.75 for its work, which amount was unpaid, and that a claim of lien had been filed for record on February 24, 1926, with a prayer for judgment for said sum of $593.75, and for a foreclosure of the lien. There was no allegation in the complaint respecting the copartnership named in the caption, or showing who were its constituent members.

Defendants demurred upon the sole ground that plaintiff had no legal capacity to sue, and moved to dismiss upon the same ground. On July 17, 1926, and before the demurrer and motion were heard, an amended complaint was filed in the name of the same plaintiff and with two personal defendants, G. M. Sourich and T. A. Sourich, and four fictitious defendants added, and containing an allegation that plaintiff Ginsberg Tile Company was at all

times mentioned a copartnership composed of H. Ginsberg and S. Ginsberg, and that they had complied with the provisions of sections 2466 and 2468 of the Civil Code, and other allegations not found in the original complaint. Defendants promptly demurred to the amended complaint again upon the ground that plaintiff lacked the capacity to sue, and again moved to dismiss upon the same ground, and moved to strike the amended complaint from the files upon the ground that it changed the cause of action originally set forth. The trial court granted the motion to dismiss, but took no action upon the demurrer or motion to strike.

An appeal was taken from the order of the trial court granting the motion to dismiss. The appellate court reversed the order of the trial court granting the motion to dismiss with directions to the trial court to allow the complaint to be again amended. Ginsberg Tile Co. v. Faraone, 99 Cal. App. 381, 278 P. 866, 869.

After the going down of the remittitur, and on August 26, 1929, a second amended complaint was filed in which the name of the plaintiff was given as "H. Ginsberg and S. Ginsberg, copartners doing business under the name and style of Ginsberg Tile Company" against Salvatore Faraone, Jennie Faraone, his wife, G. M. Sourich and T. A. Sourich. Defendants Salvatore Faraone and Jennie Faraone, his wife, demurred to the second amended complaint again upon the ground of plaintiff's lack of capacity to sue, and upon the ground that plaintiff's alleged cause of action was barred by section 1190 of the Code of Civil Procedure, and again moved to dismiss upon the same ground, and upon the additional ground that the second amended complaint changed the cause of action originally set forth, not only as to parties, but also as to subject-matter, and moved to strike the second amended complaint from the files upon the same ground. The trial court overruled defendants' demurrer and denied defendants' motion to dismiss and strike.

Appellants contend that their demurrer to the second amended complaint should have been sustained without leave to amend and that their motions to dismiss and strike should have been granted, for the following reasons: (1) A copartnership acting under a fictitious name cannot sue in that name, citing section 388, Code Civ. Proc. (2) As there was no legal entity in plaintiff, there was no foundation upon which to base an amendment. (3) Inasmuch as it does not appear by affirmative allegation in the original complaint that the plaintiff, designated as "Ginsberg Tile Company, a copartnership," was represented in the persons of H. Ginsberg and S. Ginsberg, as the owners of the business transacted under that name, it was not within the power of the court to allow plaintiff to amend the title of his action by changing it from "Ginsberg Tile Company, a copartnership, Plaintiff, v. Salvatore Faraone and Jennie Faraone, his wife, Defendants", to "H. Ginsberg and S. Ginsberg, copartners doing business under the name and style of Ginsberg Tile Company, Plaintiffs." (4) The second amended complaint entirely and completely changes the cause of action originally set forth in the original complaint, both as to parties and subject-matter. The party plaintiff in the original complaint is "Ginsberg Tile Company, a copartnership," and the parties plaintiff in the second amended complaint are "H. Ginsberg and S. Ginsberg, copartners doing business under the name and style of Ginsberg Tile Company." That it is thus apparent that in the second amended complaint new plaintiffs are brought into the case. (5) The action herein is barred by section 1190 of the Code of Civil Procedure.

Respondent contends that all the points urged by appellants on the present appeal were presented to and determined by the District Court of Appeal on the former appeal.

It is clear that the points numbered 1, 2, and 3 were presented to, considered, and determined on the former appeal adversely to the contention of appellants, as will be disclosed by the following excerpts from said decision: It is there held that the statute and the authorities in this state fully warrant the conclusion at which the lower court arrived, namely, that plaintiff had no legal capacity, but it must be remembered that the designation of the plaintiff, as shown in the complaint at the time the matter was so considered and determined by the District Court of Appeal was "Ginsberg Tile Company, a copartnership," and not as now appears in the amended complaint, as amended under the direction of the said District Court of Appeal. In any event, said statement was followed by the court in effect holding that by granting the motion to dismiss, the opportunity to amend was cut off and that by demurring and moving on one ground and not on the other, the defendants waived the admitted defect and irregularity; that the defect is not absolutely fatal; that, if a cause of action exists, the complaint is amendable; that the granting of the motion to dismiss was tantamount, so far as the question of the amendment is concerned, to the sustaining of a demurrer without leave to amend; that, if the amended complaint was susceptible of amendment so as to show upon its face the real parties plaintiff, and we are satisfied it was, the case would seem to be squarely within the case of Metzger v. Vestal, 76 Cal. App. 409, 418, 244 P. 942, 945, wherein this language was used: "While the demurrers were properly sustained, * * * the plaintiffs ought to be permitted to amend in order that the case may be decided upon the merits rather than upon technical rules of pleading. 'Unless it be clear

to a trial court that a defective complaint cannot be amended so as to obviate the objections made thereto, a plaintiff desiring it should be allowed reasonable opportunity to so amend.' "

On the former appeal, the court further stated: "The motion to dismiss, the granting of which gave rise to this appeal, was made upon the ground that 'plaintiff' had no legal capacity to sue. The motion to strike out the amended complaint was upon the ground that it wholly changed the cause of action set forth in the original complaint. This latter point is discussed in the briefs, but it is not necessary to discuss it herein. Moreover, as stated above, it was not the ground of the motion to dismiss and no action was taken upon the motion to strike, by the lower court."

Therefore, as hereinbefore stated, the District Court of Appeal having reversed the order of the trial court and directed that the complaint be amended, it is obvious that, in so far as the points numbered, respectively 1, 2, and 3 are concerned, they were definitely decided on the former appeal. The decision thereon was afterwards reviewed by the appellate court under a petition for a rehearing, which was denied; and a petition to have the cause heard by the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court.

[1] With respect to point 4, dealing with the motion to strike out the amended complaint upon the ground that it wholly changed the cause of action set forth in the original complaint, and point 5, contending that the action is barred by section 1190 of the Code of Civil Procedure, appellants contend that the first and second amended complaints involving G. M. Sourich and T. A. Sourich for the first time were filed beyond the time fixed by the statute for the institution of a mechanic's lien suit, and in connection therewith we may use the words of appellants, that the test is, "Does the amended complaint introduce a wholly different cause of action?" and may adopt and quote the rule found in the case of Doolittle v. McConnell, 178 Cal. 697, 174 P. 305, 307, cited by appellants, wherein it is said, " 'A complainant (is not) at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment,' or 'to strike out the entire substance and prayer of his bill, and insert a new cause by way of amendment.' "

[2] Whatever may have been the rights of defendants G. M. Sourich and T. A. Sourich need not be considered, for the reason that, after their demurrer to the second amended complaint was overruled and their motions to strike and dismiss were denied, they failed to answer, and their default was entered, and, in so far as the appellants, the defendants Salvatore Faraone and Jennie Faraone, are concerned, their rights were not affected by the joinder of the defendants G. M. Sourich and T. A. Sourich, and they cannot now be heard to object to the joinder. Gardner v. Samuels, 116 Cal. 84, 47 P. 935, 58 Am. St. Rep. 135; Madary v. City of Fresno, 20 Cal. App. 91, 128 P. 340; Holmes v. Anderson, 90 Cal. App. 276, 265 P. 1010; Blodgett v. Trumbull, 83 Cal. App. 566, 257 P. 199; O'Connell v. Rogers, 72 Cal. App. 539, 237 P. 775; Oliver v. Staples & Pfeiffer, 67 Cal. App. 570, 227 P. 927.

In this action in the original complaint, briefly stated, plaintiff alleged that defendants Salvatore Faraone and Jennie Faraone, his wife, were the owners of certain land; that plaintiff and defendants agreed that plaintiff would do certain tile work in a house on the property, for which defendants agreed to pay the sum of $593.75; that plaintiff performed the work according to said agreement; that no part of the sum agreed upon has been paid; that a claim of lien was filed and recorded in the office of the county recorder where the land is situate; and the usual prayer for judgment for the amount, and that same be adjudged a lien against the property, and that the property be sold, etc. Although the amended complaint amplified in many respects the rather sketchy averments of the original pleading, and added allegations not found in the original complaint, the only material change was that the contract, instead of having been made directly with the defendants Salvatore Faraone and Jennie Faraone, his wife, was made with the defendants G. M. Sourich and T. A. Sourich, who were the real contractors for said work, and that the said Sourichs were acting for and on account and also as agents of the defendants Salvatore Faraone and Jennie Faraone, his wife.

[3] In both the original and the amended complaints, it was sought to foreclose the identical lien, for the identical work, labor, and materials, arising out of the identical transaction and covering the same property. In clarification of the rule that a wholly different cause of action cannot be substituted by amendment, in the case of Frost v. Witter, 132 Cal. 421, 424, 64 P. 705, 706, 84 Am. St. Rep. 53, the following rules are promulgated: " * * * That great liberality should be used by the courts in allowing amendments (Burns v. Scooffy, 98 Cal. 276, 33 P. 86, and cases cited); and that the allowance of amendments is a matter within the discretion of the courts (Coubrough v. Adams, 70 Cal. 378, 11 P. 634; Lestrade v. Barth, 17 Cal. 288). And in practice the courts have been extremely liberal,—as, e. g., in Heilbron v. Heinlen, 72 Cal. 376, 14 P. 24, where the complaint was amended so as to describe a different tract of land from that described in the original complaint; or in Walsh v. McKeen, 75 Cal. 519, 17 P. 673, where the case was changed from an action at law to a case in

equity; or in Cox v. McLaughlin, 76 Cal. 60, 18 P. 100 [9 Am. St. Rep. 164], where the change allowed was from an action on a special contract to an action on a quantum meruit; or as in Castagnino v. Balletta, 82 Cal. 256, 23 P. 127, where the change was from an action on a mechanic's lien to an action on the special contract, or in assumpsit; or in Bogart v. Crosby, 80 Cal. 195, 22 P. 84, where the principal debtors, who had been omitted from the original complaint, were brought in by amendment." See, also, Gambling v. Haight, 5 Daly (N. Y.) 152, affirmed 58 N. Y. 623; Becker v. Kenney, 15 Ga. App. 239, 82 S. E. 936; Sullivan Construction Co. v. Twin Falls A. Co., 44 Idaho, 520, 258 P. 529.

[4, 5] Applying these rules to the case at bar, it is clear that the cause of action set up in the original and that set up in the amended complaint was the same obligation sought to be enforced; that is to say, the obligation to pay the money agreed to be paid. Therefore it cannot be said that the cause of action was wholly changed. Where the cause of action is not changed, the time to which the statute of limitations runs is the filing of the original complaint. Frost v. Witter, supra, and cases therein cited.

It follows that there was no error in overruling the demurrer and denying the motion to strike and dismiss. No other points were urged for a reversal.

Judgment appealed from is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

126 Cal.App. 558

DEYOE v. DEYOE.

Civ. 977.

District Court of Appeal, Fourth District, California.

Sept. 30, 1932.

1. Divorce ⇐303(1), 309.

Court has general power to modify divorce decree as respects custody and maintenance of parties' minor child (Civ. Code, §§ 138, 139).

2. Divorce ⇐309.

Court *held* authorized to modify divorce decree by requiring husband to pay stated sums for minor child's support after he attained age of 14 (Civ. Code, §§ 138, 139).

The divorce decree expressly reserved jurisdiction to make further orders for minor's support, and included parties' written agreement that court might fix amount payable after child reached age of 14, in absence of agreement thereon by parties.

3. Divorce ⇐309.

Order modifying divorce decree by requiring husband to pay $50 monthly for son's support after he attained age of 14 *held* not abuse of discretion (Civ. Code §§ 138, 139).

There was evidence that wife owned realty worth less than $50,000, subject to $4,500 mortgage, $954.59 delinquent taxes, and $12,000 street improvement assessment, which would be partially offset by allowance of about $11,000 for property taken; that rental value thereof was $100 per month; that she earned $75 a month in small business; that husband owned home worth $6,000, land worth $2,000, and stocks and bonds worth $60,000; that his income was $4,000 a year; and that he pledged stocks and bonds to bank to secure loan of $45,000.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Ethel Wilson Deyoe against J. Wellington Deyoe. From an order modifying a divorce decree in respect to the custody and maintenance of the parties' minor child, defendant appeals.

Affirmed.

John H. Foley and John Dennison, both of Los Angeles, for appellant.

Warren L. Williams and Seymour S. Silverton, both of Los Angeles, for respondent.

BARNARD, P. J.

This is an appeal from an order modifying a judgment and decree in a divorce action in respect to the custody and maintenance of the minor child of the parties. An interlocutory decree of divorce was entered on April 22, 1924, in favor of the plaintiff herein, upon the ground of the desertion of the defendant. This decree adopted, and made a part thereof a property settlement agreement previously entered into between the parties. On May 9, 1925, a final decree was entered in which was included the following: "It is further ordered and decreed that wherein said interlocutory decree makes any provision for alimony or the custody and support of children, said provision be and the same is hereby made binding on the parties affected thereby the same as if herein set forth in full. * * *"

The interlocutory decree contained the following provisions:

"Whereas, by the terms of the said agreement the custody and care of said minor child is given to plaintiff until said child shall

reach the age of fourteen years, whereupon the said child shall elect which of its said parents, the said plaintiff or defendant, shall thereafter have his custody and care, but with the right in the meantime to the defendant, and thereafter to such of either the defendant or plaintiff as shall thereafter not have the care and custody of said minor child, to visit it and to have the said child visit him, or her.

"It is further, adjudged and decreed that no other disposition of the property of said plaintiff and defendant be hereby made, nor any other provision for the support and maintenance of the said plaintiff, or of the said minor child, but the custody, care and control of said minor child be awarded to plaintiff, subject to and pursuant to the terms of said agreement, the court, however, expressly reserving and retaining jurisdiction to make such further proper order as to it may be made to appear best for the support and maintenance, or for the custody, care and control of the said minor child."

The property settlement agreement, which is attached to the interlocutory decree, in addition to providing that certain property should be turned over to the plaintiff, provided as follows:

"And the First Party doth hereby agree with the Second Party that so long as said boy, J. Wellington Deyoe, Jr., is in the care and custody of the Second Party under and in accordance with the foregoing provisions of this agreement and until said boy has attained the age of 14 years he will pay to the Second Party for the care and maintenance of said boy the sum of $40.00 per month, said payment to be made on or before the 1st day of each calendar month, the first of said payments to be made January 1, 1923.

"And the First Party doth further agree that upon said boy attaining the age of 14 years and continuing in the care and custody of the Second Party he will pay monthly for the care and maintenance of said J. Wellington, Jr., and so long as said boy shall remain in said care and custody and require an allowance for his care and maintenance (said allowance to terminate in any case upon the death of the First Party or upon said boy attaining the age of twenty-one years, whichever event shall first happen), such monthly amount as the First Party shall decide upon. If the amount so decided upon is not satisfactory to the Second Party the amount shall be determined by the Superior Court of the proper county in a proceeding brought for that purpose and shall be determined by a consideration of the needs of the minor and the financial resources of both parents."

The defendant complied with the property settlement agreement by turning over to the plaintiff certain property, as therein agreed, and paid the agreed amount of $40 per month for the support of the minor until January 29, 1929, when, the minor having attained the age of 14 years, such monthly payments were discontinued. On March 7, 1930, an order was issued to show cause why the decree should not be modified in respect to the custody and maintenance of the minor child. After a hearing, an order was made on March 26, 1930, giving the care and custody of the minor to the plaintiff herein and requiring the defendant to pay to the plaintiff for the support and maintenance of said minor, the sum of $50 per month beginning April 1, 1930, and continuing until the further order of the court. From this order the defendant has appealed.

It is conceded that after reaching the age of 14 years this minor elected to remain in the custody of the respondent. The appellant contends that, since the complaint alleged that ample and sufficient provision had been made in the property settlement for the care, maintenance, and support of the minor child, since it was adjudged in the decree that sufficient and ample provision for such support and maintenance had been made in the property settlement agreement, and since this decree has become final, the court had no power to make the order appealed from. As stated by the appellant, the only issue presented is whether the respondent is "entitled to a further continuing allowance for the support of said minor child, where it is admitted that she still has all the property settled upon her by the appellant for the express purpose of providing for herself and the care, maintenance and support of said minor child during his minority." In effect, the contention of the appellant is that the court was without authority to make this order in the absence of a showing as to the necessity for such an order, that no such necessity here appears, since the respondent still retains the property turned over to her through the property settlement agreement, and that it is the duty of the respondent to use such property for the support of the minor after he has reached the age of 14 years. While standing upon the finality of the decree, as based upon the agreement of the parties, the appellant apparently would forget and omit that part thereof which calls, in addition to any property turned over, for a continuing monthly payment for the support of the child, and which provides that the amount thereof may be settled by the court.

[1, 2] There can be no question as to the general power of a court to make such an order as the one here involved. Evans v. Evans, 154 Cal. 644, 98 P. 1044; Lewis v. Lewis, 174 Cal. 336, 163 P. 42; Civ. Code, §§ 138 and 139. In addition, not only did the decree expressly reserve and retain jurisdiction to make such further order for the support of

the minor as might appear to be proper, but the written agreement of the parties, included in the decree, provided that the court might fix the amount to be paid in the absence of any agreement. It fully appears that the monthly payments were stopped by the appellant after the child reached the age of 14 and that this situation was not satisfactory to the respondent. The appellant had agreed to pay monthly thereafter for the care and maintenance of the minor, the amount only being left for later determination. It is obvious that the clause in the agreement to the effect that the appellant would pay for the care and maintenance of the minor so long as he should "require an allowance for his care and maintenance," related to the needs of the child and not to the ability of the mother to pay for such needs. It is argued that the respondent agreed to accept the provisions of the agreement for her support and for the support of the child as a full and complete provision for those purposes. While this is true, these provisions are not limited to the property turned over to her, but they include the appellant's agreement to pay $40 a month for the support of the minor until he reached the age of 14 years, and thereafter to pay a monthly sum for that purpose, which sum was to be later determined in accordance with the provisions of the agreement. The appellant recognized and lived up to that part of the agreement applying prior to the time the child arrived at the age of 14 years, and the remaining part of the contract is no less binding upon him. The order complained of only requires that he comply with the terms of his agreement, and adds nothing thereto.

[3] The contract provided that the amount to be paid by the appellant after the minor reached the age of 14 years should be determined by the superior court after a consideration of the needs of the minor and the financial resources of both parties. It fully appears that this was done, and much evidence appears in the record upon these matters. It is practically conceded in appellant's brief that the financial condition of the parties had not changed in the meantime, and the evidence indicates that this is a fact. There is evidence that the respondent owns certain real property in Los Angeles worth less than $50,000; that it is subject to a mortgage for $4,500, to delinquent taxes in the amount of $954.59, and to an assessment for a street improvement in the sum of about $12,000; that its rental value is $100 per month; and that she earns $75 a month through running a small business. It further appears that the street assessment referred to will be partially offset by an allowance of about $11,000 for property taken in connection therewith. It also appears that the appellant owns a home worth $6,000, land worth $2,000, stocks and bonds which in March, 1930, were of the value of $60,000, and that his income was then $4,000 a year. In addition, it appears that he has pledged his stocks and bonds to a bank to secure a loan of $45,000, although it does not appear what became of the proceeds of the loan. The amount allowed for the support and maintenance of the minor was only increased $10 a month, which could not be considered excessive in view of the natural increase in his requirements as he advanced in age. In view of all the facts shown, we are unable to hold that the court abused its discretion in arriving at the amount fixed in the order.

The order appealed from is affirmed.

We concur: MARKS, J.; MORTON, Justice pro tem.

LEVEE v. HARRIER.*

Civ. 8377.

District Court of Appeal, First District, Division 2, California.

Sept. 30, 1932.

Rehearing Denied Oct. 29, 1932. Hearing Granted by Supreme Court Nov. 28, 1932.

1. Appeal and error ⇐870(3).

Unappealed order granting change of venue could not be reviewed on appeal from final judgment.

2. Courts ⇐170.

Demurrer to complaint in action to recover less than $1,000, exclusive of interest, *held* not to present question of superior court's jurisdiction of subject-matter, where complaint did not disclose whether defendant resided in township having population of 30,000 or more (Code Civ. Proc. §§ 76, 112; Const. art. 6, § 5, as amended in 1928).

3. Appeal and error ⇐1040(2).

Plaintiff *held* not prejudiced because ruling on question of superior court's jurisdiction of subject-matter of action to recover less than $1,000, exclusive of interest, was made on demurrer instead of after answer, under circumstances (Code Civ. Proc. §§ 76, 112, 433; Const. art. 6, § 5, as amended in 1928).

Circumstances disclosed that both in trial court and in appellate court the litigation was presented, without objection, as though record showed on its face that the defendant resided in township having a population of 30,000 or more, and if the demurrer had been overruled defendant would have been entitled to plead the facts in her answer.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 19 P.2d 981.

4. Courts ⇐472(7).
Venue ⇐80.

Superior court of county to which venue of action to recover less than $1,000, exclusive of interest, was transferred, *held* without jurisdiction of subject-matter where defendant resided in township having population of 30,000 or more. (Code Civ. Proc. §§ 76, 112, 832; Const. art. 6, § 5, as amended in 1928).

Superior court was without jurisdiction of subject-matter of the action, since under Code Civ. Proc. §§ 76, 112, 832, and Const. art. 6, § 5, as amended in 1928, justices' courts have jurisdiction in judicial townships having a population of 30,000 or more in all cases at law in which the demand, exclusive of interest, amounts to $1,000 or less, and therefore such law ousted the superior court of jurisdiction under the circumstances although the county from which the venue was transferred had no township containing population of 30,000 or more.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by S. M. Levee against Jessie V. Harrier, as executrix of the last will and testament of L. G. Harrier, deceased. Judgment for defendant, and plaintiff appeals.

Affirmed.

Francis C. McInnis, of Fairfield, and Clarence N. Riggins, of Napa, for appellant.

George M. Naus, of San Francisco, for respondent.

STURTEVANT, J.

The plaintiff presented a claim to the defendant as executrix of the estate of her deceased husband. The claim was rejected and he commenced this action to collect the amount of the claim. In his complaint he inserted two counts. In the first count he alleged his claim as an open book account for moneys loaned and he pleaded as an exhibit the claim so presented. In the second count he pleaded a cause of action as for the balance due on a mutual, open, and current account; and otherwise he inserted the same allegations. The complaint was filed in the superior court of the state of California in and for the county of Solano, that being the county where the proceedings in probate were pending. The defendant was served and appeared and filed a demurrer and at the same time she filed a demand that the place of trial be changed to Alameda county. Thereafter her motion for a change of venue was granted and the action was transferred for trial to the superior court of the state of California in and for the county of Alameda. After the action had been transferred the defendant filed an amended demurrer in which she alleged, among other things, that the court had no jurisdiction of the subject of the action. The point was based on the fact that the claim presented to the executrix showed that the demand was for $975.91 principal and that the balance of the claim was for interest. The demurrer was sustained and the plaintiff declining to amend judgment was entered in favor of the defendant. From that judgment the plaintiff has appealed under section 953a, Code of Civil Procedure.

[1-4] While minor points were made it is conceded by both sides that the real point involved in the case is whether the superior court of Alameda county has jurisdiction of the subject of the action and therefore whether the order sustaining the demurrer on the ground that it had no jurisdiction is well founded in law. Prior to the amendment to section 5 of article 6 of the state Constitution, which was adopted on November 6, 1928, the jurisdiction of the superior courts, that is, courts of record, was specifically defined by the Constitution. During the same period of time the Constitution contained words to the effect that justices of the peace should have such jurisdiction as might be conferred by the Legislature, provided that such jurisdiction did not "trench upon the jurisdiction of the civil courts of record. * * *" Section 11. However, by the amendment of 1928, a radical change was enacted. Section 5 of article 6 of the state Constitution, as amended in that year, is as follows: "The superior courts shall have original jurisdiction in all civil cases and proceedings (except as in this article otherwise provided, and except, also cases and proceedings in which jurisdiction is or shall be given by law to municipal or to justices in other inferior courts). * * *" That language is repeated in section 76 of the Code of Civil Procedure. Neither in Solano county nor in Alameda county have any inferior courts been organized excepting justices' courts. Solano county has no township containing a population of thirty thousand or more. Alameda county, however, has two such townships. Section 112 of the Code of Civil Procedure provides: "The justices' courts shall have jurisdiction as follows: 1. In cities * * * and judicial townships, having a population of thirty thousand or more, said courts shall have original jurisdiction in all cases at law in which the demand, exclusive of interest, * * * amounts to one thousand dollars or less; * * * 2. In those having a population of less than thirty thousand, said courts shall have original jurisdiction in all cases at law in which the demand, exclusive of interest * * * amounts to three hundred dollars or less. * * *" It is clear that the superior court in and for the county

of Solano had jurisdiction. When the motion to change the place of trial was made in that court and it appeared that the defendant resided in Alameda county, said court made its order transferring the action to the superior court of Alameda county. There is nothing in the record showing that there was any error in that order. Code Civ. Proc. § 398. Furthermore, whether the order was correct or incorrect, no appeal from that order was taken and said order may not be reviewed on this appeal. Starkey v. Parker, 44 Cal. App. 215, 218, 186 P. 195; 2 Cal. Jur. 823. After the order had been made and the papers had been received in Alameda county, the action was lawfully pending in the superior court of that county. It cannot be said as a matter of law that said court did not have jurisdiction of money demands in the amount of one thousand or less. The most than can be said is that it did not have jurisdiction of all such actions. It had jurisdiction of all such actions except where the action was against a defendant who resided in one of the townships having a population of thirty thousand or more. As to where the defendant resided did not appear on the face of the complaint. Therefore speaking technically, the demurrer should have been overruled, but if it had been overruled the defendant was entitled to plead the facts in her answer. Code Civ. Proc. § 433; 49 C. J. 229. Moreover, both in the trial court and in this court the litigation has been presented without objection as though the record showed on its face that the defendant resided in Oakland township. Under these circumstances we think it is clear that the plaintiff was not prejudiced by the ruling made on demurrer instead of by a ruling made after answer filed. When the demurrer was presented it raised the question of jurisdiction of the subject-matter, that is, what court had the power to hear and determine the action. "The justices' courts shall have jurisdiction as follows: In * * * judicial townships, having a population of thirty thousand or more, said courts shall have original jurisdiction in all cases at law in which the demand, exclusive of interest * * * amounts to one thousand dollars or less. * * *" Code Civ. Proc. § 112. "Actions in justices' courts must be commenced, and, subject to the right to change the place of trial, as in this chapter provided, must be tried: * * * 9. * * * in the township or city in which the defendant resides." Code Civ. Proc. § 832. "The superior courts shall have original jurisdiction: 1. In all civil cases and proceedings except cases and proceedings in which jurisdiction is or shall be given by law * * * to justices' * * * courts. * * *" Code Civ. Proc. § 76. These provisions make it clear that the jurisdiction of the justices' courts is defined specifically and that being shown the jurisdiction of the superior court consists of other matters. In other words, the present laws oust the superior courts of jurisdiction in certain localities, one of which is Oakland township. Such a condition arose in Pennsylvania. The case of Wilson Black's Executor v. Marcus Black's Executors, 34 Pa. 354, is helpful. Samuel Black left an estate which was administered on in the orphans' court of Washington county, Pa. Later, by appropriate decrees, the legacy of Wilson Black was ascertained. The amount not having been paid, his executor commenced an action to recover it. He filed his action in the district court of Allegheny county. On motion of the defendant that court directed a nonsuit to be entered. An appeal was taken to the Supreme Court. In passing on the points that court said: "It is obvious, that the District Court had jurisdiction of the action of debt, but was ousted of it by the several statutes regulating the jurisdiction of the Orphans' Court. There was no objection that this was not pleaded, and the question was discussed as if it had been—and hence there is no difficulty in this case, but a different practice would be advisable. * * * The question must, therefore, be considered as settled, that the Orphans' Court had exclusive jurisdiction, and ample power, to enforce the payment of the distributive share sued for in this case; and that the District Court were right in entering judgment of nonsuit against the plaintiff. No good reason can be given why the Orphans' Court should not be held to be a court of exclusive jurisdiction in such cases. * * * It seems to me, that it was eminently proper to determine, that within its 'appointed orbit' it is a court of exclusive jurisdiction."

For the reasons above stated the judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

126 Cal.App. 471

CRUM v. SUPERIOR COURT IN AND FOR SHASTA COUNTY et al.

Civ. 4776.

District Court of Appeal, Third District, California.

Sept. 28, 1932.

Dismissal and nonsuit. ⇐45.

Dismissal of action, finally set for trial over five years after oral stipulation therefor, without defendant's written consent to continuance, was mandatory (Code Civ. Proc. § 583).

Application by M. B. Crum for a writ of mandamus to the Superior Court in and for Shasta County and Walter Herzinger, Judge thereof.

Writ granted.

Jesse W. Carter, of Redding, for petitioner.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is a petition for a writ of mandamus to compel the dismissal of an action under the provisions of section 583 of the Code of Civil Procedure, for failure, on the part of the plaintiff, to bring the cause to trial for more than five years after the issues are settled.

December 5, 1925, a complaint for an action in assumpsit was filed in the superior court of Shasta county. The case was entitled Wiegel v. Crum. March 12, 1926, the defendant's answer was filed. It is alleged that on November 5, 1926, by oral consent of counsel in open court, the cause was set for trial for March 28, 1927. It is conceded that no further stipulation for continuance of the cause was made. After numerous ex parte proceedings and orders made upon the court's own motion, to none of which the defendant appears to have consented, the cause was finally set for trial for October 3, 1932. On April 22, 1932, the defendant duly served and filed his motion under section 583 of the Code of Civil Procedure, to dismiss the action. This motion was heard by the court and denied on May 20, 1932. The present petition for a writ of mandamus was then presented to this court.

Section 583, supra, provides in part: "Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended."

Under the circumstances of this case, it became mandatory for the court to dismiss the action for the reason that more than five years elapsed without any written consent for a continuance on the part of the defendant before the cause was finally set for trial. 9 Cal. Jur. 543, § 30; Miller & Lux, Inc., v. Superior Court, 192 Cal. 333, 219 P. 1006. It has been held that a stipulation which will suffice to extend the statutory time for bringing the cause to trial must be reduced to writing and signed by the attorneys for the respective parties to the action. Perrin v. Miller, 35 Cal. App. 129, 169 P. 426. Since the stipulation of counsel to set the cause for trial for March 28, 1927, which was made in open court in the present case, did not purport to specifically extend the statutory five years in which the law requires a case to be brought to trial, it did not have the effect of waiving the provisions of section 583, supra. Larkin v. Superior Court, 171 Cal. 719, 154 P. 841. Assuming, without so deciding, that the oral stipulation of counsel which was made November 5, 1926, in open court, to set the cause for trial for March 28, 1927, constituted a stipulation in writing conforming to the requirements of section 583, supra, with respect to the five-year limitation of time within which a case may be brought to trial, still, more than five years elapsed thereafter before it was finally set for trial. The oral stipulation which was made in open court extended the time for trial only to March 28, 1927. April 29, 1932, the defendant moved to dismiss the action for failure to bring it to trial within five years from the date of the filing of the answer. This was more than five years from the time when it may be said the defendant consented to a continuance of the time of trial, even though we deem that stipulation to have been made in writing, which we seriously doubt. Under a construction of the circumstances of this case most favorable to the respondent in this proceeding, it must be held that more than five years elapsed before the cause was finally set for trial, and that it was therefore mandatory for the trial court to grant the defendant's motion and dismiss the action.

Let the peremptory writ of mandamus issue requiring the respondent to dismiss the action as prayed for.

We concur: PRESTON, P. J.; PLUMMER, J.

125 Cal.App. 752

In re BARREIRO'S ESTATE.

BARREIRO et al. v. BANK OF ITALY NAT. TRUST & SAVINGS ASS'N.

Civ. 488.

District Court of Appeal, Fourth District, California.

Sept. 13, 1932.

Rehearing Denied Oct. 11, 1932. Hearing Denied by Supreme Court Nov. 10, 1932.

1. Courts ⇐202(5).

In determining executor's appeal from probate court's judgment, appellate court may consider more extensive record in appeal by others from same judgment.

2. Executors and administrators ⇐154.

Executor is entitled to possession of only such stock certificates found in effects of testator as belonged to him.

3. Corporations ⇐197.

Executor's statutory right to vote corporate shares found in testator's effects extends only to such shares as testator owned (Civ. Code, § 313).

4. Corporations ⇐191.

Mexican corporation was not bound by what was done by persons acting as directors where no board meetings were held and no stockholders' meetings were called or held as required by Mexican Code.

5. Courts ⇐200¼.

Superior Courts have both probate and equity jurisdiction, and where necessary to do justice, probate courts may exercise equity jurisdiction.

6. Equity ⇐31.

Where equity court has jurisdiction of the person, it may enforce decree in personam, though it could not do so in rem.

7. Executors and administrators ⇐60.

Where California executor has taken charge of assets in foreign jurisdiction, probate court may hold executor accountable for them (Code Civ. Proc. § 1913).

8. Executors and administrators ⇐60.

Probate court had jurisdiction to require executor to account for property taken from Mexican corporation by reason of representation of shares found in testator's effects (Code Civ. Proc. § 1913).

9. Executors and administrators ⇐111(1).

Executor should not be allowed credit for fees paid attorney for services performed in connection with claim against third party by foreign corporation placed in hands of liquidator before testator's death.

10. Executors and administrators ⇐111(1).

Executor's account was properly surcharged with fees allowed attorney for legal services for which, before testator's death, attorney had agreed to make no further charge.

11. Attorney and client ⇐152.

Where attorney had agreed to make no further charge for legal services, he was entitled to necessary traveling expenses in performing such services.

12. Executors and administrators ⇐111(6).

Allowance to executor of $20 per day for traveling expenses of Mexican attorney *held* ample.

13. Executors and administrators ⇐513(1).

Allowances of probate court in annual settlement of executor's account are conclusive where supported by evidence.

14. Executors and administrators ⇐508(1).

Where executor wrongfully took funds from Mexican corporation, probate court properly required return thereof, instead of surcharging account (Code Civ. Proc. § 1913).

15. Executors and administrators ⇐118.

Where executor after learning that foreign attorney had obtained possession of funds paid into court acquiesced in their retention, it was properly surcharged with amount lost through attorney's disappearance.

16. Executors and administrators ⇐111(1).

Executor which paid attorney for services, despite possession of attorney's written agreement not to charge for them, was negligent and properly surcharged therefor.

17. Executors and administrators ⇐506(3).

Evidence to be required of executor on settlement of annual account rests largely in probate judge's discretion.

18. Executors and administrators ⇐506(1).

That probate judge imposed burden on executor rather than on contestants disputing annual account was not error.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

On rehearing.

Judgment below affirmed.

For prior opinion see 13 P.(2d) 1033.

See, also, 13 P.(2d) 1017.

Wright & McKee and C. M. Monroe, all of San Diego, for appellant.

Jesse George and C. A. Brinkley, both of San Diego, for respondents.

MARKS, J.

[1] A rehearing was granted in this cause to permit further consideration of the question of whether or not this court was justified in its former conclusion that a substantial portion of the 1,000 shares of the capital stock of the Compania de Inversiones de la

Baja California, S. A., a Mexican corporation (hereinafter referred to as the "Compania"), belonged to Gertrudis Marquez Barreiro as tenant in common with her former husband, was justified by the evidence before us. In determining this question we have again reviewed the printed record in this cause and the more extensive typewritten record in the appeal taken by the minors from portions of the same judgment attacked in this case (Estate of Barreiro [Cal. App.] 13 P.(2d) 1017), which we are permitted to do (Hollenbach v. Schnabel, 101 Cal. 312, 35 P. 872, 40 Am. St. Rep. 57; Sewell v. Price, 164 Cal. 265, 128 P. 407; Wood v. Kennedy, 117 Cal. App. 53, 3 P.(2d) 366).

It is evident from all the records which we have, that at least up to the time of these two appeals, it was the opinion of the executor, the widow, and her counsel and others having to do with the probate proceedings, that Gertrudis Marquez Barreiro had "a vested interest," as expressed by witnesses for the executor, in a portion of the property in its possession. See Estate of Barreiro, 86 Cal. App. 764, 261 P. 509. It is evident from the written opinion of the trial judge that he also indulged in this assumption, although no findings were made upon this question. By an order not involved in this appeal he set aside the order involved in Estate of Barreiro, 86 Cal. App. 764, 261 P. 509, as beyond the jurisdiction of the probate court to make.

Our review of the records in the two appeals has led us to the conclusion that we would have to indulge in a presumption, which would be authorized by law upon the evidence before us, in order to sustain our former position. There is now pending in the superior court of San Diego county an action to determine whether or not Gertrudis Marquez Barreiro became the owner with Benigno Barreiro of a portion of their community property, if any, at the time of their final divorce in 1922, the decree of divorce not attempting to divide or dispose of their community property, if they owned any. Counsel for appellants have become exercised at the thought that what we said in our former opinion might become the law of the case and hamper the trial court in its decision of this question. The presumption which we have to invoke to sustain our former position is rebuttable and might be overcome by evidence. A decision of the question of whether or not Mrs. Barreiro is the owner of any portion of the property now possessed by the executor is not necessary on this appeal nor was it necessary in the appeal by the minors. Estate of Barreiro (Cal. App.) 13 P.(2d) 1017. We do not desire to hamper the decision of a trial judge in another action by any unnecessary language used by us, if it could possibly be construed as establishing the law of the other case. Whatever may be said in Estate of Barreiro (Cal. App.) 13 P.(2d) 1017, and what we may say in this opinion must not be considered or construed as holding that Gertrudis Marquez Barreiro owned, as tenant in common with her deceased husband, any portion of the capital stock of the Compania or any definite portion of the property now in the possession of the executor of his last will and testament so that such a holding may become the law of the case controlling in any proceeding in this estate or in any other action or proceeding in which this question may be presented for decision.

This is an appeal taken by the executor of the last will and testament of Benigno Barreiro, deceased, from a portion of an order of the superior court of San Diego county, settling its fourth annual account, in which order the executor was directed to pay out of its own funds into the treasury of the Compania the sum of $4,782.95, and also the sum of $500, out of the funds of the estate. This is a companion case with one bearing the same title, Estate of Barreiro (Cal. App.) 13 P.(2d) 1017, wherein the minors appealed from the same order, the opinion in which case is referred to for a more complete statement of the facts than is here incorporated, and a discussion of some questions of law which we find it unnecessary to repeat.

After the death of Benigno Barreiro and the appointment of appellant's predecessor as the executor of his last will and testament, there were found among the effects of the deceased 1,000 shares of the capital stock of the Compania made payable to bearer. The then executor caused a meeting of the stockholders of the Compania to be held in Mexico on July 9, 1925, at which time a new board of directors was elected with Norman R. Morison, who was trust officer of the executor and in active charge of the estate, elected as president, and Lewis J. Utt, then the attorney for the executor, named among the directors. The then executor and its successors have ever since continued in control of the affairs of the Compania.

The order of the trial court requiring the executor to pay moneys into the treasury of the Compania is based upon its finding that charges made by attorney Manuel Lujan of Mexico for professional services rendered and expenses incurred were unjust, excessive, and no proper charge against the deceased, the Compania, or the estate. The task of the trial court in determining the correctness of these charges was made more difficult by the fact that Lujan, prior to the hearing that resulted in the order under consideration, left his home, has not been heard from since, and is presumably now dead. Mr. Utt, who acted as attorney for the executor and American adviser for the Compania during all of the time covered by the Lujan account, is also dead. Therefore, the testimony of these two

witnesses which would have been most desirable was not available.

While appellant makes several separate specifications of error upon which it relies for a reversal of that portion of the judgment of which it complains, practically all of them may be stated and considered under one head, namely: Has the probate court of California, having jurisdiction over the estate of the deceased, the right to examine the conduct of the executor in managing the affairs of a Mexican corporation and charge it with expenditures made by it for or through the corporation? This question does not seem to have been directly answered by any of the cases decided in California. The respondents seek to justify the action of the court below upon the theory that the executor possessed the control of all of the stock of the Compania and the complete management of its affairs, using it only as its alter ego, and that therefore the court could look through the corporation and examine the actions of the executor and its officers, as though the corporation did not exist. The argument of respondents in support of the order in question is based upon the assumption that the deceased was the sole and only owner of all of the stock of the Compania and all of the property standing of record in its name. They urge that the corporation after the reorganization meeting of July 9, 1925, ceased to have any actual existence in so far as the management of its properties and affairs was concerned, and served only as a fictitious name under which the executor managed and operated the properties in Mexico. The deceased at the time of his death had possession of all the certificates of stock in the corporation.

It is true that in some instances a court may look through the form of a corporation in order to reach the sole owner of all of the stock when that owner attempts to transact his business in the name of the corporation as his alter ego. There must be a unity of interest and ownership between the two individualities, and such a state of facts that would perpetrate a fraud and work an injustice upon an innocent party by the recognition of the existence of the corporation separate and apart from the identity of the individual owning all its stock and operating through it, to justify such an action by the court. Minifie v. Rowley, 187 Cal. 481, 202 P. 673; Wenban Estate, Inc., v. Hewlett, 193 Cal. 675, 227 P. 723.

[2, 3] The first question to be considered is the legality of the reorganization meeting held on July 9, 1925, at which a new board of directors was elected for the Compania. As we have observed, the stock in the corporation was issued to bearer and was in the possession of the executor. The right of possession of only that portion of the stock belonging to Mr. Barreiro vested in the executor at the time of its appointment.

Section 313 of the Civil Code, as it existed prior to the amendments of 1931, provided that "shares of stock of an estate of a minor, or insane person, may be represented by his guardian, and of a deceased person by his executor or administrator." This section has been construed to give the right to executors to vote stock belonging to their testators upon exhibiting a certified copy of letters testamentary without formal transfer of the shares on the books of the corporation. Smith v. San Francisco, etc., Co., 115 Cal. 584 at page 591, 47 P. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119; Market Street Ry. Co. v. Hellman, 109 Cal. 571, 42 P. 225. Of course, this right given to the executor to represent the stock of the deceased at any meeting of stockholders of the Compania could only extend to such stock as was owned by Mr. Barreiro at the time of his death. The executor could not represent the stock owned by Mrs. Barreiro, if any, without authority from her.

There seems to be no great difference between the rules of descent established by the Mexican law and those prevailing in California. The estate of a deceased person in both jurisdictions descends to the heirs subject to administration. Article 3232 of the old Mexican Civil Code, stated to be article 1286 of the new Code; article 3235 of the old Civil Code, stated to be article 1290 of the new Code; article 3173 of the old Civil Code, stated to be article 1990 of the new Code; article 3703 to article 3706 of the old Civil Code and articles 3726, 3727 of the old Civil Code consolidated in article 1704 of the new Code. Articles 3728, 3729, and 3730 of the old Mexican Civil Code, re-enacted into articles 1704, 1705, and 1706 of the new Code, give the executor such powers as are authorized by law and by the testator in a will or those which the heirs expressly give him, and no others. In the will admitted to probate the Southern Trust & Commerce Bank was given charge of the heritages of the children of Mr. Barreiro and the desire was expressed that Eustaquio Valle continue carrying on the business of the Compania as he was doing prior to the death of deceased. Under this power in the will, which seems to be permitted under the provisions of the Mexican Civil Code, it is argued with some force that the executor possessed the same rights to represent the deceased and his children in voting the stock of the Mexican corporation that it would have possessed under the authority given by section 313 of the Civil Code of California had the Compania been a California corporation. For the purpose of this opinion we will assume, without holding, that such powers were given to it.

Article 204 of the Commercial Code of Mexico provides that the call for meetings of a corporation shall be made by the board of directors, or by the examiners, and that more than one-half of the capital stock must be represented. Article 205 of the same Code provides that the calls to general stockholders' meetings shall be made by a notice published in the official journal of the state, district, or territory wherein the corporation has its domicile, and that the notice must contain a statement "of the proceedings for the day, or of all questions to be submitted for the deliberation of the meeting. Every resolution adopted in contravention of this article shall be void." These rules were not all followed in calling the meeting, nor in calling any of the other stockholders' meetings held after the death of Mr. Barreiro. No calls for these meetings were published in the official journal of the state. If we were to give literal interpretation to the provision of this section, that "every resolution adopted in contravention of this article shall be void," we would be forced to the conclusion that all proceedings taken at these meetings were void for not alone lacking the authority of law, but as being taken contrary to the express provisions of law.

The by-laws of the Compania provided that calls for general stockholders' meetings must be signed by the president or by the commissary and be published for at least ten days in advance of such meeting. The by-laws further provided that, when all of the capital stock is represented, a meeting may be held without the necessity of a call. Mr. Uribe, a Mexican attorney called as an expert on Mexican law, testified that the provisions of the Commercial Code would prevail over those of a by-law.

The trial court was of the opinion that as all of the stock of the corporation was actually represented at the meeting of July 9, 1925, including the stock of Mrs. Barreiro, if any, those participating in the meeting would be estopped from contesting its legality and that the directors elected at such meeting would at least be the de facto directors of such corporation and entitled to act as such until removed from office by a proceeding instituted by an authority other than that of one of those participating in the meeting. Guaranty Loan Co. v. Fontanel, 183 Cal. 1, 190 P. 177; Dolbear v. Wilkinson, 172 Cal. 366, 156 P. 488, Ann. Cas. 1917E, 1001; San Buenaventura Mfg. Co. v. Vassault, 50 Cal. 534; Guaranty Loan Co. v. Treadwell, 53 Cal. App. 538, 200 P. 653. We have been referred to no opinion of any one learned in the law of Mexico and to no decision of a Mexican court upon this question.

At the time of the meeting of July 9, 1925, Mrs. Barreiro was represented there by Messrs. Herman Freese and Stephen Connell, who were her attorneys. The minors were represented by their guardian, and the executor bank was represented by its trust officer and by Mr. Lewis J. Utt, its attorney in the probate proceedings. The minutes of this meeting recite that all of the stock of the Compania was represented as follows: Eustaquio Valle, 1 share; Norman R. Morison, 1 share; Stephen Connell, 1 share; Anton J. Schreiber, 1 share; M. G. Richardson, 1 share; D. M. Plaister, 1 share; Lewis J. Utt, 994 shares. The minutes recite that Morison was named president of the meeting and Valle its secretary and that Messrs. Connell and Utt were named inspectors to count the number of shares and votes. Messrs. Morison, Richardson, Schreiber, Connell, and Utt were elected directors, and Morison and Utt were elected president and secretary respectively. The by-laws were amended by making Tia Juana as well as Mexicali an authorized place for holding the corporate meetings. These minutes were protocalized before a Mexican judge of the first instance and were recorded in the registry at Tia Juana, Mex. The Mexican law provides that the certificates of stock of a corporation must be actually and physically present and exhibited at a stockholders' meeting. It is doubtful if this provision was complied with at this meeting, or at any of the other stockholders' meetings.

From what we have said it is apparent that the meeting of July 9, 1925, was not legally called and held, and that, if the proceedings there had are to be considered binding upon the stockholders, it must be because of the doctrine of their estoppel to question the legality of the meeting because of their participation therein. If they be estopped to question the legality of this meeting, at least Mrs. Barreiro is not estopped from questioning the legality of any subsequent meeting, either of the stockholders or of the board of directors, if she be considered a stockholder. No call or notice of any subsequent meeting was given and she did not participate therein. Her attorney, Mr. Connell, was removed as a member of the board of directors.

[4] The Mexican law vests the management of the affairs of a corporation in its board of directors much as does the law of California. No meeting of the board of directors seems to have been held. All the business of the corporation which was referred by the executor to any meetings seems to have been referred to stockholders' and not to directors' meetings. The questions of sales of properties, execution of leases, and other matters of policy, when considered at all, were considered at stockholders' meetings which were not called in accordance with the law of Mexico. The stockholders of a Mexican corporation seem to be given no power over the details of its management under the

law of Mexico. Two of the trust officers of the executor made vague references in their testimony to meetings of the board of directors held in the town of Tia Juana or perhaps in Mexicali. That these meetings were anything more than informal gatherings of some or all of the persons acting as directors does not appear. The trial judge in two voluminous opinions filed by him makes the statement that no directors' meetings were held. The minute books and other Compania records were before him. While we cannot give this statement the dignity or effect of a finding, its truth seems to be borne out by the record. We have carefully searched the bill of exceptions in the appeal now before us and the long typewritten record in the appeal taken by the minors and have found no minutes of directors' meetings, although meetings of the stockholders are set forth at length. If the directors ever assembled in Mexico at other than stockholders' meetings, it seems apparent that their convocations were so informal as not to justify any minute record of their proceedings. As far as the record goes no meetings of the board of directors, as the term is known in the law, were held. Therefore, it follows that whatever was done in the name of the corporation after the meeting of July 9, 1925, was done, not only without the authority of law, but in direct violation of the provisions of the Mexican Code.

The attitude of the executor in regard to the Compania and the management of the Mexican properties is clearly reflected in its first annual report and account, where it is said: "Your petitioner, immediately upon its appointment, proceeded to reorganize the said Mexican corporation, and to assume full control and active management thereof. The assets of said Mexican corporation, in addition to securities and personal property held on this side of the line and amounting to some $99,500, consisted of real estate, both improved and unimproved, as well as of mines and of partnership interests in mining and oil ventures and claims, all of said property being located in the northern district of Baja California. The said real estate is located at Tia Juana, at Mexicali and St. Algodones, a small town on the Colorado river opposite Yuma. The collection of rents from said real property, and the execution of leases to tenants has involved and does involve a high degree of attention, as well as responsibility. Your petitioner has had to handle considerable sums of money from this source, as well as to carry on all the business of the decedent, a business which engrossed his entire time, and which consisted of looking after his Mexican interests."

These statements were made in connection with a request for extra compensation for its services in managing the Mexican property. The executor's trust officer was in the active charge of the administration of the estate and was also president and general manager of the Compania. If the trust officer had rendered these services in his capacity as an officer of the corporation he should have sought his compensation from the Compania and not from the estate. $3,000 as compensation for these extra services was allowed and paid to the executor out of the estate funds.

The books of the Compania were kept by the executor bank and consisted of little more than a cash account. Rents from the Mexican tenants were often paid to the executor and deposited in the estate funds with appropriate cross entries in the Compania cash book. It cannot be doubted but that the income of the Compania was expended by the executor alone and that the policy of leases and sales of property were dominated by it.

The Mexican Commercial Code requires that corporations keep an elaborate set of books in forms particularly specified. No effort was made after the death of Mr. Barreiro to keep any such set of books and no attention was paid to any of these requirements.

It cannot be doubted that the executor dominated and controlled all of the affairs of the corporation following the death of Mr. Barreiro. It chose one board of directors and then proceeded to brush aside its authority and administer the properties of the corporation. The only function performed by the Compania seems to have been that of holding the naked title to the Mexican property. The executor brushed aside the legal entity of the corporation and assumed direct control of its property and its affairs.

The question, therefore, which presents itself may be stated as follows: Can the executor, after having disregarded the corporate existence and corporate entity, and having failed to observe the provisions of law of the republic of Mexico regarding the functioning of a corporation, and having taken direct charge of the corporate property, hide behind the corporate entity which it did not recognize over a period of years and thus protect itself from losses occasioned by its direct management of the properties of the Compania? The question would seem to contain its own answer.

In this opinion all references to the Code of Civil Procedure are made to that Code in effect before the adoption of the Probate Code.

We are next confronted with the question of the jurisdiction of a probate court of California over property owned in Mexico by the Compania which was taken possession of and administered by an executor appointed by the California probate court without

any ancillary letters having been issued in Mexico. Section 1913 of the Code of Civil Procedure provides that the authority of an executor or administrator does not extend beyond the jurisdiction of the government under which it was given its authority. The rigorous jurisdictional limitation of the powers of an executor imposed by this section has been somewhat modified by many decisions sustaining the right of an executor to collect debts due the estate in other jurisdictions when such collections can be made without suit. 12 Cal. Jur. 238, 239, and cases there cited.

[5] It is well settled in California that superior courts have both probate and equity jurisdiction and that, where necessary to do justice to all parties concerned, the probate courts may exercise equity jurisdiction. Estate of Maxwell, 74 Cal. 384, 16 P. 206; Estate of Burton, 93 Cal. 459, 29 P. 36; Verdier v. Roach, 96 Cal. 467, 31 P. 554, 557; Toland v. Earl, 129 Cal. 148, 61 P. 914, 79 Am. St. Rep. 100; Estate of Bell, 168 Cal. 253, 141 P. 1179; Estate of Glenn, 153 Cal. 77, 94 P. 230; Bauer v. Bauer, 201 Cal. 267, 256 P. 820; Estate of Heeney, 3 Cal. App. 548, 86 P. 842; Estate of Hill, 94 Cal. App. 113, 270 P. 708. In Verdier v. Roach, supra, it was said: "Our superior courts have both probate and equity jurisdiction, so that whenever, in the course of the administration and settlement of estates, our probate statutes are found to be inadequate to authorize and accomplish all that a court of equity is authorized to do in such cases, our superior courts may exercise their equity powers in connection with, and as incidental to, their powers in probate matters, to the extent necessary to a complete administration and distribution of estates: provided, of course, that nothing be done in contravention of any statutory provision."

[6] It has long been the rule in equity that where a court has jurisdiction of the person it may enforce a decree in personam although it could not enforce it in rem. Penn v. Lord Baltimore, 1 Vesey Sr. 443 (27 English Reports, Reprint, p. 1132); Massie v. Watts, 6 Cranch, 148, 3 L. Ed. 181; Arglasse v. Muschamp, 1 Vern. 75; Tollor v. Carteret, 2 Vern. 494; Phelps v. McDonald, 99 U. S. 298, 25 L. Ed. 473; Mitchell v. Bunch, 2 Paige (N. Y.) 606, 22 Am. Dec. 669; Miller & Lux v. Rickey (C. C.) 127 F. 573; State v. Cronan, 23 Nev. 437, 49 P. 41; 5 Cal. Jur. 471, § 44; Smith v. Davis, 90 Cal. 25, 27 P. 26, 25 Am. St. Rep. 92; Peninsular, etc., Co. v. Pacific S. W. Co., 123 Cal. 689, 56 P. 604; Taylor v. Taylor, 192 Cal. 71, 218 P. 756, 51 A. L. R. 1074; Redwood Inv. Co., etc., v. Exley, 64 Cal. App. 455, 221 P. 973; Cole v. Manning, 79 Cal. App. 55, 248 P. 1065. In the case of State v. Cronan, supra, it was held that the courts of Nevada, having obtained personal jurisdiction over the parties therein, had the right to inquire into and determine the powers of a California corporation, its officers, and stockholders, under the laws of California, and question the validity of the corporate acts although the courts of Nevada had no jurisdiction over the corporation itself.

[7] For many years it has been held in California that where a California executor has taken charge of and gathered in assets of an estate in a foreign jurisdiction it may be held accountable for them. Estate of Ortiz, 86 Cal. 306, 24 P. 1034, 1035, 21 Am. St. Rep. 44; Fox v. Tay, 89 Cal. 339, 24 P. 855, 26 P. 897, 23 Am. St. Rep. 474; Estate of Grivel, 199 Cal. 351, 249 P. 184, 185; Reed v. Hollister, 44 Cal. App. 533, 186 P. 819. The rule is stated in Estate of Ortiz, supra, as follows: "I think the law applicable to the facts is correctly stated by Prof. Schouler, in his late treatise on Executors and Administrators (2d Ed. 1889, § 175), as follows: 'The earlier rule frequently asserted in England, in one loose form or another, is that assets in any part of the world shall be assets for which the domestic executor or administrator is chargeable; the practical effect being to enjoin upon the principal personal representative the duty of procuring, so far as foreign law and the peculiar circumstances will permit, personal assets wherever situated, realizing the bulk of the estate of his decedent as best he may, gathering in the property as one who represents the whole fortune, and, having gathered it, account to those interested accordingly. Some of the judicial expressions on this point, to be sure, import too onerous a responsibility on the representative's part; and Mr. Justice Story has pointed out the fallacy of holding a domestic executor or administrator answerable for foreign property which it is admitted that he can neither collect nor sue upon, nor compel its payment or delivery to himself by virtue of his domestic appointment,—foreign property, we may add, of whose existence, or of the grant of foreign administration for realizing it as assets, he may be quite unaware. And yet, to let external assets knowingly escape his control, and be lost to the estate, when with reasonable diligence they might have been procured, seems a plain dereliction of duty in the principal or domiciliary representative, whose function, as rightly understood, is to grasp the whole fortune, as the decedent did during his life, save so far as the obstructive law of foreign situs, or the limitations of his own appointment, may restrain him.'"

Estate of Grivel, supra, is quite similar in fact to the one at bar. The deceased had

property in the republic of Mexico and in the United States. He had a former wife and children. There was this difference, that probably there were ancillary probate proceedings in Mexico. The appeal was taken by the domiciliary executor from an order surcharging his accounts. In the course of the opinion the court said: "Appellant admits that he did sell about 1,600 head of cattle, collected debts owing decedent from persons residing or doing business in Mexico, and transacted other business in said foreign territory, but claims that in so doing he acted solely as attorney in fact for said [ancillary] administratrix, and not in his official capacity as administrator of said estate. He further admits that moneys derived from the sales of property made in Mexico, and which passed into his hands, were deposited by his direction in a bank situate in Calexico, county of Imperial, where the business of the estate was transacted by him. It is the insistent claim of appellant that he was acting in two separate and distinct capacities in handling the funds and property of an estate of which he was the domiciliary administrator, to wit, as agent or attorney in fact of the ancillary administratrix of all property which had its situs in Mexico at the time of decedent's death, and as administrator only of such property as had its situs in the state of California at the time of decedent's death, and to no further extent. We question the soundness of this contention. Appellant was the administrator of the entire estate and of all the funds and property which came into his hands which was admittedly property and moneys belonging to the estate, and it was clearly his duty as such officer to report and account to the court which had appointed him for all moneys and property belonging to the estate which he received into his possession, and it does not matter what the source may have been. We think as a general proposition that the court has inherent power to compel a report of the property which has passed into the hands of the domiciliary administrator, even though he claims to have remitted it to the ancillary administrator."

Reed v. Hollister, supra, also involved the necessity of a local executor accounting for funds coming into his possession from a foreign jurisdiction and the power of the probate court to require him to account for such funds. After a careful consideration of the case, the court reached the conclusion that the probate court had such jurisdiction and that the executor must account to it for such funds.

[8] We have reached the conclusion that the probate court had the jurisdiction to require the executor of the estate of Barreiro to account to it for the Mexican property of which it took control and which it virtually removed from the possession of the Mexican corporation which owned it, and correctly required the executor to render an account of all of the transactions which it conducted in connection with the Mexican property standing in the name of the Compania.

The order of which the executor complains on this appeal is a virtual surcharge of its account in the sum of $4,782.95, on account of moneys paid to and collected by Manuel Lujan. Mr. Lujan, an attorney at law of the republic of Mexico, was apparently the personal attorney of Benigno Barreiro and for the Compania before Mr. Barreiro's death. He acted also as the Mexican adviser to the executor of the estate. The items of the account, showing charges and receipts as summarized by the trial judge, are as follows:

"For services rendered prior to Mr. Barreiro's death, as per statement of June 20th, 1925 (Executor's Exhibit N-2), as follows:	
1. Trip to Mexico City re certain appeals pending against the Compania and the City of Mexicali as well as the Galeana case	$ 1,300.00
2. Cardinale attachment	1,775.00
3. Attachment on real property of Paul Kittiquitz	650.00
4. Two suits against the Compania Commercial	500.00
5. Appeal in a criminal case involving Mr. Barreiro	500.00
6. Consultations with Mr. Barreiro, stated to have been not less than 100 in number	1,000.00
7. Drawing up documents and papers	200.00
Total	$ 5,925.00
For services to Compania for the 12 months ending June 6, 1926, as per statement (Executor's Exhibit O-2) of that date, at $350.00 per month	$ 4,200.00
Personal expenses during that year	250.00
Compensation for the two months ending August 6, 1926, as per statement dated November 30, 1926 (Executor's Exhibit P-2)	700.00
Compensation and expenses on trip to Mexico City in summer and fall of 1926, amounting apparently to	2,100.00
(Balance the two remittances to him for that purpose of July 27th, 1926, and September 11th, 1926, respectively, hereinafter referred to.)	
Making an aggregate of	$13,375.00

As against these charges he has admittedly been paid:

By Mr. Barreiro in his lifetime (see Executor's Exhibit N-2)...	$ 100.00
Other items as shown by said supplement to the Executor's Fourth Account:	
November 5, 1925.....	600.00
December 4, 1925.....	500.00
July 27, 1926 (re Lujan's trip to Mexico City).....	600.00
August 19, 1926.....	400.00
September 11, 1926 (re Lujan's trip to Mexico City).....	1,500.00
(I do not count a transmission charge on last item of $32.95 in this connection.)	
December 8, 1926.....	500.00
Also collections in which Executor's Exhibit O-2, Lujan admits having made and retained as follows:	
13 months' rent from the Compania Commercial on the Mexicali and Tia Juana properties affected by the lease litigation, at $450.00 per month	5,850.00
Interest on the so-called Johnson note	325.00
Aggregating	$10,375.00

This accounting, if correct and complete, would still leave due to Lujan..... $ 3,000.00

The account as revised and allowed by the trial court is as follows:

Lujan admits, according to his statements (Executor's Exhibits N-2, O-2 and P-2), as hereinbefore reviewed, an aggregate of..	$10,375.00
This, however, includes what he collected by way of interest on the Johnson note, an account which was apparently not property of the Compania de Inversiones, and should, therefore, have nothing to do with his accounting with it.....	325.00
This leaves of money of the Compania de Inversiones for which he admits being accountable....	$10,050.00

As we have also seen, he is chargeable also with the $591.68 collected by him through the Cardinale escrow; but since there has been reserved for the future the question of whether he has earned anything in connection with the Cardinale litigation, the question whether this debit of $591.68 is to be offset against any such charge may properly be reserved, and the disposition of said $591.68 item reserved also. Neglecting this item for the present, then, we consider the credit side of his account generally.

He is credited with:

Expenses in trip, January and February, 1925, to Mexico City, amounting altogether to sixty days.....	$1,200.00	
Fees in suits against the Compania Commercial	500.00	
Consultations with Benigno Barreiro regarding Compania affairs and drawing up documents relative to same.....	200.00	
Fourteen months' services as consulting Mexican attorney for the Compania de Inversiones subsequent to Mr. Barreiro's death	2,100.00	
Personal and traveling expenses for ten days in trips to Mexicali..	200.00	
Personal and traveling expenses for thirty days in summer and fall of 1926 in trip to Mexico City.....	600.00	
Making an aggregate of.....		4,800.00
This left him indebted to the Compania de Inversiones to the extent of		$ 5,250.00"

To the balance of the account just quoted and charged against the executor the court added the sum of $32.95, costs paid on sending money to Lujan in Mexico City

The items of which appellant complains are those credits either disallowed or reduced. Ruling was reserved on the charge of $1,775 for the Cardinale attachment, and $591.68 collected through escrow. We have considered the right of the probate court to reserve ruling on items of an account in

Estate of Barreiro (Cal. App.) 13 P.(2d) 1017. This portion of that opinion is referred to for a discussion of this question and it will not be necessary to repeat it here.

[9] The court below disallowed the charge of $650 for an attachment on the real property of Paul Kittiquitz. It appears that this grew out of a claim against one Johnson alleged to be due to the Compania Merchantil Internacional, a corporation formerly controlled by Mr. Barreiro, which he placed in the hands of a liquidator for the purpose of liquidation. It is evident that this particular claim for services could not be made against the executor or the Compania, but against the Compania Merchantil Internacional or the liquidator. The trial court reserved a ruling upon the question of a settlement between the executor and the liquidator and this item can undoubtedly be adjusted when that matter is determined.

The charge of $1,000 for not less than 100 consultations by Barreiro with Lujan, and the $200 for the drawing up of documents and papers by Lujan will be considered together. On November 19, 1924, Lujan executed a receipt to the Compania whereby he receipted for $500 in full for his services, both to the Compania and to Mr. Barreiro up to that date and agreed to make no further charge for services to be rendered by him in the two appeals pending in the Supreme Court in the City of Mexico, one on a petition of Miguel Galeana in which the Compania was a third party, and the other an appeal presented against the municipal council of Mexicali. This receipt was dated about seven months prior to the death of Mr. Barreiro. The trial judge was of the opinion that the charges were excessive and were not supported by proper evidence. In this we agree with him. He allowed $200 for these services, which we cannot hold was an unreasonable compensation under the circumstances disclosed by the record.

Lujan presented a bill for services rendered the Compania for fourteen months at the rate of $350 per month. On account of the death of Mr. Utt, and the apparent death of Mr. Lujan, the evidence as to just what these services consisted of is very meager. The trial court found that some services were performed consisting of consultations with Mr. Utt as attorney for the executor and the Compania and that the reasonable value of the services rendered was $150 per month. We think the allowance quite liberal under the circumstances and cannot hold the trial court in error in fixing the compensation at this sum.

[10-13] The account of Lujan contains three items of traveling expenses, one on a trip to Mexico City concerning the two appeals pending there which we have mentioned, which trip occupied sixty days; another, compensation and expense on a trip to Mexico City in the fall of 1926 in connection with the same two appeals which occupied thirty days, and the third, expenses of trips to Mexicali, which occupied ten days. The total amount claimed by Lujan for these items was $3,850, which the court held to be excessive and not justified by the evidence. In so far as they included any compensation for services rendered in connection with the two appeals the correctness of the ruling of the trial court in excluding such charges from the account cannot be questioned in view of the receipt given by Lujan on November 19, 1924. The trial court allowed him traveling expenses of $20 per day for each day occupied on the trips to Mexico City and to Mexicali. The receipt of Lujan did not contain any agreement not to make a charge for traveling expenses and a reasonable allowance to cover such expenditures was undoubtedly correct. We think the sum of $20 per day fixed by the trial court for this purpose was ample and that it cannot be questioned by us. These allowances made by the trial court are supported by competent evidence in the record and as the question is merely one of the sufficiency of the evidence to support the ruling of the trial court, its conclusion becomes final.

[14] Appellant urges that the probate court had no authority to direct that the sum of $4,782.95 be paid out of the private funds of the executor into the treasury of the Compania, but only had authority to surcharge the executor's account with this amount and direct it to be paid into the estate funds. This money was withdrawn from the treasury of the Compania by the executor without any authority from the board of directors or any lawful procedure. The trial court was undoubtedly correct in directing it to be returned to the source from which it was taken.

[15] Appellant maintains that the finding of the trial court to the effect that the executor failed to use due diligence, prudence and care in its transactions with Lujan, and that Lujan was overpaid and was permitted to retain more money than he was reasonably entitled to, due to the negligence of the executor, is not supported by the evidence and is contrary to it. It relies upon the rule that where the executor exercises its best judgment and due care and prudence in the selection of an agent or attorney who is well recommended, it is not liable for money lost by the insolvency of the agent unless the executor was negligent and careless in its dealings with him. 24 Cor. Jur. 126; Estate of Taylor, 52 Cal. 477. Appel-

lant particularly urges that it should not be chargeable with the sum of $5,850, thirteen months' rental from the Mexicali and Tia Juana properties, nor with overpayments to Lujan on account of his trips to Mexico City.

The real properties from which the rentals were collected were the ones involved in an action instituted by Mr. Barreiro to cancel leases held by the Compania Commercial. See opinion in Estate of Barreiro (Cal. App.) 13 P.(2d) 1017, for further particulars. When the suits were instituted the rents were paid into court. Lujan, as the attorney of record in these cases, in some manner obtained possession of the money, retaining it when he disappeared, which was some considerable time later. During the time that this money was in his possession, the executor did not seek to have him pay it into the treasury of the Compania, where it rightfully belonged, nor in any manner did it seek its recovery. The trial court concluded, and we think correctly so, that the loss of this money was directly traceable to the executor, who, over a considerable period of time, failed to collect from Lujan, and seemingly acquiesced in his retention of this money.

[16] Appellant urges that it was not negligent in overpaying Lujan on account of his expenses and services rendered on the two trips to Mexico City, because, at the time the payments were made, it did not have actual knowledge of the receipt which Lujan had executed on November 19, 1924. The evidence discloses that this receipt was found among the papers of Mr. Barreiro, of which the original executor took possession at the time of his death. No good reason appears why the executor by the exercise of reasonable diligence could not have acquainted itself with the contents of this receipt long before it made any of these payments to Lujan. We think its negligence is apparent in both instances and that the court properly directed it to replace the money lost as a result thereof.

[17, 18] Appellant next complains that the trial court wrongfully placed upon it the burden of proving the correctness of its accounts rather than placing upon the contestants the burden of proving that the accounts were not correct. In this contention we cannot agree with appellant. The amount of evidence which a probate judge may require of any executor in support of the correctness of any account is largely a matter of his own discretion. Where there is no contest it is the duty of the trial court to satisfy itself of the correctness of the account, and, within the limit of reason, it may require the executor to produce such evidence as will satisfy it in this respect.

The portion of the order approving the final account, appealed from by the executor, is affirmed.

We concur: BARNARD, P. J.; SCOVEL, Justice pro tem.

126 Cal.App. 605

READING v. MARR ESTATES, Inc.

Civ. 8658.

District Court of Appeal, First District, Division 2, California.

Oct. 5, 1932.

Appeal and error ⇐907(3).

When appeal is based on judgment roll alone, appellate court must assume that findings were supported by evidence introduced at trial.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Sarah C. Reading, a widow, against the Marr Estates, Inc. Judgment for plaintiff, and defendant appeals.

Affirmed.

Mitchell, Silberberg & Davis and C. R. Montgomery, all of Los Angeles, for appellant.

Willedd Andrews, of Los Angeles, for respondent.

STURTEVANT, J.

The plaintiff commenced an action against the defendant to obtain relief by reason of alleged fraud practiced on her in a transaction involving the purchase of certain real estate. The trial court made findings in favor of the plaintiff, and, from the judgment entered thereon, the defendant has appealed and has brought up a transcript containing the judgment roll alone.

The defendant asserts that a vendor is not in default until he has failed to perform after a demand for performance. The contention, under the record presented, is immaterial. In the first place, it assumes that the action is one based on contract, whereas the complaint sounds in tort. In the second place, the judgment roll does not disclose whether a demand was or was not made. When an appeal is based on the judgment roll, we must assume that all of the findings were supported by the evidence introduced at the trial.

It is next contended that the vendor's delivery and the vendee's acceptance of the erroneous deed did not excuse the necessity of

demand for performance. Our reply to the first contention is a complete reply to this one also.

It is next asserted that, if the delivery of the erroneous deed was performance of the contract, the vendee has no right to recover the purchase money. The point is axiomatic, however; it is not addressed to the record before us. In effect the trial court found that the erroneous deed was delivered fraudulently, and for that reason it rendered its judgment against the defendant.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

126 Cal.App. 649

Ex parte GLICK.

Cr. 2249.

District Court of Appeal, Second District, Division 2, California.

Oct. 6, 1932.

Rehearing Denied Oct. 21, 1932. Hearing Denied by Supreme Court Nov. 3, 1932.

1. Criminal law ⇐982.

Trial court could modify terms of probation, within limits.

2. Criminal law ⇐982.

Modification of probation order under which accused, who pleaded guilty of issuing checks without sufficient funds, had been placed in sanitarium, so as to serve year of probationary period at county road camp, *held* authorized.

The facts disclosed that court must have believed accused to have been laboring under a mental difficulty, since he ordered him confined by physician in a private sanitarium for treatment, and also that he believed him to be responsible for his criminal acts, and, after receiving physician's report that defendant was cured, court modified terms of probation by ordering that next year of probationary period be served at county road camp.

Habeas corpus proceeding by Harry Glick against the Sheriff of Los Angeles County.

Writ denied.

A. Brigham Rose, of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., John D. Richer, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent William I. Traeger.

STEPHENS, Justice pro tem.

This is a petition for the issuance of the writ of habeas corpus on behalf of one Harry Glick, who is confined in the county jail or in the road camp under restraint of the sheriff of Los Angeles county. Glick was charged by information of the crime of forgery in two counts. One for forging a name to a bank check for $5; and one for the sum of $25. He pleaded not guilty and not guilty by reason of insanity to both counts. When the cause was called for trial, an amended information was filed which repeated the above charges but added two more based upon the same acts. The two new counts charged Glick with issuing checks without sufficient funds. He was arraigned on the amended information, and Glick pleaded guilty to the counts charging issuing checks without sufficient funds and not guilty to the forgery charges. He then asked and received permission to file an application for probation. At this session of the court the judge presiding made it clear that the first information and the arraignment thereunder was entirely superseded by the so-called amended information and arraignment thereunder, and both Glick and his counsel agreed thereto. Some question had been raised as to Glick's sanity, but, after hearing from a physician who had examined him, the court remanded him to the sheriff.

At a later session the court ordered Glick to be examined for his sanity, but, upon being reminded that he had already been under observation, ruled that Glick should be granted probation. The terms of probation were for five years, conditioned that the probationer should be "turned over to Dr. Moore for Dr. Moore to keep in his sanitarium. When Dr. Moore is satisfied that he should be released from the sanitarium that he communicate with the probation officer, who, in turn, will obtain a court order to that effect." The other counts to the information were then dismissed. No sentence was ever pronounced.

A few weeks after making the order of probation, the court made the following order: "Dr. D. S. Moore having reported that defendant is cured, terms of probation are modified as follows: It is ordered that the next year of said probationary period, defendant shall serve at the county road camp." This order was made without notice to Glick or his attorney, and neither was present when the order was made. Thereafter Glick's attorney moved to vacate the plea of guilty and to substitute therefor the plea of "not guilty" and "not guilty by reason of insanity." This was denied. He thereupon moved that Glick be released on bail, and this motion was denied.

It is a certainty that the court believed Glick to be laboring under a mental difficulty, for he ordered him confined by a physician in a private sanitarium for treatment. It is just

as certain that the court believed him to be responsible for his criminal acts. The court was faced with a problem, and solved it in a way that seemed the most humane. A border line case, he accepted a guilty plea, mercifully saved him from a felon's cell by granting probation, and provided treatment. Later he gave the offender a taste of punishment. The only part of this program that can be criticized from a legal standpoint is the requirement that the probationer be restrained in a sanitarium. This course might well be abused, and we have no doubt but that it was error and does not meet with our approval. But it is too late to invoke this writ for that, as he is not now so confined.

[1, 2] The court had a right to amend or modify the terms of probation within limits, and the modification was within these terms. Expressions, though probably dictum, in People v. O'Donnell, 37 Cal. App. 192, 174 P. 102, are illuminating.

We conclude that there is no showing here that Glick is now illegally restrained of his liberty. Should there ever be any question as to his sanity, a complaint may easily be laid and that issue tried. Section 1367, Pen. Code; People v. Scott, 59 Cal. 341. It can readily be seen by the language of this opinion that it would be profitless to comment specifically on the denial of the motions to substitute a plea and to be released on bail.

The petition that the writ of habeas corpus issue is denied.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

126 Cal.App. 121

Ex parte HALLINAN.

Cr. 1684.

District Court of Appeal, First District, Division 1, California.

Sept. 21, 1932.

1. Contempt ⇐66(1).

Judgment of contempt being final is not appealable but resort must be had to other remedies (Code Civ. Proc. § 1222).

2. Habeas corpus ⇐92(3).

Where contempt proceeding is attacked by habeas corpus and record is not produced, jurisdiction must be determined from judgment itself, and facts recited therein must be taken as true.

3. Habeas corpus ⇐85(3).

Attorney attacking contempt proceeding by habeas corpus had burden of showing as matter of law that restraint was not legal.

4. Criminal law ⇐728(1).

Right to make objections to argument or assignments thereon may be waived in whole or in part.

5. Stipulations ⇐3.

Attorneys could lawfully stipulate that defendant would be entitled to reserve and have benefit of exceptions that it might be lawful for him to make during course of prosecutor's argument.

6. Contempt ⇐6.

Recitals in judgment that attorney entitled to exceptions by stipulation, contrary to court's order and in loud and contemptuous voice and insolent manner interrupted district attorney's argument *held* to support adjudication of contempt (Code Civ. Proc. §§ 1209, 1211, 1222).

> Judgment recited, in substance, that counsel for defendant in a criminal prosecution, contrary to the court's direction, interrupted and continued to interrupt the closing argument of the district attorney; that such interruptions were unnecessary, since counsel was entitled to all objections by stipulation; that the manner, method, and tone of voice in refusing to cease making such interruptions was extremely loud, boisterous, and contemptuous; and that the conduct of counsel in manner and method was disorderly and contemptuous, and tended to and did interrupt the judicial proceedings.

7. Contempt ⇐6.

Contempt may be shown by language or behavior, and in determining whether language is contemptuous, regard must be had to words used and surrounding circumstances.

8. Contempt ⇐30.

Every court of general jurisdiction has inherent power to punish for contempt.

Application by Vincent W. Hallinan for a writ of habeas corpus to be directed to the Sheriff of the City and County of San Francisco.

Writ discharged; petitioner remanded.

William F. Herron, C. K. Bonestell, and W. Earl Shafer, all of San Francisco, for petitioner.

Joseph A. Garry, Deputy Dist. Atty., of San Francisco, for respondent.

KNIGHT, Acting P. J.

While acting as attorney for the defendant in a criminal case the petitioner was adjudged guilty of contempt of court. He has applied for a writ of habeas corpus. In his return the sheriff sets forth that he holds the petitioner by virtue of a judgment and commitment reading as follows, to wit:

"Be it remembered, that on this 2nd day of September, 1932, in the Superior Court of the State of California, in and for the City and County of San Francisco, in Department 12 thereof, the Honorable Frank H. Dunne presiding, in the above-entitled matter, the defendants Albert Tinnin and Frank J. Egan being charged by grand jury indictment with the crime of a felony, to wit, murder, then regularly on trial, the defendant Tinnin appearing personally and through his attorney Nathan C. Coghlan, Esq., and the defendant Egan appearing personally and through his attorney Vincent Hallinan, Esq.

"That during the course of said proceedings, and during the closing arguments to the jury which were then being made by the District Attorney, on behalf of the People of the State of California, the said Vincent Hallinan, Esq., contrary to the order and direction of the Court theretofore made, interrupted and continued to interrupt the said closing arguments and presentation of the case then being made by the said District Attorney;

"And be it further remembered, that there was no necessity legal or otherwise for said interruptions by said Vincent Hallinan, Esq., for the reason that pursuant to the order of said court theretofore made, and pursuant to stipulation and agreement theretofore made by the District Attorney and said Vincent Hallinan, Esq., as attorney for defendant Egan, it was not necessary either to interrupt the closing arguments of said District Attorney or to enter any objections or exceptions thereto, or to any part or portion thereof, having been notified by the Court and stipulated by the District Attorney that he would be entitled to reserve and have the benefit of any and all possible exceptions that it might be lawful for him to have and make during the course of the argument, and that the defendant Egan could be deemed to have objected and excepted to any and all parts and portions of said closing arguments,

"And be it further remembered, that despite the lack of necessity therefor, and despite said order and stipulation, the said Vincent Hallinan, Esq., did interrupt and did continue to interrupt the arguments of said District Attorney,

"And be it further remembered, that the manner, method and tone of voice of the said Vincent Hallinan, Esq., in refusing to cease making said interruptions were extremely and unduly loud, boisterous, harsh, offensive and contemptuous, and

"Be it further remembered, that the aforesaid conduct of said Vincent Hallinan, Esq., in manner, tone and method, was disorderly, contemptuous, and that his attitude and behavior toward this Court, while the Court was holding said session, was insolent, and that the same tended to and did interrupt the due course of the trial and the said judicial proceedings which were then and there in progress, and that the said conduct of the said Vincent Hallinan, Esq., was boisterous and that it did breach the peace of said judicial proceedings, and the same did create and was a violent disturbance of said judicial proceedings, and the same tended to and did interrupt the due course of the said trial and proceedings as aforesaid, which then and there was in progress.

"Now therefore, this court being fully advised of the law in the premises, finds as matters of fact that all of the above acts and conduct of the said Vincent Hallinan, Esq., above recited took place in open court, and as a conclusion of the law therefrom, the Court finds that the same constituted a contempt of the authority of this Court.

"Wherefore, it is ordered, adjudged and decreed by this Court that by reason of the speech and conduct of the said Vincent Hallinan, Esq., and the findings of fact of this Court, that he, the said Vincent Hallinan, Esq., be and he is hereby committed to the custody of the Sheriff of the City and County of San Francisco, State of California, for the period of twenty-four hours.

"Done in open Court this 2nd day of September, 1932.

"Frank H. Dunne
"Judge of the Superior Court."

[1-3] It will be observed that the proceeding involves a direct contempt; that is, one found to have been committed in the immediate view and presence of the court. In this regard, section 1209 of the Code of Civil Procedure declares that any of the following acts or omissions in respect to a court of justice, or proceedings therein, constitutes contempt of the authority of the court: 1. Disorderly, contemptuous, or insolent behavior toward the judge while holding court, tending to interrupt the due course of a trial or other judicial proceeding; 2. A breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding. Section 1211 of the same Code provides that, where a contempt is committed in the immediate view and presence of the court or judge at chambers, it may be punished summarily, for which an order must be made reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. As to the finality of judgments of contempt, it is held that the same are "subject to review only upon the point of jurisdiction" (Otis v. Superior Court, 148 Cal. 129, 82 P. 853), which is but a restatement of the provisions of section 1222 of said Code that "the judgment and orders of the court or judge, made in cases of contempt, are final and conclusive." Being final, a judgment of contempt is not appealable. The

party aggrieved must resort to other remedies. See 5 Cal. Jur., pp. 954, 955. When certiorari is invoked, the record of the entire proceeding upon which the contempt is based is brought before the reviewing court; but when, as here, the attack is made by way of habeas corpus, and the record of the proceedings is not produced, the question of jurisdiction must be determined from the judgment itself, and the petitioner is not allowed to go behind the facts and matters recited therein for the purpose of impeaching or contradicting them; they must be taken as true (In re Shortridge, 5 Cal. App. 371, 90 P. 478, 480; Ex parte Ewell, 71 Cal. App. 744, 236 P. 205; Ex parte Ah Men, 77 Cal. 198, 19 P. 380, 11 Am. St. Rep. 263); and the burden is upon the petitioner to show as a matter of law that the restraint which is apparently legal is not so (In re Clarke, 125 Cal. 388, 58 P. 22). In our opinion petitioner in the present proceeding has failed to sustain such burden.

[4, 5] Cases have been cited by him to the effect that there can be no contempt of a void order; others to the effect that, unless counsel for a defendant in a criminal action objects to the statements made by the district attorney in his argument to the jury and makes appropriate assignments of error at the time such statements are made, the defendant is precluded from urging the point on appeal as ground for reversal; and petitioner contends, therefore, that in order to protect the interests of the defendant here it was not only his right to interrupt the argument of the district attorney for the purpose of making such objections and assignments, but that it was his duty so to do; and that the "necessity" for such interruptions was a matter for him to decide and not the trial court. Conceding all of this to be true, it is equally well settled that the right to make any such objections or assignments may be waived (16 Cor. Jur. 914); and it needs no argument to demonstrate that what may be waived as a whole may be waived in part. Here no unqualified waiver is shown, but as will be noted the judgment of contempt recites that petitioner entered into a stipulation and agreement with the district attorney that at the conclusion of the arguments of the district attorney the defendant Egan would be entitled to reserve and have the benefit of any and all possible exceptions that it might be lawful for him to have and make during the course of the argument, and that the defendant Egan could be deemed to have objected and excepted to any and all parts and portions of said closing arguments. The subject of the agreement was a matter about which the parties might properly stipulate (23 Cal. Jur. 813; 36 Cyc. 1285), and it is held generally that a stipulation made in open court as this one was "constitutes not only an agreement between the parties but also between them and the court, which the latter is bound to enforce * * *" (23 Cal. Jur. 811); and even though a party, after entering into a stipulation, is allowed under certain circumstances to withdraw therefrom, it does not appear that petitioner ever asked permission so to do. Therefore, so far as the record before us shows, the trial court did not exceed its jurisdiction in seeking to enforce as against petitioner the stipulation theretofore made by him.

[6] Regardless, however, of the legal effect of said stipulation, and assuming that, after having entered into the same, petitioner had the right to repudiate it and interrupt the argument of the district attorney for the purpose of objecting thereto, he was nevertheless required to do so in a respectful and orderly manner and in keeping with the common rules of decorum and propriety, which, according to the recital of facts set forth in the judgment, he did not do. To repeat, the trial court found in this respect that the tone of petitioner's voice in refusing to cease making said interruptions which, according to the judgment, were made continually, was extremely and unduly loud, boisterous, harsh, offensive, and contemptuous; and that his conduct was disorderly and contemptuous, and that his attitude and behavior toward the court while holding said session was insolent, all of which tended to and did interrupt the due course of the trial which was then and there in progress; that said conduct was boisterous and did breach the peace of said judicial proceedings and create a violent disturbance, thereby interrupting the due course of the trial. Therefore, whether or not petitioner had the right to interrupt said proceedings for the purpose mentioned, it is apparent that the manner in which he conducted himself in seeking to exercise such right brought him clearly within the operation of the provisions of said section 1209, and subjected him to punishment for contempt.

[7] Petitioner contends, however, that the matters set forth in the judgment bearing upon his behavior are merely the conclusions of the trial court which are referable only to the fact that he interrupted the argument of the district attorney in violation of the court's order; and that therefore such conclusions must be disregarded in determining the legal sufficiency of the judgment. We are unable to agree to such contention. Under all the authorities it is held that a contempt may be shown either by language or behavior, and that although the language itself may not be contemptuous, it may become so if uttered in an insolent or defiant manner; and in determining whether the language used was a contempt, regard must be had not only to the very words used but to the surrounding circumstances, the connections in which they were used, the tone, the look, the man-

ner, and the emphasis. 13 Cor. Jur. 7; 6 R. C. L. 491. As said by Lord Denman, C. J., in Wilson's Case, 7 Q. B. 984: In contempt cases "it becomes the unfortunate duty of a court to act as both party and judge, and to decide whether it has been treated with contempt. We cannot decide upon the face of this return that they have come to a wrong conclusion. A court may be insulted by the most innocent words, uttered in a peculiar manner and tone. The words here might or might not be contemptuous, according to the manner in which they were spoken: and that is what we must look to. If the words might be contemptuously spoken, that was an ample occasion for the decision of the royal court with which no other court can meddle. Every court in such a case has to form its own judgment." In the same case Williams, J., stated as follows: "It is quite obvious that contempt may be shown either by language or manner. We can imagine language which might be perfectly proper, if uttered in a temperate manner, but might be grossly improper if uttered in a different manner. No one not present can be a competent judge of this." The Supreme Court of Indiana in Holman v. State, 105 Ind. 513, 5 N. E. 556, quoted the above statements with approval. Furthermore, according to the code commissioner's note, our section 1209 was taken originally from the Minnesota statute, and the Supreme Court of that state in the case of State ex rel. Leftwich v. District Court, 41 Minn. 42, 42 N. W. 598, in construing the statute, said: "While we have jurisdiction to review an order punishing for a criminal contempt the decision of the court making it is not to be lightly reversed. The opportunity of the court, in whose presence an alleged contempt is committed, to know and determine whether the acts or words were done or said in disregard and contempt of its authority is vastly greater than we can have from merely reading the record of such acts or words. Acts or words, when stated in writing, may appear to have been entirely innocent, but may have been done or spoken in such a manner as to have been in the highest degree a breach of the respectful conduct due to courts when in the discharge of their duty, and of the decorum and good order that ought to be observed in their presence to enable them to properly perform their functions. For this reason we do not think we state the rule too strongly when we say that an order adjudging a criminal contempt ought not to be reversed unless it is so apparent that no contempt was committed as to indicate that the court exercised its authority capriciously, oppressively and arbitrarily." In other words, as aptly stated by our own Supreme Court in Otis v. Superior Court, supra, "every court is the exclusive judge of its own contempts." And in this state, even in criminal cases where the accused is charged with disturbing the peace under section 415 of the Penal Code, which declares, among other things, that every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person "by loud or unusual noise, or by tumultuous or offensive conduct * * * is guilty of a misdemeanor," it has long since been held that a complaint charging the offense in the language of the statute is legally sufficient to sustain a judgment of conviction. In re Deusing, 178 Cal. 205, 173 P. 930; Ex parte Foley, 62 Cal. 508. Therefore in the present case, it appearing from the judgment that the contempt consisted, not in the use of language which in itself was offensive, but in the contemptuous tone of voice in which it was spoken, accompanied by disorderly behavior, it is difficult to conceive, and petitioner on oral argument was unable to point out, wherein the trial court could have been more explicit in describing the volume, tone, accent, and inflection of petitioner's voice and manner of speech than by saying as it did that it was extremely and unduly loud, boisterous, harsh, offensive, and contemptuous; or could have better pictured his attitude and behavior toward the court than by saying that it was insolent, contemptuous, boisterous, and disorderly to the extent of creating a violent disturbance and breach of the peace, all of which interrupted and interfered with the orderly progress of the trial. As was said in Ex parte Terry, 128 U. S. 289, 308, 9 S. Ct. 77, 81, 32 L. Ed. 405: "A breach of the peace in facie curiæ is a direct disturbance, and a palpable contempt of the authority of the court. It is a case that does not admit of delay, and the court would be without dignity that did not punish it promptly, and without trial."

In support of his contention on this point petitioner cites and relies mainly on the decision rendered in the case of In re Shortridge, supra, wherein the court said: "It is true that the order does state in general terms that his conduct was boisterous and offensive; but, reading this statement in connection with the context in which it occurs, it is clear that the order means no more by this than to state a conclusion from the fact that he persisted in addressing the court against the order of the court. So the question involves the single proposition: Does the simple fact that an attorney for a party to an action pending before the court, while a witness is being examined, persists in addressing the court, although admonished not to do so, constitute a contempt of court? We think it does not." But continuing, the court said: "For aught that we can see from the order, the petitioner may have been *rightfully and respectfully* discharging his duty. * * *" (Italics ours.) It will be seen, therefore, that the judgment of contempt in the present case contains much more than

the order in the Shortridge Case, because here it affirmatively appears from the judgment that petitioner was neither rightfully nor respectfully discharging his duty. But aside from the differentiating element mentioned, it would seem that the decision in the Shortridge Case is contrary to the views expressed by the courts of a number of other states having similar statutes. For example, in the case of State ex rel. Leftwich v. Superior Court, supra, arising in Minnesota, from whence our Code section 1209 was taken, the petitioner was examining a witness and had asked several questions of the same general character to which objections had been sustained. The relator proceeded in making similar offers. He was warned to discontinue. He did not do so. Thereupon a judgment in contempt was entered. Addressing itself to these facts, the Supreme Court said (page 599 of 42 N. W., 41 Minn. 42): "A counsel trying the cause of his client has, of course, rights as the representative of a suitor and as an officer of the court which must be respected; but those rights can never extend to disregarding or disobeying the rulings and orders of the court. If that were permitted the trial of a cause might become a mere farce. If he thinks a ruling against him is erroneous he can do his duty to and save the rights of his client by taking an exception. That is the only orderly and proper way to avoid the effect of an erroneous ruling. To permit the counsel, after the court has decided that a question or a particular course of examination is improper, to persist in renewing substantially the same question, or in continuing that course, would incur the danger of the trial becoming a contest of endurance between the court endeavoring to prevent a course of examination that it deemed improper and the counsel endeavoring to follow such a course, notwithstanding the ruling of the court. A counsel who would intentionally attempt such a mode of conducting a trial, especially after being warned by the court to desist, and that it would consider persistence in it a contempt, would undoubtedly be guilty of a contempt. The court, in order to have the power to promote dispatch of business and an orderly and intelligent conduct of a trial, must have the power to summarily prevent such a thing." Again, in Holman v. State, supra, the facts showed that the petitioner was engaged in cross-examining a witness. The court sustained an objection. The petitioner arose to his feet and proceeded to argue the question that had been ruled upon. He was directed to take his seat. He declined to do so, and it was held that the facts sustained the judgment of contempt. Two of the numerous other cases arising under similar circumstances, wherein the judgment of contempt was sustained, are Russell v. French, 67 Iowa, 102, 24 N. W. 741, and In re Mindes, 88 N. J. Law, 117, 95 A. 743.

[8] Moreover, in our opinion the decision in the Shortridge Case reached the limit of authority of a reviewing court to interfere with the power of a trial court to be "the exclusive judge of its own contempts," because in the absence of the statutory enactments above referred to, which are but declaratory of the common law (Ex parte Terry, supra; 4 Bl. Comm. 286), every court of general jurisdiction has the inherent power to punish for contempt, of which it cannot be deprived even by the Legislature. In this regard the Supreme Court of this state in an early case said: "No authority has been found which denies the inherent right of a court, in the absence of a limitation placed upon it by the power which created it, to punish as a contempt an act, whether committed in or out of its presence, which tends to impede, embarrass, or obstruct the court in the discharge of its duties. It is a doctrine which is admitted in all its rigor by American courts everywhere, and does not need the support of foreign authorities, based upon the fiction that the majesty of the king, represented in the persons of the judges, is always present in the court. It is founded upon the principle—which is coeval with the existence of the courts, and as necessary as the right of self-protection—that it is a necessary incident to the execution of the powers conferred upon the court, and is necessary to maintain its dignity, if not its very existence. It exists independently of statute. The legislative department may regulate the procedure and enlarge the power, but it cannot, without trenching upon the constitutional powers of the court, and destroying the autonomy of that system of checks and balances which is one of the chief features of our triple-department form of government, fetter the power itself." In re Shortridge, 99 Cal. 526, 34 P. 227, 229, 21 L. R. A. 755, 37 Am. St. Rep. 78. Therefore in the present case, if we should hold absolutely meaningless, as petitioner contends we should, the entire portion of the judgment dealing with his manner of speech and his behavior, we would be not only unduly extending the effect of the decision in the Shortridge Case, 5 Cal. App. 371, 90 P. 478, but we would be doing indirectly, by a process of judicial interpretation and decision, that which the legislature may not do directly or at all, namely, nullifying the inherent power of the trial court in this particular case to punish as a contempt a breach of the peace in facie curiæ which the trial court declared impeded, embarrassed, and obstructed the court in the discharge of its duties. To so hold would be of course to exceed our own jurisdiction.

We find nothing in the cases of In re Lake,

65 Cal. App. 420, 224 P. 126, Curran v. Superior Court, 72 Cal. App. 258, 236 P. 975, 979, or Platnauer v. Superior Court, 32 Cal. App. 463, 163 P. 237, 242, which conflicts with the views herein expressed. The Lake Case has no pertinency whatever because it did not involve the question of behavior of counsel during the progress of trial, merely his liability for punishment for contempt for inserting certain matter in an affidavit charging the judge with bias and prejudice. The Curran and Platnauer Cases were reviewed on certiorari and consequently the records of the entire proceedings were before the reviewing court; and the decisions therein go no farther than to hold that the fact that an attorney may speak in a loud, combative, and contentious tone of voice, and happens to be persistent and vehement or both in the presentation of his points, does not constitute a contempt, "so long," says the court in the Platnauer Case, "as his language is not offensive or in contravention of the common rules of decorum and propriety." In this latter respect the court in the Curran Case expressly points out "that the [trial] court in its order does not find that the manner in which the acts were done was disorderly, contemptuous, or insulting to the court * * *"; and in the Platnauer Case the court said (page 475 of 32 Cal. App., 163 P. 237, 242): "It does not appear from the facts as they are here disclosed that the petitioner at any time addressed the court in disrespectful language. On the contrary, he appears to have proceeded with full consciousness of the duty which an attorney owes to a court, and, when adjudged guilty of contempt, had merely interposed a suggestion in respectful language. * * *" And continuing on the court fully recognizes the fundamental principle that every court is vested with inherent power to punish for disorderly and insolent behavior, the court saying: "Every court has the right to protect its dignity by compelling litigants and attorneys appearing before it to conduct themselves with decorum and in a respectful manner and the proceedings of a trial in an orderly way. With this right necessarily attends the power to coerce decorum and decent conduct on the part of the parties and their counsel, and to compel them to demean themselves in a manner befitting the dignity of courts of justice. And the power should, on all *proper occasions*, be unsparingly exercised and applied, to the end that the courts, which represent in the highest form the majesty of the law, shall be accorded that respect to which the sacredness of their functions and their high dignity entitled them."

For the reasons stated it is our conclusion that the recital of facts set forth in the judgment in the present case in its entirety is legally sufficient to support the trial court's adjudication of contempt. Therefore the writ is discharged and the petitioner is remanded to the custody of the sheriff.

I concur: STURTEVANT, J.

CASHIN, J.

I concur in the order discharging the writ and remanding petitioner. While I am satisfied that the facts found in the commitment cannot well be distinguished from those of In re Shortridge, 5 Cal. App. 371, 90 P. 478, that case in my opinion not only reached but went beyond the limit of authority; and to the extent that it can be said to hold that a finding that the conduct and language of one addressing the court was boisterous and offensive, and interrupted the orderly conduct of the proceeding before the court, is insufficient to show contempt within the meaning of the law, it should no longer be followed.

126 Cal.App. 455

In re HAMBURGER'S ESTATE.

MARX v. HAMBURGER et al.

Civ. 8441.

District Court of Appeal, Second District, Division 2, California.

Sept. 28, 1932.

Rehearing Denied Oct. 27, 1932. Hearing Denied by Supreme Court Nov. 25, 1932.

1. Wills ⇐324(2).

In action to revoke probate of will, evidence that testator was mentally incompetent to execute will *held* insufficient for jury.

2. Wills ⇐324(3).

In action to revoke probate of will, evidence that will was procured by undue influence *held* insufficient for jury.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Jennie Hamburger Marx against D. A. Hamburger, as executor of the last will and testament of M. A. Hamburger, and others, to revoke probate of a will. From a judgment of nonsuit, contestant appeals.

Affirmed.

Hearing denied by Supreme Court; LANGDON and TYLER, JJ., dissenting.

Joseph Scott, of Los Angeles (Theo. C. Heyl, of Los Angeles, of counsel), for appellant.

Mitchell, Silberberg & Davis and Peery Price, all of Los Angeles, for respondents.

STEPHENS, Justice pro tem.

The decedent, M. A. Hamburger, sometimes known as Mose Hamburger, died in Los An-

geles county October 29, 1930. A document in form a witnessed will, executed August 18, 1930, was in due time presented to the probate court as his last will and testament, and without contest was admitted to probate as such. Later, Jennie Hamburger Marx, a sister of decedent, instituted a contest in which she asked that the probate of said document be revoked, basing her action on two grounds, to wit: (1) That at the time the deceased executed the will in question he was not mentally competent to make a will; (2) that said will was procured to be executed under the undue influence of D. A. Hamburger and his wife, Katherine Hamburger. The case went to trial before the court with a jury, and at the conclusion of contestant's case a motion for nonsuit was made as to each cause of action on the ground that no evidence had been produced which would justify the cause being left to the jury for decision. The court granted the motion as to each cause and contestant appeals from the ruling.

The estate involved is large and substantial. The will was long, and contained trust provisions. In reciting the facts necessary to a consideration of the case, we quote in part from appellant's opening brief under the caption "Statement of the Evidence," adding thereto as we think proper, and designating the same by use of brackets: "The deceased at the time of his death was 71 years old. He had been a well known merchant and for many years prior to his death had resided in Los Angeles, when he was not traveling. He was very active in business and in other matters, and until his last few years was a man of apparent robust health. [Decedent was a close associate in business with his brother, D. A. Hamburger, continuously for many years and up to the time of his death.] He was a bachelor and was survived by one brother and three sisters. One brother is married and has three children, all living and mentioned in the will of the deceased. One of the sisters was never married; the other two were. * * * the contestant is the mother of Mrs. Florence Hellman, who is not mentioned in the will of the decedent; neither are her children. * * * There is no necessity of setting forth here any fact in the life of deceased preceding 1927. In that year he suffered a brain concussion in a fall from a streetcar. The accident had slight effect on the deceased at the time but did cause his memory to become poor and clouded his mentality. [This lasted two or three hours while he was in the receiving hospital, although he was conscious at all times. The police surgeon testified that concussions might be temporary or permanent, and that he knew nothing of the effect of the accident on Mr. Hamburger after he saw him at the hospital. There is testimony that Mr. Hamburger went out that night to a party.] In the spring of 1928 the deceased visited Palm Springs and while there suffered a stroke of paralysis or spasm of the arteries, coming from hardening of the arteries. [This thickened his speech, confused his mind and caused him to fumble in the use of his hands.] He recovered rapidly and was removed within two weeks to Los Angeles in an ambulance. Before returning he had recovered so that his speech was clear, his mental faculties clear and normal and fumbling had practically disappeared. During 1928 and 1929 deceased traveled to Europe and there took treatments for his heart trouble. [While there he was subject to emotional outbursts without normal cause.] In January, 1930, he sailed for the Orient, and while on this trip was ill. He returned in April and went to the home of his sister [Mrs. Nathan], where he remained convalescing from his illness. His condition improved for a time after his return, but in the early part of September one of his attending physicians believed his condition to be hopeless. During his illness from April to the date of his death Doctors Leland Potts Hawkins, Donald Jackson Frick and Dudley Fulton attended him. Dr. Dudley Fulton is dead." This closes the general statement.

There can be no possible question from the evidence that decedent was mentally able to make a testamentary disposition of his estate up to his return from the Orient in April of 1930. We shall therefore analyze the testimony concerning his mental status subsequent to that date, always, of course, remembering the history to such time.

Dr. Fulton, who treated decedent prior to April of 1930, is dead, and we have only the testimony of Dr. Hawkins, a younger associate of Dr. Fulton, as to decedent's illness from that date to his death. His examination was brief, and the cross-examination was strictly limited. Dr. Hawkins first called on decedent in April of 1930, because Dr. Fulton was away. His testimony as to Mr. Hamburger's illness was similar to that of Dr. Frick, but shorter. The treatment described by him was about the same as described by Dr. Frick. He testified that deceased was given a little less medicine in July than in May, and about the same in August as in July.

Dr. Donald Jackson Frick was called on the case April 22 and attended decedent practically every day to May 23d. According to his testimony, the patient had a chronic degenerative condition of his heart muscles; some swelling of legs and feet; shortness of breath, not painful but distressing. Treatment was codeine; some morphine for sleeping and shortness of breath; morphine was discontinued shortly; improved in May. Dr. Fulton returned, and Dr. Frick was not called again until September 3d; thereafter called upon decedent September 3d, 4th, 6th, 8th, 10th, and 13th; found patient back about same as in April; heart disease had pro-

gressed; resumed old treatment; patient had good and bad days; thought case hopeless. On cross-examination, the witness said, "As far as I could see, at any time I saw him, he was mentally clear," and testified that the patient carried on conversations very well on various subjects; that morphine and other drugs for sleeping would be effective for from four to six hours; that the drugs given patient were not sufficient to have any effect upon the mentality other than the effect of producing sleep.

Mrs. Florence M. Hellman is a daughter of decedent's sister Mrs. Marx, the contestant herein, and is the mother of three children. She testified that decedent looked bad upon his return from the Orient; that she went to Europe six weeks later, returning early in August of 1930, from which time on she saw decedent often until his death; that he had failed during her absence; that he habitually lay back with eyes closed, trying to listen to what was said; would very often doze off regardless of who was in the room, occasionally making a remark; that her children would come in several times each week and his eyes would beam, and he would say, "Hello sweetheart"; that when not in pain he would seem to be interested and would listen to her narrative of European travels; that, at a birthday party at the Nathans for Mrs. Marx and decedent on August 28, 1930, decedent came to dinner not fully dressed; ate little, talked little, and was affected to tears by presents given him; the dinner lasted from 7 to 10 p. m., but decedent did not remain continuously at the table; that moving pictures were shown, but he could not enjoy them; that after that he never got up and dressed, but would lie propped up in bed by pillows, suffering and dozing off; that he would get short of breath, groan, grab the foot of the bed, and sway until relieved; that in September he sometimes would make remarks apropos of the conversation; that at times he would try reading a paper, then fall back, close his eyes, and the paper would fall. In October the witness' visits were fewer and of shorter duration.

The testimony of Mrs. Marx was essentially the same as that of Mrs. Hellman. She testified that after August decedent was given hypodermic injections quite frequently, during September once or twice a day; that he did not talk much, but smoked; that in October he grew worse, had attacks "continually all the time"; that she saw him every day in October; that he may have been conscious, but was dozing most of the time; that he was not conscious his last week.

Mr. Isi Klingenstein, a friend and relative by marriage, testified that after the oriental trip decedent seemed sleepy and drowsy most of the time, would fall asleep; that he saw him every three or four days; that he got weaker during August; that he "always talked to him, tried to talk to him"; that in September he was getting worse; "he couldn't leave the house; just several days he was feeling good and the next day he was sick again."

Louis J. Friedman testified that D. A. Hamburger told him in May of 1930 that "Mose is under the influence or spell of opiates and he is suffering all the time. Mose is going down hill very fast. We have given him dope day and night." In June decedent had a wild look in his eyes; he was shrunken. "He didn't appear to be as rational. Dave said, 'He is going down hill very fast.'" The witness at that time was in decedent's room about two minutes.

About two months before decedent died, a former chauffeur of his was called in to help move him in a wheel chair, and decedent failed to recognize him and got excited.

Miss Evelyn Hamburger, youngest sister of decedent, testified that she received a message in Europe in June, 1930, signed "Brother," saying, "Come home if you wish to see your brother alive"; that she arrived home July 1st and saw decedent that evening; that he was emaciated and very weak; that he talked of Europe and various things; that he said, "I feel pretty good"; that she saw him every day in July; that "he would get up for a few hours"; that she stayed with him from morning until afternoon and then in the evening; that decedent went down town in July, but that she tried to prevail upon him not to go because he was very weak; that he wanted to talk, but the doctors discouraged it; that he was not improving in August, but grew weaker, slept a good deal; he went down town on August 28th, his birthday, and sat as the dinner table awhile; "Oh, I don't know that he went down [town] very much in August, because it was very warm, and we tried to prevail upon him not to go too much"; that in September the injections were more frequent, made him drowsy; that in October, three or four days before his death, decedent had hallucinations; that in the beginning he was conscious quiet a good deal, but later he dozed a good deal in the middle of the day; that he listened to the radio, stock market news and "Amos and Andy." On cross-examination, the witness testified:

"Q. Right up to pretty close to his death he was interested in those things, was he? A. I think so. He listened to sport events right up to close to his death.

"Q. Did he read the newspapers a lot? A. Toward the end he was unable to, and I used to say to him, 'Don't bother about the paper just now.'

"Q. Do you mean the last week or two? A. Yes. Mose went to Silverberg's office about August 1st and then Silverberg came to the house two or more times.

"Q. In fact, really, it wasn't until the very last couple of weeks that M. A. began to more or less lose interest in things; isn't that true? A. Yes. He had to be advised all along about being careful and not to go down town."

On the question of competency, D. A. Hamburger testified in a general way that decedent was interested in affairs generally and in business up to within a few days preceding his death.

Dr. Frank M. Mikels, a mental and nerve specialist, replied to a hypothetical question: "Yes, in all reasonable certainty this man was of unsound mind." The doctor's testimony shows clearly that an "unsoundness of mind," as considered by him, was a technical term used to differentiate such a condition from a perfectly normal mind, and was not at all the soundness of mind required of a person when executing a legal testamentary disposition of his worldly goods. The hypothetical question itself was indefinite in several important elements, including the extent of the concussion and paralysis, amount of medicines, and how often given.

A hypothetical question was put to another medical expert, Dr. Samuel D. Ingham, who answered as follows: "I would think that there was very definite impairment and disturbance with emotional reaction. I don't know how to answer in regard to whether he was of sound mind or not, because soundness of mind is a relative term. It would be my opinion that his mind was limited in its scope, in its capacity, and his emotional balance was disturbed so that his mind was not working at its greatest efficiency."

The following quotation from the opinion in Estate of Chevallier, 159 Cal. 161, 170, 113 P. 130, 134, a case in which motion for nonsuit had been granted, is very pertinent: "We are herein not unmindful of the testimony of the physician who declares, under the promptings of a hypothetical question too long to be repeated, his belief that the deceased was insane. But his testimony goes no further than this. This court recently, in Estate of Dolbeer, 149 Cal. 227, 86 P. 695 [9 Ann. Cas. 795], was called upon to discuss the value of expert opinion evidence given under such circumstances, and declared it to be 'in the eye of the law of steadily decreasing value.' But giving to the evidence under the circumstances of the nonsuit, as we must, the fullest weight to which it is entitled, it is but a declaration of the belief of the physician that from a medical standpoint she was insane. It is not accompanied nor followed by any evidence showing the extent or nature of the insanity, and, as hereinbefore pointed out, the insanity which the physician believed he had found could have well co-existed with full testamentary capacity." See, also, Estate of Purcell, 164 Cal. 300, 128 P. 932, point 4, Estate of Collins, 174 Cal. 663, 670, 164 P. 1110, and Estate of Flint, 179 Cal. 552, 177 P. 451, holding that opinion evidence of unsoundness of mind rises no higher than the reasons given for the opinion.

Much of the testimony above referred to was given to show a mental weakness on the part of decedent. Such testimony should be read in the light of the opinion in the recent case of Estate of Bemmerly, 110 Cal. App. 550, 294 P. 33. In this connection, also, the following language from the opinion in Estate of Casarotti, 184 Cal. 73, 192 P. 1085, 1087, is pertinent: "It must be borne in mind that it is not every weakness and impairment of the faculties of the testator that will invalidate a will. Even where a testator is feeble in health, suffering under disease and aged and infirm, yet if he was of sufficiently sound mind to be capable of understanding the nature and situation of his property, and of disposing thereof intelligently, without any delusions affecting his action, he had sufficient capacity to make a will. * * * It was held that the fact of the testator being unable to speak articulately, and was compelled to communicate by signs, did not raise a legal presumption of incompetency to make a will. Estate of Latour, 140 Cal. 415, 73 P. 1070, 74 P. 441."

[1] Without here attempting to draw a fine technical definition of a nonsuit and without trying to harmonize the several leading cases upon the subject (and we confess that there are statements in the opinion in Estate of Ivey, 94 Cal. App. 576, 271 P. 559, with which we do not entirely agree), we think the following expresses the problem before us, in so far as the question of mental incapacity is concerned: Is there any substantial testimony that decedent was so mentally incapacitated on the 18th day of August, 1930, that he could not have understood the contents of the document which he signed on that day as his last will and testament? We think there is no such testimony. Decedent was an experienced business man, and had drawn or executed several complicated wills. In this will he had the services of an attorney. He was a sick man, but he was able to converse and to take an interest in things throughout August of 1930, the month in which the will was executed. He grew worse after August, and yet he continued almost to his death to interest himself in many things. There is no evidence that the will was executed while decedent was under the influence of drugs. Furthermore, not every person who is given sedatives to comfort him in illness or opiates to induce a night's rest is necessarily incompetent to execute a will. Estate of Fraser, 177 Cal. 266, 170 P. 601, Estate of Bemmerly, supra. The following words from In re Ferguson's Estate, 239 Mich. 616, 215 N. W. 51, 54, may well be applied to the instant case: "The technical wording of the will was the exer-

cise of professional art by an attorney, and it was not at all essential that the testatrix comprehended the legal phraseology with the eye of a lawyer, but sufficient if she fully comprehended what was accomplished thereby. Few people understand the technical language of a deed, and were understanding of its technical words the test of mental capacity of the grantor few deeds could stand. Underlying the words employed by the lawyer in the will is the simple meaning readily understandable by a layman."

[2] It seems to us, also, that the evidence is entirely lacking as to the alleged undue influence of Mr. and Mrs. D. A. Hamburger. D. A. Hamburger was educated for, and many years ago did perhaps a little practicing at, the law. Assume that he did advise with his brother in former wills; assume that he did draw a will or a form of will for one of his relatives; that the will in question was more to his and his children's advantage than former wills of decedent; assume that the last will of decedent was more to the liking of D. A. Hamburger than the preceding wills of his brother; that it left to one of the sisters property for life only and did not mention grand nieces and nephews for whom decedent had shown much love and affection; assume that D. A. Hamburger was greatly displeased with the fact that decedent was going to change one of his former wills and that he had created a scene over it, and that this had been communicated to decedent; assume that D. A. Hamburger was present when the new will was executed, along with other witnesses—assuming all of this, and there is supporting evidence in the record, yet the evidence clearly shows that decedent was mentally competent on August 18, 1930, to execute a will; that, notwithstanding the fact that contestant and other witnesses were in the testator's company during his illness a much greater time than were the D. A. Hamburgers, no word or even a suspicion as to any undue influence by anybody had been produced. It seems to us that the evidence shows that the contestant entertained but a suspicion of undue influence, unfounded in fact so far as shown by the testimony produced. "Proof, to establish undue influence, must be had of a pressure which overpowers the mind and bears down the volition of the testator at the time the will is made. It consists in the exercise of acts or conduct by which the mind of the testator is subjugated to the will of the person operating upon it. Estate of Holloway, 195 Cal. 711, 235 P. 1012; Estate of Anderson, 185 Cal. 700, 198 P. 407. Mere proof of opportunity to influence a testator's mind, even when coupled with an interest or motive to do so, will not sustain a finding of undue influence, in the absence of testimony showing that there was pressure operating directly on the testamentary act and to such an extent as to affect the terms of the testament. Estate of Fleming, 199 Cal. 750, 251 P. 637; Estate of Bryson, 191 Cal. 521, 217 P. 525. It is not sufficient for a contestant merely to prove circumstances consistent with the exercise of undue influence, but, before a will can be overthrown, the circumstances proved must be inconsistent with voluntary action on the part of the testator. Estate of Morcel, 162 Cal. 188, 121 P. 733." Estate of Donovan, 114 Cal. App. 228, 299 P. 816, 818. See, also, Estate of Presho, 196 Cal. 639, 238 P. 944, and Estate of McDevitt, 95 Cal. 17, 30 P. 101.

The entry of judgment for costs was not erroneous. The motion for nonsuit was properly granted.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

126 Cal.App. 327

KUGLER v. SCARBOROUGH et al.

Civ. 983.

District Court of Appeal, Fourth District, California.

Sept. 26, 1932.

1. Appeal and error ⇐193(6).

Allegations of mutual mistake in making reconveyance *held* good against objection for uncertainty made for first time on appeal.

2. Quieting title ⇐44(4).

Evidence *held* to support finding that purchaser on execution sale was not bona fide purchaser.

3. Reformation of instruments ⇐45(5).

Evidence *held* to support finding that creditor was entitled to reformation of reconveyance made upon form for full reconveyance of property covered by trust deed, where partial reconveyance was intended.

4. Mortgages ⇐360.

Sale under trust deed may be conducted by trustee's attorney.

Appeal from Superior Court, Los Angeles County; Ernest Weyand, Judge.

Action to quiet title by Rose Kugler against Minnie Scarborough, Gertrude A. Woods, Ralph A. Woods, and Irene Johnson, wherein Minnie Scarborough filed cross-complaint against plaintiff and her codefendants. From judgment for cross-complainant, plaintiff appeals.

Affirmed.

Raphael Dechter, of Los Angeles, for appellant.

Glen Behymer, of Los Angeles, for respondent.

MORTON, Justice pro tem.

This is an appeal by plaintiff from a judgment on an action to quiet title. Defendants Ralph A. Woods and Gertrude A. Woods, his wife, executed and delivered to defendant and cross-complainant Minnie Scarborough a promissory note for $3,000, secured by a trust deed covering two parcels of real property in Los Angeles county, to wit, a house and lot in the Los Angeles-McCarthy tract, and a lot and a half in the Redondo Villa tract. Defendant Irene Johnson was named as trustee in the deed of trust. Woods and his wife defaulted under the terms of the note and trust deed, and after some delay, the trust deed was foreclosed. Prior to the foreclosure of that trust deed a reconveyance was executed and delivered by the trustee, Irene Johnson, to Woods and his wife, describing only the Redondo Villa property, which they at once recorded. It is alleged that through the inadvertence and mutual mistake of the parties to the deed of trust that this intended partial reconveyance was made upon a *form for full reconveyance* and recited full payment of the indebtedness and release and reconveyance without warranty to the holder of the legal title when the deed of trust is executed and for the benefit of those lawfully succeeding thereto of all the estate described in the deed of trust and that this conveyance was given as satisfaction and discharge of the trust. It is further alleged that the reconveyance was made for a good and valuable consideration but without payment of any portion of the indebtedness secured thereby. Plaintiff held a judgment against defendant Ralph A. Woods, by virtue of which she caused an execution to be levied on the McCarthy tract property. It was then sold by the sheriff at execution sale and bid in by plaintiff. Her attorney testified he learned of the McCarthy tract property through a searcher's chain of title report furnished to him and that he personally examined the recorded reconveyance before he attended the sheriff's sale and bid in the equity of Ralph A. Woods in the property for his client. After getting the sheriff's deed, he wrote Ralph A. Woods of what had occurred and that before taking legal proceedings for possession, he would be willing to arrange with him to rent the property if he desired. In response to the letter Gertrude A. Woods called at his office and subsequently made a payment of $20 to the attorney inclosed in a letter in which she stated she would send more next month. She testified this payment of $20 was on the judgment indebtedness. This property was then sold at public auction under the trust deed foreclosure and bid in by cross-complainant. No further payments were made by Mrs. Woods to plaintiff's attorney and plaintiff then filed this suit to quiet title. All the defendants answered, and defendant Minnie Scarborough filed a cross-complaint alleging the mutual mistake and asking that the reconveyance and release deed be reformed to express the true intent of the parties. Judgment was in favor of cross-complainant reforming the deed as prayed for and decreeing that Minnie Scarborough was the owner in absolute fee simple of the premises and that plaintiff was forever barred from any and all claims of right or title to the property, or any lien thereon, or any part thereof.

[1] Appellant's first point on appeal is that the cross-complaint does not set forth with sufficient certainty the circumstances accounting for the mutual mistake made in the reconveyance. In the absence of special demurrer and a general objection not specifying these, but other grounds for the objection, we hold that the allegation is sufficient. 22 Cal. Jur. § 17, p. 732; Seegelken v. Corey, 93 Cal. 92, at page 95, 28 P. 849. Further, these grounds, as a basis of the aforegoing objection, are raised for the first time on this appeal.

"Where no objection is made at the trial to evidence on the score of defective pleading, the rule is well established that such a course is a waiver of a defective pleading." Beardsley v. Clem, 137 Cal. 328, at page 332, 70 P. 175, 176.

"* * * And if he objects on certain grounds, he cannot on appeal raise other objections to the complaint, which might have been obviated by timely amendment; as by pointing out particular objections he has in effect assured the adverse party that he will urge no other objection." 2 Cal. Jur. § 77, p. 254.

[2] Considering the point that plaintiff was a bona fide purchaser, it appears from the evidence that plaintiff's attorney personally examined the recorded reconveyance before bidding in the property at the sheriff's sale. In the case of Leonard v. Osburn, 169 Cal. 157, at page 160, 146 P. 530, 531, the court held: "While the description is erroneous, yet it may be expressed in such a manner, or may be connected with such attendant circumstances, that a purchaser is deemed to be put upon inquiry; and if he fails to prosecute this inquiry he is chargeable with all the notice he might have obtained had he done so." See, also, Watson v. Sutro, 86 Cal. 500, 24 P. 172, 25 P. 64, and O'Rourke v. O'Connor, 39 Cal. 442.

The inconsistency of the reconveyance was apparent on its face. It was clearly a patent ambiguity and parol evidence was admissible in an action praying for reformation. 22 Cal. Jur. § 23, p. 741.

Whether or not the evidence was sufficient to support a judgment of reformation is a question primarily for the trial court.

"The appellant insists that the evidence which will be sufficient to justify the reformation of a contract upon the ground of mistake must be clear and convincing. Assuming that the rule for which the appellant contends would have application to the attitude of the trial court toward cases of this character, we are satisfied that in this case there was clear evidence of a mistake, and whether or not it was convincing was entirely a question for the trial court." California Packing Corp. v. Larsen, 187 Cal. 610, at page 613, 203 P. 102, 103.

[3] The realtor and notary, J. T. Howard, testified the parties asked him to draw a reconveyance covering only the Redondo Villa tract lots and he prepared it thinking it covered only these lots. From an examination of all the testimony of the witnesses concerning how the mistake was made in the drawing of the reconveyance, we feel that the cross-complainant was entitled to the relief sought.

[4] The evidence does not sustain appellant's contention that the note and trust deed were never delivered and never operative. The sale under the trust deed was conducted by the trustee's attorney, which is allowable under the law of this state. Kennedy v. Dunn, 58 Cal. 339; Stockwell v. Barnum, 7 Cal. App. 413, at page 418, 94 P. 400.

The judgment of the trial court is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

126 Cal.App. 539

BURR v. GOODWIN.

Civ. 924.

District Court of Appeal, Fourth District, California.

Sept. 29, 1932.

1. Executors and administrators ⇨241.

Decree establishing due notice to creditors of estate is not conclusive in face of satisfactory evidence showing that publication of notice to creditors was insufficient (Code Civ. Proc. § 1490).

2. Executors and administrators ⇨226.

Notice to creditors of estate to exhibit claims at administrator's office, not containing alternative provision for filing claims in office of clerk of court, *held* insufficient (Code Civ. Proc. § 1490).

Code Civ. Proc. § 1490 provides that every executor or administrator must cause to be published a notice to creditors of decedent requiring all persons having claims against decedent to file them in office of clerk of court from which letters were issued, or to exhibit them to executor or administrator at place of his residence or business specified in notice.

3. Judgment ⇨562.

Judgment rejecting creditor's counterclaim against estate in action by administrator because claim filed in estate did not contain copies of notes on which claim was based, *held* not to bar creditor from recovering in subsequent action on second claim presented to administrator on same notes and rejected.

Judgment rejecting creditor's counterclaim in action by decedent against creditor, in which decedent's administrator was substituted on decedent's death, did not bar present action since, in first action, merits of creditor's claim were not passed upon by court.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by Clyde R. Burr, as receiver of the First National Bank of Calexico, against R. N. Goodwin, as administrator of the estate of A. H. Goodwin, deceased. From a judgment in favor of defendant, plaintiff appeals.

Reversed, and remanded for a new trial.

Philip Grey Smith and Clyde R. Burr, both of Los Angeles, for appellant.

M. C. Atchison, of Calexico, for respondent.

MORTON, Justice pro tem.

This is an appeal by the claimant from a judgment in favor of the administrator on a rejected claim.

Shortly prior to his death decedent filed an action against the appellant bank for charging and collecting usurious interest from him. R. N. Goodwin, as administrator, was substituted as plaintiff, and in its answer the bank pleaded certain promissory notes executed by decedent and held by the bank, as a counterclaim and set-off thereto. A claim on the notes had been presented to the administrator but he had not approved or rejected it at the time of the trial, although more than ten days had elapsed since the presentation of the claim. Judgment was for the plaintiff, and the court held that the amount of the notes was not available as a set-off because the claim filed in the estate did not contain copies of the notes. No appeal was taken from this judgment. A few days after the trial court had rendered its opinion and before judgment had been entered, the bank filed a new claim with the administrator, al-

though more than ten months had elapsed since the first publication of the notice to creditors. This second claim was rejected by written notice, and suit was then filed thereon. Judgment was for defendant, and plaintiff appeals.

[1, 2] Two points present themselves for determination: First, whether the form of notice to creditors was sufficient; second, whether the judgment in the former suit precluded the claimant from recovering in the present action upon the second claim filed.

The notice to creditors in the Goodwin estate, which is attacked by appellant as insufficient, directed "the creditors of and all persons having claims against the said deceased, to exhibit the same with the necessary vouchers within ten months after the first publication of this notice to the administrator, at the law office of M. C. Atchison, 201 City Market Building, Calexico, California." The notice omits the alternative provision of allowing claims to be filed "in the office of the clerk of the court from which the letters were issued." Section 1490, Code Civ. Proc. The evidence does not disclose whether or not a decree establishing due notice to creditors had been granted in this estate. However, such a decree would not be conclusive in the face of satisfactory evidence showing that the publication of the notice to creditors was insufficient. Wise v. Williams, 88 Cal. 30, at page 34, 25 P. 1064. In holding that section 1491a, Code of Civil Procedure, must be strictly complied with, the Supreme Court said in Hawkins v. Superior Court, 165 Cal. 743, 745, 134 P. 327, 328:

"This want of any information in the files of the estate itself of when and where publication was being made and when and to whom claims should be presented, doubtless prompted the Legislature to the enactment of section 1491a, which was intended to supply all this information by requiring that a copy of the published notice with a statement of the fact as to when publication began and in what paper should be of record in the estate within 30 days after the first publication. Parties interested in the estate whose right to act therein might be measured by lapse of time for the presentation of claims, and creditors whose claims required presentation within the given time would thus have early, direct, and full information by an inspection of the files of the estate, and could act accordingly. With this section 1491a complied with, parties interested would not be required to hunt up the whereabouts of the executor, administrator, or attorney of the estate, who might all be nonresidents of the county in which it was being probated, and whose particular places of residence or offices the files would not disclose, nor assume the task of perusing the newspapers of the various cities and towns of a county to ascertain in just which one the notice was being published. Ordinarily this task may not be a difficult one; but it was for the purpose of obviating any trouble or annoyance in the matter that the Legislature enacted section 1491a. This was the only possible purpose its enactment could subserve. While the wisdom of the Legislature in making this simple provision is obvious, still, if the claim of the petitioner is to obtain, that the filing of the notice which it provides for is merely directory, nothing has been accomplished at all, and the Legislature might have saved itself the trouble of the enactment. * * *

"Compliance with the section is so easy that there can be no reasonable excuse for its nonobservance, nor should its beneficent provisions be frittered away and rendered nugatory by a construction which treats it as merely directory. We are satisfied that both from the language used and the purpose to be attained it was intended that the section should be mandatory, and the superior court properly so construed it."

In Madruga v. Superior Court, 193 Cal. 564, 226 P. 1, the notice to creditors provided that claims should be filed in the county clerk's office or exhibited to the executrix at a place of business outside the county in which the administration was pending. The court refused to disregard as surplusage the designation in the notice of a place of business outside the county at which claims might be presented, and held the notice to creditors was insufficient. Although it is not for us to question the reasons for the amendment of section 1490, Code of Civil Procedure, allowing claims to be filed in the office of the clerk of the court from which letters issued, it was undoubtedly the intent of the Legislature in adding this provision to afford to creditors and parties interested the same facilities as provided by the information available in said office under section 1491a, Code of Civil Procedure. If the option of designating only the county clerk's office, or only the office of the executor within the county was for the executor to decide, then a creditor, who did not carefully read all the newspapers of that county and had to go to the office of the clerk of the court to get information concerning when and where to present his claim, would be required to then go and hunt up the office of the executor to present his claim, which might be anywhere in the county. We cannot feel that the Legislature so intended. It must also be noted that the Code section states that the claim be *filed* "in the office of the clerk of the court from which the letters were issued, or to exhibit them, with the necessary vouchers, to the executor or administration," etc. When a claim is filed in the office of the clerk of the court a definite record is made of the matter. Many executors and administrators are not experienced in office routine and therefore the clerk's record might

often prove the more reliable. Furthermore, this provision also tends to center probate proceedings through the office of the clerk of the court and allows the creditor to file his claim in the same office where he secured the necessary information. The time for filing claims during the administration of an estate is limited. If the creditor fails to present his claim within the time specified in the notice it is forever barred. Strict compliance must be required on the part of the estate, to justify the advantages which may inure to it thereby.

[3] Our second point is whether the judgment in the former suit precluded the claimant from recovering in the present action upon the second claim filed. After an examination of the record we fail to find any evidence that the first claim was ever approved or rejected by the administrator. If rejected, then no written notice of rejection was ever served upon the claimant as required by section 1498, Code of Civil Procedure, to start the statutory time running within which to file suit. In the prior action, wherein the first claim covering the notes was pleaded as a counterclaim and set-off, the court found that no sufficient claim including said obligations was ever presented to the administrator and therefore none of the affirmative defenses pleaded was available to the defendant in that action. This finding appears to be based upon the fact that copies of the notes were not set out in the claim. In that action, therefore, the merits of the claim were not passed upon by the court and the judgment is not a bar to their consideration here.

In the case of Palmer v. Guaranty Trust & Savings Bank, 45 Cal. App. 572, at page 577, 188 P. 302, 304, the court says: "On the contrary, if a party makes an improper attempt to present a claim to an administrator, particularly where it is so defective as to be insufficient to constitute the basis for a cause of action, he is not estopped from presenting one in due form, if within proper time, and upon which an action may be based. Westbay v. Gray, 116 Cal. 660, 48 P. 800; Warren v. McGill, 103 Cal. 153, 37 P. 144." See, also, 11 Cal. Jur. § 379, p. 661.

To the same effect: "To operate as a bar a judgment must have been final, upon the same claim or cause of action, between the same parties or their privities, and must have been an adjudication in the merits." 15 Cal. Jur. § 210, p. 171.

Thus where a plaintiff has pursued the wrong remedy or form of action a judgment against him is not on the merits of his claim. In Gray v. Dougherty, 25 Cal. 266, at page 272, it was held: "* * * If the trial went off on a technical defect, or because the cause of action had not yet accrued, or because of a temporary disability of the plaintiff to sue, or the like, the judgment will not be a bar to a future action. (Greenleaf on Evidence, Sec. 530.)" See, also, 15 Cal. Jur., § 183, p. 124.

In this matter we are therefore of the opinion that the notice to creditors published was insufficient and that the claim upon which the present action is based is not barred by the former judgment.

The judgment is reversed, and the cause remanded for a new trial under the law as determined hereby.

We concur: BARNARD, P. J.; MARKS, J.

PENZINER v. WEST AMERICAN FINANCE CO. et al.*

Civ. 8333.

District Court of Appeal, First District, Division 1, California.

Sept. 22, 1932.

Rehearing Granted Oct. 22, 1932.

1. Usury ⇐49.

Parties may freely contract in writing respecting interest within statutory limit of 12% per annum without right to compound interest (Usury Law [St. 1919, p. lxxxiii]).

2. Usury ⇐53.

Lender may perform specific services or incur expenses entitling him to reimbursement from fund loaned, if incidental to loan and not mere device to exact additional interest or profit (Usury Law [St. 1919, p. lxxxiii]).

3. Usury ⇐53.

Court will carefully scrutinize whole transaction and declare its substance, regardless of form, where lender performs services or incurs expenses entitling him to reimbursement from fund loaned (Usury Law [St. 1919, p. lxxxiii]).

4. Usury ⇐15.

To constitute usury, interest exceeding 12% must have been paid under contract requiring payment thereof; but interest agreed on, not amount paid, determines usurious character of contract (Usury Law [St. 1919, p. lxxxiii]).

5. Usury ⇐16.

Money paid for lender's cancellation of note or surrender of right should not be considered usurious, though resulting in rate exceeding 12%, if computed as part of interest (Usury Law [St. 1919, p. lxxxiii]).

6. Usury ⇐77.

Contract originally unaffected by usury cannot be invalidated by subsequent usurious transaction (Usury Law [St. 1919, p. lxxxiii]).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 24 P.2d 501.

7. Usury ⇐111(4).

Complaint alleging defendant's agreement to loan plaintiff stated sum at 7% interest, which, with other alleged charges, totaled less than 12% of principal, did not state case of usury (Usury Law [St. 1919, p. lxxxiii]).

The complaint alleged that defendant agreed to loan plaintiff $150,000, with interest at 7% per annum, without saying anything about compound interest, and that plaintiff was to pay brokerage fee of 3% of amount loaned, $250 inspection fee, $150 appraisal fee, and $25 to cover cost of drawing papers.

8. Usury ⇐111(4).

Court must assume, in absence of contrary allegation in complaint, that defendant finance company, loaning money to plaintiff, and mortgage company, charging brokerage fee, acted in different capacities, and that mortgage company had interest in loan and premium, in determining question of usury (Usury Law [St. 1919, p. lxxxiii]).

9. Usury ⇐15.

Court must look entirely to parties' contract in determining whether transaction was usurious (Usury Law [St. 1919, p. lxxxiii]).

10. Usury ⇐34.

Advancement of money loaned for improvements in installments on borrower's order, as improvements progressed, did not render transaction usurious (Usury Law [St. 1919, p. lxxxiii]).

11. Usury ⇐113.

Burden is on borrower to show that transaction is usurious (Usury Law [St. 1919, p. lxxxiii]).

12. Usury ⇐111(4).

Pleadings showing payment of less than 12% per annum on loan to plaintiff *held* demurrable as not pleading usury, notwithstanding conclusive allegations thereof (Usury Law [St. 1919, p. lxxxiii]).

13. Usury ⇐111(4).

In pleading usury, it must be clearly alleged that sum charged as interest exceeds 12% per annum on amount of loan (Usury Law [St. 1919, p. lxxxiii]).

14. Usury ⇐111(4).

Allegation of complaint that defendant loan company acted as defendant finance company's agent in selling property under plaintiff's trust deed absolved loan company from liability to plaintiff for damages or money received.

15. Fraud ⇐43.

Complaint, alleging that president of defendant finance company fraudulently advised plaintiff not to sacrifice his equity in property sold under trust deed through purchase thereof for himself and one offering to advance money for such purpose or to pay off plaintiff's indebtedness to finance company, stated no cause of action for fraud.

16. Appeal and error ⇐909(5).

Appellate court must assume that plaintiff, appealing from adverse judgment in action for fraud in assuring him that property would be purchased by defendant for plaintiff's protection at sale under latter's trust deed, was in default at time, and that notice of breach and sale were given in conformity with deed, in absence of complete affirmative showing of terms of note and deed.

17. Mortgages ⇐369(3).

Sale under trust deed may be set aside, if bidders were kept away, undue advantage was taken to property owner's prejudice, he was lulled into false security, or sale was collusively or otherwise conducted for purchaser's benefit and property sold for greatly inadequate price.

18. Conspiracy ⇐1.

Conspiracy is not actionable, unless combination results in perpetration of unlawful act or of injurious act by unlawful means.

19. Mortgages ⇐591(3).

Ordinarily, sale under trust deed is absolute and redemption impossible without purchaser's acquiescence.

20. Corporations ⇐432(12).

President of corporation, assigning notes to another corporation for loan, had no power to make agreement to reconvey property to maker after sale thereof under deed securing notes, unless delegation of such authority to him was clearly shown.

21. Corporations ⇐506.

Corporation directors' demurrer to complaint, alleging corporation president's fraudulent statements tending to keep bidders from sale under trust deed, for misjoinder of parties, was properly sustained, in absence of allegations that they participated in or knew of such statements or any acts tending to prevent fair sale.

22. Pleading ⇐225(2).

Refusal of leave to amend third amended complaint on sustaining demurrers thereto *held* not abuse of discretion, where previous complaints were filed about ten months one year, and two years, respectively, after foreclosure sale sought to be set aside, and third amended complaint about seven months later.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by William L. Penziner against the West American Finance Company and oth-

ers. Judgment for defendants, and plaintiff appeals.

Affirmed.

B. M. Aikins, of San Francisco, for appellant.

Courtney L. Moore, of San Francisco, for respondent West American Finance Co.

Orrick, Palmer & Dahlquist, of San Francisco (Christopher M. Jenks, of San Francisco, of counsel), for respondent Pacific States Savings & Loan Co.

John A. Sinclair and A. Don Duncan, both of San Francisco, for respondents R. T. Harper, C. A. Gibson, J. E. Scully, and E. W. Milburn.

LAMBERSON, Justice pro tem.

This is an appeal by plaintiff from a judgment in favor of the various defendants named in the action, based upon an order that the respective demurrers of the defendants to plaintiff's third amended complaint be sustained without leave to amend.

The original complaint was filed November 1, 1929, and was set out in a single count. By that complaint it was sought to have the sale of plaintiff's property set aside on the ground of fraud. One individual and one corporation, who do not now appear in the action, were included among the defendants. An amended complaint was filed as of right on December 28, 1929. A second amended complaint was filed on November 20, 1930, omitting the individual and corporate defendants above referred to, and adding the defendants J. E. Scully and E. W. Milburn.

The second amended complaint attempted to set forth three causes of action, and the relief sought was practically the same as that in the third amended complaint. The court sustained the demurrers of the defendants. The third amended complaint was filed June 9, 1931. The defendant West American Finance Company filed a demurrer in its own behalf; the defendants R. T. Harper, C. A. Gibson, J. E. Scully, and E. W. Milburn together filed a demurrer and a separate demurrer was filed by the defendant Pacific States Savings & Loan Company. On September 23, 1931, after a hearing of the demurrers, the court entered a minute order sustaining the demurrers without leave to amend, and on September 25, 1931, entered judgment in favor of the respondents.

In the first cause of action in the third amended complaint, the appellant alleged in substance that the defendants R. T. Harper, C. A. Gibson, J. E. Scully, and E. W. Milburn were at all of the times referred to in the complaint members of the board of directors of the defendant West American Finance Company, and that the defendant Harper was at all of said times the president thereof; that on the 15th day of August, 1927, plaintiff was the owner of a certain parcel of land situate on Jackson street near Buchanan in the city and county of San Francisco; that the respondent finance company was engaged in the business of making loans for the construction of buildings or other improvements, which loans were known as building or construction loans made for the purpose of providing owners of real property, who contemplated the construction thereon of improvements, with funds to pay for such construction, and that the plan regularly employed by said finance company, in making such loans, was to pay the same in installments from time to time to those supplying material and labor in the process of construction after such material and labor had actually been furnished and used in such construction, and to require those to whom such loans were made to agree to repay the principal upon maturity, and in the meantime to pay said finance company interest monthly in advance on the whole amount of the principal, whether or not any part of said loans had actually been paid out by said finance company, and regardless of the amount so actually paid out, and also regardless of the question of whether or not the interest so agreed to be paid and received by said finance company would prove to be the amount in excess of the rate of 12 per cent. per annum upon the aggregate amount of such installment computed upon the amounts of said several installments from the respective dates of the payment thereof; that at said time First Mortgage Bond Company, a corporation, was engaged in the business of canvassing the public in its own name, but in fact for and on behalf of said finance company for applications for such loans and of charging premiums to borrowers and collecting said premiums from such borrowers directly and through said finance company, and of dividing the same with said finance company, all of which was known to plaintiff and to all of the defendants; that on August 15, 1927, plaintiff desired to improve the real property described in the complaint by erecting an apartment house building thereon, and applied on said date to the defendant finance company for a construction loan of $150,000 to be secured by a deed of trust on the lot; that the finance company, through its president, requested plaintiff to procure from First Mortgage Bond Company a form of application, and to fill the same out and deliver it to the finance company, which occupied offices with the bond company; that plaintiff immediately procured such a form, which was directed to the bond company, but was in the form regularly used by the finance company in the ordinary course of its business, and plaintiff thereupon filled out the printed form, and delivered the same to the finance company, which thereupon approved it; that by its terms the

plaintiff applied to the First Mortgage Bond Company for a construction loan in the sum stated for a term of one year, at 7 per cent. per annum, payable monthly in advance from date of the note, and set forth the character of the proposed building; that by the terms of said application it was provided that the amount of the loan was to be advanced on plaintiff's order in installments as the improvements progressed, and in amounts stipulated "by said First Mortgage Bond Company," and that the money borrowed was to be paid out for labor and material actually furnished and used in said improvements, directly to the contractors or materialmen and laborers, and that plaintiff was to pay a premium of 3 per cent. on the amount of said loan, and was to allow "said company" to write and maintain in effect fire insurance in the sum of $150,000; that a copy of the plans and specifications was delivered to the finance company as specified in the application; that on said date, and pursuant to the terms of said application, plaintiff, on August 16, 1927, executed a promissory note as specified in the application, and executed and delivered to the defendants R. T. Harper and C. A. Gibson, as trustees designated by the finance company, a deed of trust conveying the property described to said trustees as security for the payment of said promissory note, said deed of trust containing a power of sale whereby said trustees were authorized to sell said lots and improvements on demand of the finance company upon any default in the performance of the obligation set forth in the deed of trust; that in the usual and ordinary course of construction work, a period of one year was reasonably necessary for the construction of the improvements referred to, and that the rate of interest named in said promissory note would exceed a rate of 12 per cent. for one year if computed from the actual dates of the respective payments as made by the finance company; that the application form procured by plaintiff from the bond company was furnished by the bond company to plaintiff at the instance and request, and as the agent of the finance company, and for the purpose of enabling it to obtain from plaintiff for the use of said loan a greater rate than 12 per cent. for one year, all of which was known to plaintiff and all of the defendants other than the Pacific States Savings & Loan Company, which will be referred to hereafter as the loan company; that at the time of making said application and of its approval by the finance company, and at the time of the execution and delivery of said promissory note and deed of trust, it was believed by plaintiff and the defendants, other than the loan company, that a greater rate of interest than 12 per cent. would be paid by plaintiff to the finance company, and received by the finance company by virtue of the provisions of said application and said promissory note, and it was the intent of the finance company to exact of plaintiff a greater sum for the use of the money advanced by it than interest at the rate of 12 per cent. per annum; that plaintiff immediately began the work of clearing and excavating said lot for construction purposes, and the finance company thereafter from time to time, until August 16, 1928, made advances of money pursuant to the agreement between it and plaintiff; that plaintiff is unable to state the actual amount of said advances so made, but is informed and believes that said advances did not, in the aggregate, exceed the sum of $100,000, and prior to the commencement of this action plaintiff demanded of the finance company an account of said advances, which said account the finance company delivered, but such account was not, in fact, a true account of said advances, but, on the contrary, was false and excessive, and no true account has ever been given to plaintiff; that about August 16, 1928, the defendants other than the loan company unlawfully combined and conspired together for the purpose of defrauding the plaintiff of his title to said property with the improvements; that pursuant to said conspiracy, the finance company on August 17, 1928, executed a purported notice of breach of the obligations of plaintiff under said deed of trust, and on August 21st caused said notice to be recorded, and said defendants Harper and Gibson, as trustees, did at the instance and in collusion with the finance company thereafter cause to be published a notice of sale of said real property, purporting to be under and by virtue of the power of sale, and fixed the date of sale as December 31, 1928; that pursuant to such conspiracy the finance company did, on December 15, 1928, unknown to plaintiff, make a purported assignment to the loan company of said promissory note for a consideration unknown to plaintiff, but with the understanding that the loan company would bid in said real property at the sale, and would obtain a deed therefor, and thereafter convey said real property to the finance company, and pursuant to said conspiracy said trustees on December 31, 1928, offered said property for sale, and the loan company bid therefor the sum of $150,000, which bid was accepted by the trustees who executed a deed of the real property to the loan company, and the trustees acknowledged the payment to them by the loan company of the sum of money in gold coin bid by it, and the loan company on March 13, 1929, conveyed said real property to the finance company pursuant to the understanding theretofore existing, and the finance company thereupon conveyed said property to one Joseph Greenback, who was one of the defendants named in the original and first amended complaint, for a consideration unknown to plaintiff, and without first giving to plaintiff an opportunity to redeem

the property; that plaintiff had prior to December 31, 1928, received among other offers an offer from one Oliva to advance the money necessary to pay off his indebtedness to the finance company, or for the purchase of said real property for the joint account of plaintiff and of said purchaser, and that Oliva was ready, willing, and able to advance said money wherewith to pay off said indebtedness, or bid in said real property at said sale, and that plaintiff informed defendant Harper, who was at that time president of the finance company and one of the trustees named in said deed of trust, of said facts, but Harper, in pursuance to the conspiracy alleged, informed plaintiff that it would be unwise for plaintiff to sacrifice any of his equity in said property, and represented that it would not be necessary for him to carry out arrangements for a loan for the reason that the title would be bid in by the finance company, and would be held for the protection of plaintiff and reconveyed to him at any time after the sale upon his repaying the amount of his indebtedness to the finance company; that plaintiff was very young and inexperienced, and relied upon the statements of Harper, and for such reason refused offers of others to advance the money necessary to pay the finance company, and abandoned all attempts to raise the money necessary to pay off said indebtedness, or to bid in said property at the sale, and permitted the sale to take place without any bid being made on his behalf; that Harper also falsely represented to other persons who would otherwise have appeared and bid at said sale, that the property was to be bought in by the finance company for the benefit and protection of plaintiff, and but for said representations such other persons would have appeared at said sale and bid against said loan company for the property, but the only bid made at the sale was made by the loan company, and that but for the assurance and representations of Harper, other bidders would have been present and would have bid against said company for the purchase of the property, and that no other bidders were present at the sale; that after the announcement of the sale of the property to the loan company was made, Harper stated to plaintiff that the title was being taken in the name of the loan company, but for the account of the finance company, and that plaintiff need feel no uneasiness about the sale, and he would still be given the right to redeem the property at any time upon payment of the amount of his indebtedness; that daily, between the 2d and 11th days of January, 1929, plaintiff called upon Harper and offered to pay the full amount of his indebtedness to the finance company and redeem the property, but Harper rejected said offers and failed to state the amount of the indebtedness in response to the inquiries of plaintiff, and on January 11th finally informed plaintiff that it would not be possible to comply with his representations theretofore made, and that plaintiff would not be permitted to redeem the property; that thereupon plaintiff demanded an accounting, which accounting was refused; that the value of the property at the time of the sale was the sum of $450,000, and that plaintiff had suffered damages in the sum of $350,000.

The second cause of action set forth in the complaint again excepts the defendant Pacific States Savings & Loan Company; repeats the allegations as to the ownership of the property; the business in which the finance company was engaged; the application to the First Mortgage Bond Company; the execution of the note and deed of trust; the fact that the construction work would occupy a period of one year, and that the rate of interest would exceed 12 per cent. upon the installment payments computed from the actual dates when the payments were made; the intent and anticipation of the parties that such would be the fact, and that the advances did not, in the aggregate, exceed the sum of $100,000, and that the finance company did not deliver a true account of such advances to plaintiff. Then the second cause of action proceeds to allege in substance that about December 15, 1928, and after the recording of the notice of breach, the finance company borrowed from the defendant loan company the sum of $97,500, and by way of security, executed an assignment of plaintiff's note by way of pledge to the loan company with the understanding that the loan company would purchase the property of plaintiff at the trustees' sale for the account of the finance company, and would obtain a conveyance thereof from the trustees and hold the title thereto in lieu of said promissory note by way of security, and upon the repayment of the loan made to the finance company, reconvey said property to the finance company; that the exact contents of the instruments involved in said transaction are not known to plaintiff; that at the sale the loan company, under the direction of the finance company, bid for the property in its own name the sum of $150,000, which bid was accepted, and thereafter the trustees executed a deed conveying the property to the loan company; that the agreement above mentioned was that the loan company should hold legal title to the property subject to a lien thereon, in favor of the loan company for the sum of $97,500; that it was further agreed between the loan company, the finance company, and the trustees that the title to the property was taken by the loan company in lieu of and in substitution for plaintiff's promissory note so pledged to the loan company, and that the pledge was, by virtue of said conveyance, released and discharged; that at the time of the sale, the finance com-

pany had not actually paid out or advanced upon the construction of the buildings mentioned, sums exceeding the aggregate amount of $100,000, and that for the purpose of extorting from plaintiff a greater sum and value for the loan of the amount actually paid out, it charged to plaintiff as advances the sum of $10,500 for interest from August 16, 1927, to August 15, 1928, the sum of $4,500 as a so-called premium or brokerage fee for the making of the loan, the sum of $250 as a so-called inspection fee, the sum of $150 as a so-called appraisal fee, and the sum of $25 as a fee for drawing papers, amounting in all to the sum of $15,425, and that the finance company had also charged to plaintiff the sum of $3,937.50 for interest from August 16 to December 31, 1928, and that in addition thereto said finance company had charged plaintiff as advances from the principal a sum sufficient in amount to bring the total of said advances to the face amount of the principal of the promissory note, but that said advances were not, in fact, made pursuant to the application of the plaintiff, accepted by the finance company, and were fictitious; that all of said facts were known to the trustees, and to all the other defendants, and that the trustees, with the approval and consent of all the defendants, and under the instructions of the loan company and finance company, failed and neglected to collect the amount of said bid, or any part thereof, in cash from the loan company or said finance company, and in lieu thereof, receipted therefor to said loan company, and credited the amount, to wit, $150,000, upon said promissory note in payment of the amounts of the advances, and of the amounts charged by the finance company up to the sum of $19,362.50, and in pretended payment on account of said fictitious amounts charged to plaintiff upon the construction loan; that plaintiff does not know, and is unable to state the exact dates of the several payments made by the finance company, but alleges upon information and belief that the aggregate amount of interest from the respective dates thereof to the 31st of December, 1928, did not exceed certain amounts much less than the amount charged; that the value of the property at the time of the sale was the sum of $350,000, and that through the medium of said sale and the said conveyance to said loan company for the account of said finance company, said plaintiff was compelled to and did pay, and said finance company did extort and receive from him and appropriate to itself for said loan, which did not exceed the sum of $100,000, the said sum and value of $19,362.50, which is a greater sum than would accrue at the rate of 12 per cent. per annum; that no part of the sum of $19,362.50, or of the proceeds of the sale, has been paid to plaintiff.

As a third and separate cause of action against defendants Pacific States Savings & Loan Company, R. T. Harper, and C. A. Gibson, the complaint alleged in substance that the respondent West American Finance Company was engaged in the business of making construction loans, and that the method or plan regularly employed was to require interest, monthly in advance on the principal amount named in the loan, whether or not any part of said loan had actually been paid out by the finance company, and regardless of the question of whether or not the interest agreed to be paid to and received by said finance company would be in excess of 12 per cent. per annum, computed from the respective dates of payments of installments; and that First Mortgage Bond Company was engaged in the business of canvassing for loans in behalf of the finance company. The complaint then alleges the ownership of the property previously described; plaintiff's desire to improve the lot by the erection of an apartment house; his application made through the First Mortgage Bond Company to the finance company for a loan dated August 15, 1927; the execution of his promissory note and deed of trust, and several other allegations which are but repetitions of allegations contained in the first cause of action, including the notice of breach, and the notice of sale to be held on December 31, 1928; the assignment of the note to the loan company; the holding of the sale at the time indicated in the notice at which sale the loan company bid for the property the sum of $150,000, and received a deed therefor; that the finance company had not actually paid out or advanced installments exceeding an aggregate amount of $100,000, and that for the purpose of extorting a greater rate of interest than 12 per cent. per annum, the said finance company had falsely charged plaintiff with certain advances already detailed; that plaintiff does not know, and is unable to state, the exact dates of the several payments made by the finance company on account of the loan; that no notice was ever given to the plaintiff of the purchase by the loan company of said note, and that plaintiff was ignorant thereof until after the sale of the property on December 31, 1928; that all of the facts therein above set forth in said third cause of action were known to the defendants Harper and Gibson and the loan company at the time of the assignment of said note by the finance company; that the defendants Harper and Gibson, as trustees, at the instance of the loan company, failed and neglected to collect the amount of the bid, and in lieu thereof receipted for the same to the loan company, and credited the amount thereof, to wit, the sum of $150,000 upon said promissory note in payment of advances actually made as alleged, and of the amounts charged by said finance company for the loan of said sum amounting to the sum of $15,425 and of the additional sum of $3,-

937.50 for interest from August 16 to December 31, 1928, and in pretended payment of account of fictitious amounts charged by the finance company; that the value of the property was $350,000 at the time of the sale, and through the medium of said sale and conveyance, the plaintiff was compelled to pay said loan company, and the loan company did charge to and receive from him, and appropriate to itself for the loan of said installments of money, which did not exceed the sum of $100,000, a sum which represented a rate of interest greater than 12 per cent. per annum, and that none of said sum has been repaid to plaintiff.

As a fourth and separate cause of action against the defendants Pacific States Savings & Loan Company, R. T. Harper, and C. A. Gibson, the plaintiff reaffirmed in greater part his allegations of the third cause of action, and added these allegations: That the loan company knew that the principal of the promissory note purchased by it was payable one year from the 16th of August, 1927, and also knew that said note was given to secure advances upon a loan as thereinbefore set forth, and that the loan company failed and neglected to notify plaintiff of its purpose to purchase said promissory note, and failed and neglected to make inquiries of plaintiff as to the amount of advances actually made upon said construction loan and covered by said note, or as to any other facts tending to show the rights and obligations of plaintiff in connection therewith, and upon information and belief, plaintiff alleged that the loan company failed and neglected to examine the records of the finance company, or to take any other steps open to it to ascertain the actual amounts advanced by the finance company upon the loan, or to make any inquiries in relation to any facts tending to show the rights and liabilities of the plaintiff, and that all the facts thereinbefore set forth were at all times known to the defendants Harper and Gibson, and that the said loan company could have ascertained all of said facts, but for its failure and neglect to make such inquiries.

Plaintiff prays judgment against all of the defendants other than the Pacific States Savings & Loan Company, for damages in the sum of $350,000, and with the alternative prayer that if for any reason it should be determined that plaintiff is not entitled to said damages, then that defendants be compelled to account to plaintiff for all moneys received out of said property, and that plaintiff have judgment against said defendants and each of them for the amount so found to have been received, less the sum of $100,000 advanced by said finance company, and that plaintiff have judgment against all of the defendants and each of them for $58,087.60, being treble the amount of the sum which said defendants or any or either of them may be found to have taken or received for the loan of said sum of $100,000, and for all other further and additional relief to which he might be entitled.

The first count, briefly, is an action for damages occasioned the plaintiff by fraud practiced by defendants, other than the loan company, in assuring plaintiff that the property to be sold under the deed of trust would be bought in by the finance company for his protection, and thereby dissuading him from looking up bidders for the property to be sold under the deed of trust, and in dissuading other bidders from attending the sale. Appellant claims that the element of usury is necessarily involved in this count because the measure of damages is the value of the property, less the amount of principal and interest owing under the deed of trust, and any usurious interest must be left out of the question because the agreement to pay the same is void.

The second count is against the same defendants named in the first count, for an accounting, and for treble the amount of usurious interest received by the finance company, of which corporation the individual defendants were directors, and the defendant Harper was president.

The third count purports to allege a claim of usury against the loan company and the defendants Harper and Gibson upon the theory that the usurious interest had been received by the loan company through the cooperation of the defendants Harper and Gibson, and that all of the facts were known to each of said defendants.

The fourth count appears to set forth a claim to liability on the part of the defendants loan company, Harper, and Gibson, by reason of the fact that the loan company failed and neglected to notify plaintiff of its purpose to buy in the property, and failed to make inquiry of the plaintiff as to the state of the transaction with the finance company, and that such facts were at all times known to Harper and Gibson.

Appellant in his opening brief states that all of the counts in the complaint involve usury. The demurrers of the various defendants are voluminous, and for that reason we have already devoted considerable space to a statement, in substance, of the allegations contained in the different causes of action set forth in the third amended complaint. The demurrers are both general and special, that of the defendant finance company alleging that the complaint, as well as each separate count thereof, fails to state a cause of action; that there is a misjoinder of the parties and of causes of action; and that there are many uncertainties and ambiguities and unintelligible allegations contained in the two counts against the finance company.

The demurrer of the loan company is to each cause of action, and particularly to the third and fourth, both upon general and special grounds. The demurrer of the individual defendants is based upon general and special grounds. Inasmuch as the claim of usury forms the basis of the second, third, and fourth causes of action and plays an important part in determining the liabilities of the defendants who were made parties to the first cause of action, it is advisable to discuss that question at this time.

[1-3] Section 3 of the Usury Law (St. 1919, p. lxxxiii) provides: "Every person, company, association or corporation, who for any loan or forbearance of money, goods or things in action shall have paid or delivered any greater sum or value than is allowed to be received under the preceding sections, one and two, may either in person or his or its personal representative, recover in an action at law against the person, company, association or corporation who shall have taken or received the same, or his or its personal representative, treble the amount of the money so paid or value delivered in violation of said sections, providing such action shall be brought within one year after such payment or delivery."

Under this law, the maximum rate of 12 per cent. per annum on the amount loaned is the full measure of all profit to the lender without the right to compound interest, and within such limits the parties may, in writing, freely contract in respect thereto. Haines v. Commercial Mortgage Co., 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A. L. R. 725. The lender may also perform services or incur expenses in connection with the loan, which will entitle him to reimbursement from the fund about to be loaned, but such items must be confined to specific services or expenses incidental to the loan and incurred in such a way as to absolutely preclude its being merely a device through which additional interest or profit on the loan may be exacted, and a court will carefully scrutinize the whole transaction and declare its substance regardless of its form. Haines v. Commercial Mortgage Co., supra.

[4, 5] To constitute a violation of the usury statutes, two elements must concur: First, interest in excess of 12 per cent. must actually have been paid; second, such interest must have been paid pursuant to a contract, the terms of which required the payment of interest by the borrower in excess of 12 per cent. per annum. It is, however, the interest charge agreed to be paid under the terms of the contract, and not the amount of interest which was actually paid which determines the usurious character of the contract. Westman v. Dye (Cal. Sup.) 4 P.(2d) 134. Money paid in consideration of the cancellation of a note or for the surrender of some right on the part of the lender and resulting in a rate of interest in excess of 12 per cent. if computed as a part of the interest, should not be considered as involving a matter of interest, or as being usurious. McCarty v. Mellinkoff (Cal. App.) 4 P.(2d) 595.

[6] A contract which, in its inception, is unaffected by usury, can never be invalidated by any subsequent usurious transaction. O. A. Graybeal Co. v. Cook, 111 Cal. App. 518, 295 P. 1088; Sharp v. Mortgage Security Corporation of America (Cal. Sup.) 9 P.(2d) 819.

[7] In the instant case the application for the loan and the note and deed of trust have not been made a part of the third amended complaint, but according to the allegations of the complaint respondent finance company agreed to loan to appellant $150,000 with interest at the rate of 7 per cent. per annum, payable monthly in advance. Nothing is said in the complaint about the compounding of interest. In addition to the payment of said principal sum and interest, appellant was to pay a brokerage fee of 3 per cent. of the amount of the loan to the First Bond Mortgage Company; the sum of $250 for an inspection fee; $150 as an appraisal fee; and $25 to cover the cost of drawing papers. Granting to the allegations of the complaint all of the weight and meaning that may be attached thereto, and construing them most favorably to appellant, they do not state a case of usury because the total amount of the charges is much less than the sum which would accrue upon the principal named in the promissory note at the rate of 12 per cent. per annum.

[8] There is no showing in the complaint that the entire amount of the brokerage fee, or any particular or substantial part thereof, was to be paid to the defendant finance company. The complaint simply alleges that the First Bond Mortgage Company occupied offices jointly with the finance company; that the mortgage company was engaged in the business of canvassing the public in its own name, but for and on behalf of the finance company, for loans; of charging premiums to borrowers and of *dividing* the premiums with the finance company; that appellant applied to the finance company for a loan upon a form directed to the bond company; and that by the terms of the application, the amount of the loan was to be advanced *on plaintiff's order* in installments as the improvements progressed, and in amounts *stipulated* by the bond company. The complaint does not indicate that the premium or brokerage charge, or the appraisal or inspection fees or the fees for drawing papers, were not actually paid by the finance company, or that they were not actually paid out to other persons or corporations for services rendered under the application agreement. In the absence of allegations to the contrary, we must assume that the finance company and the

First Bond Mortgage Company were acting in different capacities, and that the First Bond Mortgage Company had an interest in the application which was made by the appellant, and in the premium paid therefor.

[9, 10] The court, in determining whether or not the transaction was usurious, must look entirely to the contract into which the parties entered. In the light of the agreement as set forth in the complaint, and in the absence of the text of the application, the promissory note and the deed of trust, or of any other papers which might have entered into the transaction and which have not been made a part of the complaint, nothing appears, and no mathematical calculation can be made, which would indicate that the transaction was intended by the parties to involve usury. The intent of the parties is not here involved, because the complaint does not set forth a state of facts which in any wise discloses a condition of usury. In Haines v. Commercial Mortgage Company, supra, the court said (page 625 of 200 Cal., 254 P. 956, 255 P. 805, 807, 53 A. L. R. 725): "We intended to hold that the maximum rate allowed for loans coming under the act is at the rate of 12 per cent. per annum for the full period of the loan, and that within such limit the parties may freely contract in respect thereto, if done in writing. * * * This means, also, that commissions and bonuses may be charged by the lender, but all such charges must, when added to the interest specified and spread over the whole period of forbearance, be kept within the limit set by the law." The fact that money was advanced from time to time in installments will not render the transaction usurious if the contract was not subject to the charge of usury in its inception. As we have seen the moneys advanced were to be paid on plaintiff's order as the improvements progressed. No delay in the payment of advances occasioned by his voluntary act could render the agreement usurious. Low v. Sutherlin, Barry & Co. (C. C. A.) 35 F. (2d) 443; Sharp v. Mortgage Security Corporation of America, supra.

[11-13] The burden is upon the borrower to show that a transaction is usurious. If the pleadings, notwithstanding conclusive allegations, evidence the payment of an amount not in excess of 12 per cent. per annum, a demurrer addressed to the deficiency in pleading should be sustained. In pleading usury, it is necessary to clearly set out that the sum is in excess of 12 per cent. Mortgage Guarantee Co. v. Patch, 116 Cal. App. 584, 3 P. (2d) 35. In the case of Coley v. Wolcott, 103 Cal. App. 140, 146, 284 P. 241, 244, the court said: "While courts will tolerate no subterfuges designed to evade the Usury Law, and will always admit evidence to show that a contract fair on its face is nevertheless a disguise for a usurious transaction, it is equally true that, if a contract is subject to two constructions, one of which will render it usurious and therefore unlawful and one which will render it lawful, the courts, in the absence of other evidence requiring the contract to be construed as usurious, will give it such a construction as will render it lawful. Shelley v. Byers, 73 Cal. App. 44, 57, 238 P. 177; Cobb v. Hartenstein, 47 Utah, 174, 152 P. 424, 427; Ohio Inv. Co. v. Brown, 89 Kan. 66, 130 P. 665; Lusk v. Smith, 71 Kan. 550, 81 P. 173; German Sav., Bldg. & Loan Ass'n v. Leavens, 89 Wash. 78, 153 P. 1092; Martin v. Oklahoma State Bank, 86 Okl. 113, 206 P. 824; Foreman v. Needles, 78 Okl. 105, 188 P. 1087."

The complaint in the case before us omits material matters in regard to the actual dates and amounts of advances which must have been within the knowledge of the appellant, because the payments were to be made upon his order. In Whittemore v. Davis, 112 Cal. App. 702, 708, 297 P. 640, 642, the court said: "A pleading must be construed most strongly against the pleader (Du Bois v. Padgham, 18 Cal. App. 301, 123 P. 207) and, so construed, the complaint fails to state a cause of action. If the allegations in a pleading are silent as to dates, and it appears that such dates are material to the issue, it must be presumed that a statement of such dates would have weakened the pleader's case. The same rule applies when the pleader fails to make a clear specific statement of the facts relied upon. Smith v. Buttner, 90 Cal. 100, 27 P. 29."

[14] There is nothing in the amended complaint to show that the transaction whereby the finance company assigned the promissory note of appellant to the loan company as security for a loan of $97,500 was anything but a legitimate transfer. The allegation of the complaint that the loan company was at all times acting as the agent of the finance company in the matter of the sale of the property absolves the loan company from individual liability. There was no contractual relation between appellant and the loan company, and so far as the allegations of the complaint are concerned, it does not appear that the loan company retained for its use any of the proceeds of the sale in excess of the sums owing to it from the finance company. We are of the opinion that the several demurrers to the second, third and fourth causes of action were properly sustained, for the reason that none of the said causes of action constitute a cause of action against respondents or either of them. It is unnecessary to discuss the other and numerous phases of the demurrers filed on behalf of the various respondents to these causes of action.

The appellant in his argument states that the first cause of action is based upon the

theory that the sale whereby the loan company obtained the property which was sold by the trustees under the notice before referred to, was illegal, and that appellant is entitled to damages measured by the value of his equity; that is, by the value of the property after deducting therefrom the sum of $100,000 advanced under the provisions of the promissory note and deed of trust. He expresses it again as an action for damages for the wrong of respondents in defrauding appellant of his property by means of a sale thereof at which he and others were dissuaded from bidding; that the gist of the action is the stifling of bids.

In view of what we have already said, it is unnecessary to discuss the charge of usury, to the development of which a large part of the first cause of action is devoted, it being the theory of appellant that the matter of usury is important in fixing the amount of damages to which appellant might be entitled, because if the loan were usurious, there should be no deduction for interest in computing the sum which should be allowed in mitigation of damage; that is, the principal sum named in the promissory note. The allegations of the first cause of action have already been detailed. The charges of fraud and conspiracy begin with allegations that about August 16th, the defendants, other than the loan company, unlawfully combined and conspired for the purpose of defrauding plaintiff of his title to the real property described, and pursuant thereto executed a notice of breach followed by a notice of sale, fixing December 31, 1928, as the date of the sale. In the meantime, on December 15th, the note was assigned to the loan company. Up to and including such assignment, everything that the finance company did was something that it had a lawful right to do, and nothing that intervened between the execution of the note and deed of trust by appellant, and the giving of the notice of sale by the trustees, is entitled to consideration because the charge of conspiracy and fraud must be sustained by what ultimately occurred, and not by such intervening acts as were lawfully done by respondents. The charge of usury has no connection with the alleged acts of fraud or conspiracy, which acts began with the notice of breach according to the allegations of the complaint. The loan company, according to the complaint, did not share in the conspiracy, and all of its acts were done in the enforcement of its legal rights as an assignee of the promissory note.

[15] The allegations in regard to other possible bidders are that appellant received an offer from one Oliva, among others, to advance the money necessary to pay off his indebtedness to said finance company, or for the purchase of the real property at said sale for the joint account of plaintiff and of said purchaser, and that said Oliva was ready, willing, and able to advance said money wherewith to pay off said indebtedness, or bid in said real property at said sale; that appellant informed the respondent Harper of said facts, and that Harper, in pursuance of the conspiracy, informed appellant verbally that it would be unwise for him to sacrifice any of his equity in said real property, and represented to him that it would not be necessary for him to carry out said arrangements for the reason that the title would be bid in for the finance company, and would be held for his protection and reconveyed to him at any time after the sale upon his repaying the amount of his indebtedness; and the complaint again alleged that in further pursuance of said conspiracy said Harper falsely represented to other persons who would otherwise have appeared and bid at said sale, that the property was to be bought in for the finance company for the benefit and protection of plaintiff, and that but for said representations, such other persons would have appeared at said sale and bid against said loan company, and that the only bid made at the sale was made by the loan company, and but for the assurances and representations on the part of Harper, other bidders would have been present and would have bid against said company, and that no other bidders were present.

The allegations that Harper advised appellant that it would be unnecessary to sacrifice his equity is inconsistent with the allegation that Oliva was ready to advance money to pay off the indebedness by which action appellant would have protected his title to the property, both legal and equitable. The allegation is ambiguous and uncertain because the failure of appellant to take advantage of an opportunity to secure a complete liquidation of his indebtedness before the sale constituted a lack of diligence on his part for which the defendants could not have been responsible. Appellant's remedy under such circumstances, the funds being available, was to have secured the advance from Oliva, and to have paid the indebtedness. Gavin v. Phillips, 12 Cal. App. 34, 106 P. 424. In spite of his youth and inexperience, there is nothing to indicate that the appellant was ignorant of the conditions of the application, or of the promissory note or deed of trust. The allegations that Harper falsely made representations to other persons, who would otherwise have appeared and bid, contain no statements as to the names of such persons, or possible bidders, or the amounts which they would have been able and willing to bid, or a statement that they would have been able to bid a sum in excess of $150,000, and nowhere is there a showing that Harper dissuaded or discouraged any of said bidders, or Oliva, who was the only person named in the complaint as a possible bidder, or by his insistence compelled any of them to remain

away from the sale, or from bidding at the sale.

[16, 17] The weakness of appellant's first cause of action lies in the fact that appellant did not allege, and does not contend, that the loan company was a party to the conspiracy, or did any act tending to defraud the appellant. It was the legal holder of the obligation, and had the lawful right to be a bidder at the sale. There is no allegation in the first count of any act of collusion with the finance company or the trustees, on the part of the loan company, designed to defraud the appellant, and the complaint is silent as to any intimation that the loan company had any part in dissuading other bidders to remain away from the sale. It received by the sale what it had a right to acquire, and it must be assumed in the light of the complaint that it received a valuable consideration from the finance company for the reconveyance of the property to that corporation in the form of a settlement of the indebtedness of the latter to it, the existence of which indebtedness is not questioned. In the absence of an affirmative and complete showing of the terms of the promissory note and deed of trust, we must assume that the appellant was in default on August 16, 1928, and that the notice of breach and notice of sale were regularly given in conformity with the terms of the deed of trust. All of the acts of conspiracy, therefore, center about the sale held on December 31, 1928, and the alleged stifling of bids and the matter then resolves itself into a determination of the question as to whether the acts of Harper as president of the finance company, or of the trustees, were such as to keep bidders from being present, at the sale and competing in the bidding for the property. The general rule governing this class of cases is expressed in Odell v. Cox, 151 Cal. 70, 90 P. 194, 196, where the court, quoting from Schroeder v. Young, 161 U. S. 334, 16 S. Ct. 512, 40 L. Ed. 721, said: " 'If the sale has been attended by any irregularity, as if several lots had been * * * sold in such manner that their full value could not be realized; if bidders have been kept away; *if any undue advantage has been taken to the prejudice of the owner of the property,* or he has been lulled into a false security; or if the sale has been collusively or in any other manner conducted for the benefit of the purchaser, and the property has been sold at a greatly inadequate price, the sale may be set aside, and the owner may be permitted to redeem.' (The italics are ours.) We think there can be no doubt under the authorities that where, in addition to gross inadequacy of price, the purchaser has, in the language of the United States Supreme Court, 'been guilty of any unfairness or has taken any undue advantage,' resulting in such gross inadequacy and consequent injury to the owner of the property, he will be deemed guilty of fraud warranting the interposition of a court of equity in favor of the owner who is himself without fault." Winbigler v. Sherman, 175 Cal. 270, 165 P. 943; Sargent v. Shumaker, 193 Cal. 122, 223 P. 464.

In Jones v. Sierra Verdugo Water Co., 63 Cal. App. 254, 263, 218 P. 454, 457, the court said: "The established rule in this state is that: 'Mere inadequacy of price, however gross, is not itself a sufficient ground for setting aside a sale legally made. There must, in addition, be proof of some element of fraud, unfairness, or oppression, before a court will be justified in depriving the purchaser of his legal advantage.' Rauer v. Hertweck, 175 Cal. 280, 281, 165 P. 948. See, also, Bock v. Losekamp, 179 Cal. 676, 677, 179 P. 516. Appellants claim that they are entitled to have the sale set aside under this statement of the rule. They claim that the facts alleged by them in their complaint do show that, in addition to inadequacy of price, there was fraud and unfairness. But the accompanying fraud, unfairness, or oppression which will suffice to make inadequacy of price a ground for setting aside a sale must be such as accounts for and brings about the inadequacy of price. The rule is stated in Ruling Case Law as follows: 'What causes, in addition to inadequacy of price, are sufficient to lead the court to withhold confirmation from a sale at a sacrifice, cannot well be reduced to any general rule; but they must be such as were calculated to prevent the property from bringing its value, or something reasonably near what it should bring at a public sale, and which on the particular occasion have actually produced that effect.' 16 R. C. L. p. 98."

[18-20] Conspiracy is not actionable, unless the combination results in the perpetration of an unlawful act or of some injurious act by unawful means. Moropoulos v. C. H. & O. B. Fuller Co., 186 Cal. 679, 200 P. 601.

Weighed by these tests, do the allegations of the complaint disclose a course of conduct so tainted with deceit as to render the sale fraudulent and actionable as to the appellant? It is not alleged that any bidders were actually dissuaded from attending the sale or from bidding thereat, by the active persuasion of the president of the finance company or the trustees named in the deed of trust. Appellant knew of the notices, and of the time and place of sale, and of the right, as well as the duty, of the trustees, to sell, and knew that the obligation had matured. It must be assumed that appellant knew that ordinarily, under the terms of a deed of trust, the sale is absolute and no redemption is possible except by the acquiescence of the purchaser. The property upon conveyance to the loan company was no longer property over which the trustees had any control, and

the conveyance to the finance company was likewise absolute. It was beyond the power of the president to make any agreement as to permitting a reconveyance to the appellant in the absence of a clear showing that such authority had been delegated to him, and the alleged promise to reconvey was without consideration. Williams v. Parker, 30 Cal. App. 71, 157 P. 550; Peachy v. Witter, 131 Cal. 316, 63 P. 468; Downing v. Brennan, 232 Mass. 535, 122 N. E. 729. We must conclude that the acts of the finance company and of the respondent Harper, as set forth in the complaint, were not such as were calculated to prevent the property from bringing its value, or something reasonably near what it should bring at a public sale, and that the acts of respondents did not actually produce that effect. A discussion of all the various demurrers, particularly upon the ground of ambiguity and uncertainty, would entail the use of space which we consider unnecessary in view of our conclusions as to the principles which underlie the nature of the right of appellant, as attempted to be set forth in the third amended complaint.

[21] The third amended complaint does not make out a case against the defendants Milburn, Scully, or Gibson, because it does not appear in any way that those defendants, either officially or otherwise, actually participated in or had knowledge of any of the alleged statements of Harper, which tended to keep bidders away from the sale, or of any acts which tended to prevent a fair sale being had, and it does not appear that the respondents Scully or Milburn, even though they were directors of the company, joined in any act or were parties to any acts whereby a fair sale was prevented. Their demurrer as to misjoinder of parties was properly sustained.

[22] Appellant has objected that the court abused its discretion in sustaining the various demurrers to the third amended complaint without leave to amend. As has already appeared, judgment was entered upon the order in favor of respondents two days after the order was entered. The original complaint to set aside the sale was filed about ten months after the sale occurred. The second complaint was filed about a year after the sale, the second amended complaint about two years after the sale, and the third amended complaint about seven months later. We must conclude that during the passing of such a period of time, the appellant was able to inform himself as to his rights and to formulate a complaint in accordance with a definite theory. As we have hereinbefore observed, the original and first amended complaints had as their basis a cause of action distinctly different from the cause of action attempted to be set forth in the second and third amended complaints. Inclined as the courts are to a hearing of an issue upon its merits, still there must be an end to litigation, and while the time elapsed between entry of the minute order sustaining the demurrers to the last complaint, and the entry of the judgment was very short, in the absence of an affirmative showing that the appellant made application for leave to amend, or expressed a desire to amend, and in view of all of the circumstances which we have recited, we cannot say that the trial court abused its discretion in refusing leave to amend. Haddad v. McDowell (Cal. Sup.) 3 P.(2d) 550, and cases therein cited.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

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CITIZENS' NAT. TRUST & SAVINGS BANK OF LOS ANGELES v. ARROWHEAD SPRINGS BEVERAGE CO.

Civ. 8646.

District Court of Appeal, First District, Division 2, California.

Sept. 30, 1932.

Rehearing Denied Oct. 29, 1932. Hearing Denied by Supreme Court Nov. 28, 1932.

1. Corporations ⇐76.

Document acknowledging receipt of check for stated sum on account of stock subscription *held* mere "receipt," not "contract."

[Ed. Note.—For other definitions of "Contract" and "Receipt," see Words and Phrases.]

2. Corporations ⇐77.

Document reciting receipt of stock and recipient's agreement to deliver other stock therefor or return that received was both "receipt" and "contract," to be construed with prior stock subscription agreement (Civ. Code, § 1642).

3. Evidence ⇐416.

Parol evidence was admissible to show that words "and seven hundred shares of Common," after signature to receipt for check on account of subscription for preferred stock, were intended as part of receipt.

4. Corporations ⇐77.

Corporation agent's receipt for check on account of stock subscription "on the terms set forth in * * * subscription contract" *held* not vulnerable to objection that, such contract being complete, its terms cannot be enlarged by construing other writings therewith (Civ. Code, § 1642).

5. Corporations ⇐77.

Instruments modifying prior stock subscription agreement by obligating corporation

to sell common as well as preferred stock may be considered in ascertaining terms of real contract (Civ. Code, § 1642).

6. Evidence ⇨66.

It must be taken that stock subscriber, to whom court found, and subscription agreement stated, that sale permit, showing issuance of common stock in escrow to corporation's president and promoter, who could sell it only on further permission of corporation commissioner, was exhibited, knew that promoter owned such stock.

7. Corporations ⇨79.

It was corporation agent's duty to inform stock subscriber that sale of common stock was by corporation's president and promoter, who owned it, and agent's negligence in that regard was chargeable to corporation.

8. Corporations ⇨77.

Letters acknowledging subscription for preferred stock and informing subscriber that corporation president owned common stock and would apply to corporation commissioner for permission to transfer it cannot be considered with subscription agreement and contemporaneous documents in determining real agreement; contract having already been consummated (Civ. Code, § 1642).

9. Corporations ⇨77.

Letters from corporation by its president and from latter personally to stock subscriber cannot be considered as evidence of parties' construction of subscription contract; one being written by outsider and the other by only one party to contract.

10. Evidence ⇨271(19).

Letters acknowledging preferred stock subscription and informing subscriber that corporation president owned common stock and would apply to corporation commissioner for permission to transfer it were self-serving declarations, which could not be considered in interpreting contract.

11. Novation ⇨1.

To accomplish novation, new debtor must be substituted with creditor's consent, and parties must intend to release original debtor's obligation.

12. Novation ⇨12.

Letters acknowledging preferred stock subscription and informing subscriber that corporation president owned common stock and would apply to corporation commissioner for permission to transfer it *held* not to evidence president's substitution for corporation as debtor for common stock, in absence of evidence that subscriber consented or so intended.

13. Stipulations ⇨14(7).

Stipulation that stock subscriber would testify that she would not have signed agreement had she known she was not to receive common stock supported finding that sale thereof was material consideration for contract.

14. Corporations ⇨78.

Stock subscriber, notifying corporation of rescission of contract over eight months after date thereof, *held* not guilty of laches barring recovery of amount paid, where she made numerous futile attempts in meantime to obtain common stock, sale of which was material consideration for contract, and attended annual stockholders' meeting.

15. Licenses ⇨39.

Stock subscriber *held* entitled to recover amount paid as against contention that both parties were equally guilty in contracting for sale of common stock without permission of corporation commissioner.

16. Appeal and error ⇨1058(1).

Exclusion of corporation agent's testimony that he told stock subscriber that corporation president owned common stock *held* not prejudicial error, where sale permit, exhibited to subscriber, stated such fact.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Annie W. Stimson against the Arrowhead Springs Beverage Company. Judgment for plaintiff, and defendant appeals, the Citizens' National Trust & Savings Bank of Los Angeles, as guardian of plaintiff's estate, being substituted for appellant after she was declared incompetent.

Affirmed.

Rollin L. McNitt, Bertin A. Weyl, and Edythe Jacobs, all of Los Angeles, for appellant.

Janeway, Beach & Hankey and S. T. Hankey, all of Los Angeles, for respondent.

GRAY, Justice pro tem.

Annie W. Stimson having been declared incompetent, pending this appeal, the guardian of her estate has been substituted in her stead. For the sake of clarity, she will continue to be called the respondent.

Respondent recovered judgment for the return of her paid subscription for appellant's stock upon the theory that the subscription agreement was void because it included the sale of 700 shares of common stock, which, under the permit of the corporation commissioner, was not to be sold but was to be issued in escrow for the promoter of appellant, as well as 3,040 shares of preferred stock, which such permit authorized appellant to sell. Appellant disputes the evidence's support of the finding that the sale included such common stock in addition to such preferred stock. Respondent signed a subscription agreement

in the following form: "I hereby subscribe for and agree to purchase 3040 shares of * * * Preferred stock of" appellant "and agree to pay therefor $10.00 per share * * * in cash with this subscription. * * *" At the same time, appellant's agent signed and delivered a writing, prepared by himself and reading as follows: "Received of Annie W. Stimson * * * check for the sum of Thirty Thousand Four Hundred Dollars on account of his (sic) subscription for 3040 shares of * * * Preferred shares of said Company on the terms set forth in his (sic) subscription contract. * * *" Underneath his signature, the agent wrote, "and seven hundred shares of Common." Also, at the same time, the agent signed and delivered the following instrument, prepared by respondent's secretary: "Received of Annie W. Stimson * * * 152 shares of * * * the Anaheim Sugar Co. * * * for which I agree to deliver to her 3040 shares of the preferred stock and 700 shares of the common stock of the" appellant "or I agree to return the sugar stock received." It is undisputed that the agent received the sugar stock and not the check, and that he sold this stock for cash several days later as previously arranged by the parties. No question arises as to the agent's authority.

[1-3] In support of the finding, respondent, invoking the rule of construction declared in section 1642 of the Civil Code, that "several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together," contends that the true agreement is not evidenced solely by the agreement signed by respondent, but its terms are to be ascertained by consideration of all three documents. Torrey v. Shea, 29 Cal. App. 313, 155 P. 820. In reply, appellant argues that, since the last two documents are receipts and not contracts, the above rule is not applicable, and that therefore the agreement is evidenced solely by the first writing. Since the second document is but a bare acknowledgment that the agent received a check, it is a mere receipt. Greer v. Los Angeles Athletic Club, 84 Cal. App. 272, 276, 258 P. 155. The third document is both a receipt and a contract because, in addition to acknowledging receipt of the stock, the agent agrees to deliver specified stock therefor or to return the stock so received. Lawrence v. Premier Indem. Assur. Co., 180 Cal. 688, 182 P. 431. Although the Code in stating the rule uses the word "contract," generally the rule as stated uses the word "instrument" in lieu thereof. 13 C. J. 528; 6 R. C. L. 850. In Flinn & Treacy v. Mowry, 131 Cal. 481, 63 P. 724, 1006, in construing a receipt and contract together, it was assumed that a receipt was within the terms of the Code section. In that the last two instruments are identical for present purposes, the same result is obtained, even if the first of these is ignored. Appellant's further objection that the words after the signature in the second writing formed no part thereof is untenable, because parol evidence was admissible to show such addition was intended to form part of the receipt. Verzan v. McGregor, 23 Cal. 339.

[4, 5] Citing Merkeley v. Fisk, 179 Cal. 748, 754, 178 P. 945, 948, to the effect that several contracts can be construed together "only when upon their face they deal with the same subject-matter and are by reference to one another so connected that they may be fairly said to be interdependent," appellant argues that, as the first agreement signed by respondent is complete, its terms cannot be enlarged by construing therewith the two other writings. But the first receipt signed by the agent does refer to the contract signed by respondent, and therefore it is not vulnerable to this objection. The cited case, following Torrey v. Shea, supra, also recognizes that this rule yields to the rule that "a contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates," and that, therefore, oral testimony of the surrounding circumstances is admissible for the purpose of ascertaining the intention of the parties concerning the scope and effect of the several instruments. The fact that the last two instruments by increasing appellant's obligation to that extent modify the agreement signed by respondent does not prohibit their consideration in ascertaining the terms of the real contract. Cobb v. Doggett, 142 Cal. 142, 75 P. 785; McAuliff v. McFadden, 42 Cal. App. 505, 183 P. 870; Spotton v. Dyer, 42 Cal. App. 585, 184 P. 23; Kelly v. Great Western Acc. Ins. Co., 46 Cal. App. 747, 189 P. 785.

[6, 7] The testimony of respondent and the agent disclosed that, when several days before the execution of the documents, he solicited her subscription for preferred stock, she demanded common stock, as an incentive therefor; that he told her, according to his version, that Charles G. Anthony, the president and promotor of appellant, owned it, and, according to her version, that the common stock was owned by the promoters; that he would have to obtain Anthony's approval before he could give her such common stock; and that several days after he returned and the documents were executed. The reverse of the subscription agreement fully set forth the permit, from which it clearly appears that all common stock was issued in escrow to Anthony, who could only sell it upon further permission of the corporation commissioner. In view of the finding that such permit was exhibited to her and the statement in the subscription agreement that such permit was so exhibited and that she had read the same, it must be taken as true

that she knew that Anthony owned the common stock. Gridley v. Tilson, 202 Cal. 748, 262 P. 322. However, she had already been told that either, according to her version, that the promoters owned such stock, or, according to the agent's version, that Anthony owned it, and that Anthony's approval was necessary to her obtaining it. When the agent returned and, without telling her what Anthony had said as to such approval, executed the last two instruments, purporting to sell the common stock as well as the preferred, the respondent might reasonably have inferred from such documents that she was dealing with the company in subscribing for the common as well as the preferred stock. She had been dealing with the agent, as representative of appellant, and had no reason to believe, when he signed the documents, that he was acting in a dual capacity—that is, as appellant's agent as to the preferred stock and Anthony's agent as to the common stock. Indeed, it was more reasonable for her to assume that, as the company was receiving her money, it was selling her the additional common stock than that Anthony was giving her stock without any consideration to himself. If the sale was to be other than by appellant, as apparently his writings disclosed, it was the agent's duty to have so informed respondent, and his negligence in that regard is chargeable to appellant.

[8-12] Subsequently, on the same day, the agent delivered to respondent two letters. In the first, appellant, by Anthony as its president, acknowledged the subscription for the preferred stock in the form signed by respondent. In the second, Anthony, personally, informed respondent that he was owner of the common stock, that it was escrowed and could only be transferred upon application to the corporation commissioner, and that he guaranteed that he would so apply. Appellant argues that these letters should be considered with the first three documents in arriving at the real agreement of the parties. They cannot be so considered because, prior thereto, the transaction had consummated in a contract. Neither can they be considered, in interpreting the contract, as evidence of the construction that the parties had placed upon its terms because one is written by an outsider and the other was written by only one party thereto. P. Pastene & Co. v. Greco Canning Co. (D. C.) 268 F. 168. Furthermore, each is a self-serving declaration in favor of and not against the writer. Appellant also argues that the letters evidence a substitution of Anthony for appellant as debtor for the common stock. "To accomplish a novation by the substitution of a new debtor the substitution must be with the consent of the creditor and the parties must intend that the obligation of the original debtor be released." 20 Cal. Jur. 250. The record is silent as to such consent or intent on the part of respondent.

[13] The objection that the evidence does not support the finding that the sale and delivery of the common stock was a material consideration for the contract is answered by appellant's stipulation that respondent would testify that she would not have signed the subscription agreement if she had known she was not to receive the common stock mentioned in the other two documents.

[14, 15] Notice of rescission was served eight and one-half months after the date of the contract. In the meantime, she made numerous futile attempts to obtain the common stock from Anthony. She also attended the annual stockholders' meeting. These facts, appellant claims, prove laches, debarring her from relief. Appellant further contends that relief should be denied because the parties, in contracting for the sale of the common stock in violation of the permit, were equally guilty. Neither of these contentions is well taken. First Nat. Bk. v. Thompson, 212 Cal. 388, 298 P. 808.

[16] The court sustained objections to questions asked of the agent which were designed to show that he had told her that Anthony owned the common stock. Appellant claims that these rulings were erroneous. Conceding that they were, the error is without prejudice, because, as above pointed out, the permit, printed on the reverse of the subscription agreement, stated that Anthony was the owner of the common stock, and the court found, as the agreement stated, that such permit had been exhibited to her. It is obvious, therefore, that the court, in deciding the case, considered that she knew the fact as to the ownership, and therefore the excluded evidence would have been only additional evidence as to matter already proven.

Judgment affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

126 Cal.App. 403

COLWELL v. GARDNER et al.

Civ. 4435.

District Court of Appeal, Third District, California.

Sept. 27, 1932.

1. Executors and administrators ⇐449.

That complaint alleged that services were rendered decedent at her request, while claim presented to executrices was for services furnished under contract, *held* not fatal variance.

2. Executors and administrators ⇐210.

Law will imply promise to compensate for services at termination thereof, where express promise to compensate by will has failed of fulfillment.

3. Executors and administrators ⇐221(5).

Evidence showed that plaintiff fully performed contract to render services to decedent during her lifetime.

4. Executors and administrators ⇐451(3).

Instruction reciting that if jury find for plaintiff, to determine reasonable value of services performed or supplies furnished to decedent as alleged in complaint, *held* not erroneous.

Such instruction was not erroneous where the court, in other instructions, fully instructed the jury that if plaintiff had been justly discharged and therefore did not complete his contract, he could not recover anything, and that the plaintiff must have performed each and every portion of his contract before entitled to recover anything, and that willful or gross misconduct justifying his discharge precluded his recovery.

5. Trial ⇐260(1).

Refusal to give requested instruction covered by other instructions *held* not error.

6. Appeal and error ⇐1067.

Failure to give defendants' instruction that if plaintiff had no contract of employment with deceased, but performed services for deceased, he can only recover reasonable value of services performed within two years previous to her death, *held* not prejudicial.

No prejudice resulted to defendants from the failure to give such instruction, where the jury were instructed that if no contract of service had been shown, then plaintiff could not recover, and this seemed to be the whole theory of plaintiff's case, and therefore the proffered instruction was without the issues.

7. Executors and administrators ⇐451(3).

Refusal to instruct that plaintiff could not recover if he agreed with decedent to assume with her relationship of son and mother and rendered to her such services as son would render to mother *held* not error.

There was no error in refusing such an instruction because there was no evidence from which the relationship of son and mother might be inferred, and the proposed instruction left out of consideration the idea of contract, for, even though the relationship had been assumed, nevertheless a legal contract could have been entered into whereby compensation was agreed upon.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by John L. Colwell against Alvina E. Gardner and Anna A. Lafever, as executrices of the last will and testament of Ellen East, deceased. From a judgment in favor of plaintiff and an order denying a new trial, defendants appeal.

Judgment and order affirmed.

Clyde Thomas, of Los Angeles, and Wesley E. Marten, of Chico, for appellants.

Ware & Ware, of Chico, for respondent.

PARKER, Justice pro tem., delivered the opinion of the court.

This is an action by which plaintiff sought to recover from the estate of Ellen East certain money alleged to be due for services rendered decedent during her lifetime.

The case was tried with a jury and following a verdict for plaintiff judgment was entered in his favor. A motion for a new trial was made and denied, and defendants appeal.

Before detailing the facts there are some preliminary points that may be considered.

Appellants contend that there is a fatal variance between the cause of action sued on and the claim presented to the executrices for allowance.

[1] The point is made that the complaint alleges that the services were rendered decedent at her special instance and request, while the claim presented was that the services were furnished under an agreement and contract. Hence, argues appellant, there is the variance claimed. A mere statement of the point is its own refutation, even conceding that the law requires that before an action on a claim can be maintained the claim must first be presented to the representatives of the estate.

The next claim of appellants is that the evidence does not support the contract alleged. The complaint alleges: "That between August 1, 1918, and December 29, 1928, and continuously between said dates with the exception of about two months in 1925 and

three weeks of July and August, 1929, plaintiff, at the special instance and request of Ellen East, rendered constant and continuous service to her, consisting of housekeeping for her, preparing her meals, nursing and caring for her and caring for her home, and during all of said period the plaintiff, at the special instance and request of said Ellen East, furnished her groceries, meat, vegetables and fuel and supplied her home therewith and furnished at her special instance and request, for use in her home, gas, electric energy and ice; that during the time all of the said services were rendered and performed it was agreed by and between plaintiff and said Ellen East that plaintiff would perform the services and furnish the specified provisions, etc., continually during such part of the remainder of the lifetime of said Ellen East as she might require and that she would pay to plaintiff for the same the sum of $2,000 at the time of her death, and plaintiff alleges that said sum was and is the reasonable value of said services and the things so furnished and supplied."

The complaint further alleges full performance by plaintiff; the appointment and qualification of the executrices, following the death of Ellen East; the presentation of the claim against the estate of the said decedent and the rejection thereof.

The creditor's claim presented is made a part of the complaint, and after setting forth the nature of the services rendered, as in the complaint alleged, the claim reads: "That all of said services, provisions, fuel, gas, light and ice were furnished by claimant to deceased under an agreement and contract with her by the terms of which deceased agreed to pay claimant, at the time of her death, $2,000.00, which was and is the reasonable value thereof, and upon which nothing has been paid."

With this review of the pleading we may now consider appellants' claim that the evidence does not support the contract as alleged. Appellants have been meager in their presentation of the record in arguing the evidence. We have, however, gone carefully over the transcript, aided by respondent, who has given us fully the testimony of the various witnesses.

With only changing the names the situation is described exactly in the case of Warder v. Hutchison, 69 Cal. App. at page 298, 231 P. 563, being subheading No. 7 of the opinion, which we adopt as our conclusion here on this particular point.

Appellants' next point is as follows: If a contract was proven it was one to provide by will and not as alleged in the complaint.

The argument runs to the effect that the complaint sets out a contract of hiring by the terms of which plaintiff was to be compensated at the death of Ellen East, and that the proof shows nothing more than a contract or promise to make a will in favor of plaintiff.

[2] Here, again, none of the evidence is presented in support of the contention, but again we have gone to the transcript. We feel it needless to go into the details of facts. In its factual structure the case differs little from the usual run of such cases and details would simply mean change of names and places. The rule announced in Lauritsen v. Goldsmith, 99 Cal. App. 671, 672, 279 P. 168, disposes of the point now under discussion. This citation reviews the authorities to some extent. Quoting from page 675 of 99 Cal. App., 279 P. 168, 170, the court says: "In this case respondents claim that the record of testimony does not show any express contract to compensate for the services at the termination thereof, but only an express contract to compensate by will. It is true that the testimony does not show any direct promise to pay in any other way than by will. But it has been frequently held that the law will imply such a promise where the express promise to compensate by will has failed of fulfillment." In the instant case there is much credible testimony tending to establish an express contract to compensate at the termination of the service, said termination being at the time of the death of Ellen East. After death the only manner in which payment could be made would be by the prior establishment of a fund or by will; excepting that the claim could be presented and paid out of the general funds of the estate. The manner of payment is immaterial as is the necessity of the creation of any specific legacy or fund.

Appellant next urges that if the contract was one of hiring, then plaintiff failed to show full performance.

Here we come upon a direct conflict in the evidence. There was an abundance of testimony to the effect that throughout the entire period the treatment accorded Ellen East by plaintiff was of a kindly, attentive, solicitous nature. On the other hand, certain beneficiaries under the will, themselves strangers in blood, gave testimony to the contrary.

[3] It might be conceded from all of the facts that Ellen East was a sickly, aged person, of nervous and irritable temperament, and one most likely to find fault. It might further be conceded that at various times rather acute friction existed between plaintiff and Mrs. East, at which time, perhaps, both of them would, as it were, blow up, and reach the point of open hostility. However, as was to be expected, these spells were of short duration. Plaintiff would quit or be discharged and perhaps the next day return; in any event, his return would be but a mat-

ter of a few days. This would not break the term of employment or impair the fulfillment of the contract.

So, too, with the allegations of unkindliness and neglect on the part of plaintiff. The charges of appellants were denied and the jury were fully instructed on this phase of the case. We have no inclination, restrained likewise by the rule of appellate practice, to disturb a verdict on this issue which verdict is supported by substantial evidence.

If it could be determined that at any period plaintiff ceased the performance of the contract, the evidence amply supports the conclusion that such cessation was without fault on the part of plaintiff and was caused by the wrongful temporary discharge by Mrs. East.

Finally appellants attack the instructions given and refused. While general objection is made by reference to a number of instructions, appellants point out specifically but one which is subjected to criticism, and that instruction reads as follows: "If you find for the plaintiff under the evidence and these instructions, you should find for him in such amount as you, in your judgment under the evidence, may determine to be the reasonable value and worth of any services or supplies that you may find, from the evidence, were performed and furnished by plaintiff to Ellen East as alleged in plaintiff's complaint, not exceeding the sum of $2,000.00, the amount plaintiff has sued for and named in his complaint."

It will be noted that this instruction ties in to the other instructions through its prefacing phrase; likewise it limits performance to that performance as alleged in the complaint. The court, in other instructions, fully instructed the jury that if plaintiff had been justly discharged and therefore did not complete his contract he could not recover anything; further, the jury were instructed that the plaintiff must have performed each and every portion of his contract before entitled to recover anything, and that willful or gross misconduct justifying his discharge precluded his recovery.

[4, 5] Under the rule as announced in Warder v. Hutchison, 69 Cal. App. 291, 231 P. 563, we find no reversible error in the giving of the instruction. Another noteworthy thing we discover in a reading of the transcript is that the defendants requested this instruction in exactly the same words, but the court refused to give the instruction at defendants' request on the sole ground that it had been given elsewhere. This, of course, is tantamount to the court's having given the instruction at the request of defendants; hence, no claim of error could be urged.

Inasmuch as this is the only instruction offered for analysis, under appellants' contention that the setting forth of this one will suffice to show the error contained in all, we go no further on the subject of instructions given. The court refused an instruction offered by defendants as follows: "You are instructed that if you do not believe from the evidence that the plaintiff had a contract of employment with the deceased, Ellen East, but that he did perform certain services of certain value for the deceased during her lifetime he can only recover for the reasonable value of such services as were performed within two years previous to her death."

[6] We can see no prejudice resulting to appellants from the failure to give this instruction. The jury were instructed that if no contract of service had been shown, then plaintiff could not recover, and this seemed to be the whole theory of plaintiff's case. To have told the jury then that plaintiff could recover for the value of the services for two years preceding the death of Ellen East in the absence of a contract might have been a favorable instruction for plaintiff but its refusal could in no sense have harmed appellants. We think the proffered instruction was without the issues.

Appellants then claim that the court erred in its refusal to instruct the jury that if on the evidence of the case they believed that plaintiff had agreed with decedent during her lifetime to assume with her the relationship of son and mother and that he lived with her in her home in such relationship and rendered to her such services as a son would render to his mother, then plaintiff would not be entitled to recover.

[7] There was no error in refusing such an instruction. There was no evidence in the case from which such a relationship might be inferred. There is a difference between services growing out of such a relationship and the case of such a relationship growing out of services.

Any person, under an agreement, might render services equaling those usually expected from a son or relative and yet not assume such a relationship as would negative the terms of the contract. In Mayborne v. Citizens' Trust & Savings Bank, 46 Cal. App. 178, 183, 188 P. 1034, 1037, it is said: "The cases wherein such services are presumed to be gratuitous rest upon some natural or conventional obligation of mutual care and consideration, and the present instance hardly belongs to that class. Plaintiff was under no legal or moral duty to render services to Dutton. In contemplation of law they were strangers to each other, and as between such the law says that beneficial services rendered and accepted must be paid for."

Aside from this the proposed instruction leaves out of consideration the idea of contract at all. Even though the relationship had been assumed, nevertheless a legal contract could have been entered into wherein

and whereby compensation was agreed upon. Lastly, appellants complain of the court's admission of testimony showing the reasonable value of the service rendered. We have to some extent covered this ground, but it will suffice to add that the case of Warder v. Hutchison, 69 Cal. App., 291, 299, 231 P. 563, answers every contention of appellant herein.

Concluding, we may adopt the language of respondent and state that we know of no case that has found its way into the reports of either our Supreme or Appellate courts where, in this character of a case, a plaintiff's claim was so conclusively and overwhelmingly established.

All of the propositions of law advanced by appellants have been heretofore decided adversely to their contentions, and the judgment appealed from, as well as the order denying a new trial, should be, and each and both are, affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

126 Cal.App. 349

GENERAL ENGINEERING & DRY DOCK CO. et al. v. EAST BAY MUNICIPAL UTILITY DIST.

District Court of Appeal, First District, Division 1, California.

Sept. 27, 1932.

Rehearing Denied Oct. 27, 1932. Hearing Denied by Supreme Court Nov. 25, 1932.

1. Waters and water courses ⇐183½.

Taxpayers may join in action to void tax levied by municipal utility district and to recover several amounts paid under protest (Code Civ. Proc. § 378).

2. Waters and water courses ⇐183½.

Municipal utility district is not prohibited by Constitution from incurring in any one year indebtedness in excess of income for such year (Const. art. 11, § 18).

3. Waters and water courses ⇐183½.

Powers of municipal utility district in respect of indebtedness depend on organic act and may be changed at will of Legislature (St. 1921, p. 245, as amended).

4. Waters and water courses ⇐183½.

Taxpayers seeking to void tax levied by municipal utility district must plead facts showing that indebtedness incurred transcended statutory powers if violation of statute is relied on (St. 1921, p. 245, as amended).

5. Waters and water courses ⇐183½.

Purchase by municipal utility district of water company's assets subject to mortgage indebtedness was not giving or lending of credit of such utility district to another within prohibitory provisions of Constitution (Const. art. 4, § 31).

6. Constitutional law ⇐93(1), 119.

Levy of tax by municipal utility district to take care of bonded debt on property purchased *held* valid and not impairment of obligation of contract nor infringement of vested rights of taxpayers (St. 1921, p. 245, as amended).

7. Waters and water courses ⇐183½.

Legislature has plenary power within constitutional limitations, to change or revoke powers of municipal utility district (St. 1921, p. 245, as amended).

8. Waters and water courses ⇐183½.

In action to void tax levied by municipal utility district, allegations of complaint relating to district's power and duty to fix water rates are good on demurrer only so far as they accord with the law (St. 1921, pp. 251, 257, 258, §§ 12, 18, 20(1), as amended by St. 1929, pp. 63, 66, 67, §§ 4, 8, 9).

9. Waters and water courses ⇐203(10).

Provision in organic act that "as far as possible" utilities shall be self-supporting, but unreasonable rates need not be fixed, does not refer to mere physical power unrestrained by considerations of propriety and justice (St. 1921, pp. 251, 257, 258, §§ 12, 18, 20(1), as amended by St. 1929, pp. 63, 66, 67, §§ 4, 8, 9).

[Ed. Note.—For other definitions of "As Far As," see Words and Phrases.]

10. Waters and water courses ⇐183½.

Tax levied by municipal utility district to take care of bonded indebtedness on properties acquired, where revenue derived from water rates was insufficient, *held* valid (St. 1921, pp. 251, 257, 258, §§ 12, 18, 20(1), as amended by St. 1929, pp. 63, 66, 67, §§ 4, 8, 9).

11. Municipal corporations ⇐956(1).

Power of taxation is essential to existence of public corporation or utility, and is never denied except where prohibited in clearest terms.

12. Waters and water courses ⇐203(10).

Legislature did not intend that financial needs, without regard to reasonableness, should control water rates of municipal utility district (St. 1921, pp. 251, 257, 258, §§ 12, 18, 20(1), as amended by St. 1929, pp. 63, 66, 67, §§ 4, 8, 9).

13. Waters and water courses ⇐183½.

Complaint seeking to void tax levied by municipal utility district to take care of bonded indebtedness is insufficient, where it shows no fraud or abuse of discretion granted by Legislature (St. 1921, pp. 251, 257, 258, §§ 12, 18, 20(1), as amended by St. 1929, pp. 63, 66, 67, §§ 4, 8, 9).

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by the General Engineering & Dry Dock Company and others against the East Bay Municipal Utility District. From judgment for defendant, on demurrer to second amended complaint, plaintiffs appeal.

Affirmed.

James H. Boyer, of Oakland, and H. M. Anthony, of San Francisco, for appellants.

T. P. Wittschen, L. W. Irving, and Harold Raines, all of Oakland, for respondent.

GEORGE H. THOMPSON, Justice pro tem.

This action was brought by the above-named five plaintiffs to secure a judgment of the court decreeing to be void the assessment and tax levied and collected by the defendant district for the fiscal year 1929 and adjudging that the sums paid by each of the said plaintiffs respectively as such tax be returned. The complaint was divided into ten counts; each of said plaintiffs being an active complainant in two of such counts. The demurrer of the defendant to plaintiffs' second amended complaint as it finally read by amendment was sustained by the court without leave to amend. Thereafter judgment in favor of the defendant was entered, from which judgment the plaintiffs have appealed. The question presented by this appeal is accordingly one of pleading: Was the court in error in so sustaining the demurrer interposed?

In the said complaint for the recovery of the tax that had been paid under protest, each of said five plaintiffs asserted as one cause of action that said tax so paid should be returned because of the alleged illegality of certain indebtedness of the defendant utility district in the purchase of the properties of the East Bay Water Company, which company was the predecessor of the defendant in the supplying of water to the area served and was a privately owned utility, and, as a second cause of action, that said tax so paid should be returned, for the reason that, under the organic law (Stats. 1921, p. 245, chap. 218) under which the district was organized and was being operated, it was contemplated and intended that the district should be self-sustaining, that is, sustained from the revenues derived from the operation of the public utilities (section 18 of said act, Stats. 1921, p. 257), and that, as the defendant had as a fact embarked on and engaged in the business of selling water, it was required to fix rates in such amounts that the returns from the commodity sold would be sufficient to meet all its legitimate expenses and demands, and that the defendant, failing so to do, had no power to levy the tax in question.

The assessment and tax attacked by the plaintiffs as taxpayers of the utility district was one of 50 cents on each $100 assessed valuation of all property in said district, including the properties of the plaintiffs, levied by the defendant on August 28, 1929, by resolution reading as follows: "Resolution No. 2329 Fixing the amount of money necessary to be raised by taxation and levying a tax upon all property within the East Bay Municipal Utility District. Introduced by Director Johnston: Seconded by Director Latham. Resolved by the Board of Directors of the East Bay Municipal Utility District 1. That in the opinion of the Board of Directors of this District the revenues thereof will not be sufficient to pay the principal or interest on the bonded debt of the District as it becomes due or to carry out the objects and purposes of the District and that the amount of money necessary to be raised therefor by taxation is the sum of $2,031,650.00. 2. That said Board of Directors having heretofore elected to avail itself of the assessments made by the Assessors of the Counties of Alameda and Contra Costa, respectively, and to take such assessments as the basis for District taxation and to have its taxes collected by the county officials of such counties. Now, therefore, pursuant to law the said Board of Directors does fix the rate of taxation for the East Bay Municipal Utility District for the fiscal year beginning July 1, 1929, and ending June 30, 1930, at 50 cents upon each hundred dollars of the valuation of property as so assessed by the said county assessors of Alameda and Contra Costa Counties for the property within each respective County, said rate of tax being sufficient to raise the amount hereinbefore fixed by the said Board of Directors as required by law; and said Board of Directors does hereby levy a tax at said rate on all property within the District. 3. The Secretary is hereby instructed to immediately transmit to the county auditors of said counties, respectively, a statement of the rate of taxation so fixed and of the tax levy so made by the said Board of Directors by filing with each of said county auditors a certified copy of this Resolution. 4. That out of the sum raised by the foregoing tax levy there shall be set aside a sufficient sum to provide for sinking funds to meet the outstanding bonded indebtedness of the District as same becomes due; there shall next be reserved a sufficient sum to pay the interest on any of such bonds and any bonds that may be issued by the District which interest may become due before the next general tax levy; any balance of the sum so raised shall be used to carry out the objects and purposes of the District."

The defendant demurred generally to the entire complaint and also upon the ground of misjoinder and demurred generally and specially to each count.

The first cause of action, that set forth in the first count and in all the odd-numbered

counts of the complaint, will be first considered. The substance of the allegations material and pertinent to the attacks made by the demurrer would appear to be as follows: On December 8, 1928, the East Bay Water Company, a private corporation for profit, owned and operated a public utility supplying water to the inhabitants of the district; that such company was indebted in an amount exceeding $20,790,700, evidenced by bonds theretofore issued and sold, which indebtedness was and is secured by mortgages and deeds of trust upon all the real and personal property of the company, that said company was also indebted in an aggregate amount of $600,000, which indebtedness was entirely unsecured; that on November 1, 1927, the electors of the district authorized a bond issue of $26,000,000 of 5 per cent. bonds to be used in the acquisition or construction of a water distribution system; that such bonds were the only bonds ever voted or authorized by the electors of said utility district for the acquisition or construction of a distribution system, and that the proceeds from the sale of said bonds were and are the only funds or property of the district available for such purpose; that on December 7, 1928, the district, acting through its officers, and without submitting the matter to popular vote, in one transaction, purchased from the water company all of its real and personal property and all of its preferred and common stock; that in the consummation of this transaction the district paid the owners of the stock the sum of $13,962,200, and assumed the payment of the said outstanding bonded indebtedness and also the unsecured indebtedness above referred to, and that the said bonded indebtedness is now a lien upon the property of the district; that the bonded indebtedness so assumed bears interest at 5½ per cent. per annum; that on December 8, 1928, the water company transferred and delivered possession of its property subject to the lien of the bonded indebtedness to the district, and caused to be transferred to the district all the common and preferred stock, and that since said date the district has been and is in possession of all such property, and is operating a water system throughout the district, selling water to its inhabitants; that on August 28, 1928, the utility district levied a tax and passed the resolution hereinbefore set forth; that said tax was levied by said utility district to provide funds to meet and pay the interest on said indebtedness assumed and incurred by it and to meet and pay the annual expenses of the government of said district and the operating expenses of said utility, and to provide funds wherewith to pay and satisfy said indebtedness assumed by it; that plaintiffs at the time of paying said taxes signed, executed, and served on said tax collector a written protest describing its said property, and reading in paragraphs 1 to 5 thereof as follows:

"Protest: To the Tax Collector of the County of Alameda, State of California, and to the East Bay Municipal Utility District: The undersigned owner of the hereinafter described property, situate in said utility district, hereby protests against the assessment, levy and collection of a tax thereon, for the fiscal year 1929, by said East Bay Municipal Utility District, and hereby pays said tax under protest, upon the following grounds, to-wit: 1. That said assessment and tax are in violation of law and wholly void; 2. That said assessment and the levying and collection of such tax are in excess of the powers of the Board of Directors of such utility district. 3. That said assessment was made and said tax was levied in part to meet the huge deficit existing from the operation of a water system by said district, which deficit resulted from the failure of the board of directors of said district to fix such charges for such water furnished by said district as would pay the expenses of the government of said district, including salaries, office expenses and other necessary disbursements, the operating expenses of the said utility, the interest on the bonded indebtedness incurred for the acquisition, construction and completion thereof, and provide a sinking or other appropriate fund for the payment of the principal of such debt as it becomes due, and also provide an appropriate fund for repairs, replacements and betterments, when by the provisions of the Organic Act under which said district was created, and under which bonds in the amount of sixty-five million dollars were voted by the electors of said district, said district was and is required to pay all charges and expenditures of the district, and the interest and principal of its bonded debt, from the revenues derived by the district from the operation of its public utilities, and that each public utility owned and operated by said district shall be self-sustaining; and during the entire year 1929 said utility district has owned and operated a water system and has fixed charges for such water, and has collected revenues therefrom, and can fix such charges and collect such revenues therefrom as will pay all such charges and expenses of said district and render such district self-sustaining; 4. That said assessment was made and said tax was levied to assist in the payment of a portion of the indebtedness incurred by said utility district during the fiscal year 1928, without the approval of a two-thirds vote of the electors of said district, voting on the proposition to incur such indebtedness, and which indebtedness exceeded the ordinary annual income and revenue of said district for said fiscal year 1928; 5. That said assessment was made and said tax was in part levied for the purpose of satisfying an obligation in-

curred by said utility district in giving, lending and pledging the credit of said utility district by the assumption by said district, during the fiscal year 1928, of the payment of a bonded indebtedness of approximately twenty-one million dollars, then owing and unpaid by the East Bay Water Company, a private corporation, and its predecessors in interest." And that said assessment and tax are illegal and void for all the reasons specified in said written protest as more fully appears by the statement of facts in the complaint contained.

[1-4] As to the insufficiency of the complaint: We think there is no misjoinder, and that the plaintiffs are properly joined, under the provisions of section 378 of the Code of Civil Procedure. It is likewise clear that a district such as defendant is not within the inhibition of the provisions of section 18, article 11, of the Constitution, which prohibits any county, city, town, township, or school district from incurring in any one year an indebtedness in excess of the annual income of that year. Bliss v. Hamilton, 171 Cal. 123, 152 P. 303; East Bay Dist. v. Railroad Com., 194 Cal. 603, 229 P. 949; In re East Bay, etc., Water Bonds of 1925, 196 Cal. 725, 239 P. 38. For any inhibition of such kind as against the defendant herein, the terms of the organic act (Stats. 1921, pp. 245, 251, § 12, and the later amendments), must be referred to; and, as such inhibition or limitation is statutory and not constitutional, it may be changed or be entirely dispensed with at the will of the Legislature. Accordingly, if the plaintiffs relied on such statutory limitation or inhibition, and if they wished to show that the defendant herein was affected thereby, it was incumbent on them in their complaint to set forth the facts existing from which under the statute such inhibition or limitation would follow.

It is further contended that the contract of purchase entered into December 7, 1928, between the defendant and the East Bay Water Company by which "the former contracted to and did purchase all of the preferred and common stock of the latter company for $13,962,000 and assumed the unsecured indebtedness of the water company, and bought the real and personal property of said water company, subject to a mortgage indebtedness of $20,790,000 which indebtedness said utility district, by said contract of purchase, assumed and agreed to pay" was prohibited by section 31 of article 4 of the Constitution, the said section containing the following provisions: "The legislature shall have no power * * * to authorize the giving or lending, of the credit * * * of any county * * * or other political corporation or subdivision of the state now existing, or that be hereafter established, in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever; * * * and it shall not have power to authorize the state, or any political subdivision thereof, to subscribe for stock, or to become a stockholder in any corporation whatever;" and it is likewise contended that the bonds referred to in the complaint were voted for the construction or acquisition of a distribution system, and not for the purpose of buying stock in a private corporation or of guaranteeing or paying an indebtedness incurred by a private corporation.

It is, however, alleged in the complaint that the defendant "purchased from said East Bay Water Company all of said real and personal property owned by it as aforesaid and purchased all of the preferred and common stock of said East Bay Water Company then issued and outstanding, and amounting to 130,872 shares" (paragraph VIII), and "That on the 8th day of December, 1928, said East Bay Water Company transferred and delivered possession of all of its said real and personal property, subject to said liens and encumbrances as aforesaid, to said utility district, and caused to be transferred to said utility district all of said common and preferred stock; and ever since last mentioned date said defendant, East Bay Municipal Utility District, has been and still is in possession of all of said properties and stock, and has been and still is operating a water system throughout said utility district, and has been and still is distributing and selling water to the inhabitants of said utility district." Paragraph XI.

[5] Obviously, the foregoing is a very clear allegation that the defendant purchased all the properties of the East Bay Water Company, and that it has succeeded thereto and is now the owner and in possession thereof. Where there is such an admitted situation of "purchase" and "sole ownership," there is no "giving or lending of credit" within the meaning of any such prohibitory provisions. The situation contemplated by the prohibitory measure is not present; for the "purchase of all the property" and the "sole ownership" of all the property preclude the conclusion that there has been any joinder with another as an interested party or aided party or that what was done was done in the interest or for the benefit of anyone other than the "purchaser" and "owner." In the reported cases dealing with alleged violations of such a provision as the one recited, we know of no instance where an owner in "the sole control and management" of acquired property as in the situation herein made to appear has been held to come within any such constitutional or statutory provisions. This distinction incident to "purchase," "exchange," and "sole ownership" is illustrated by the following cases: Sun Publishing Ass'n v.

Mayor, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788; Brooke v. Philadelphia, 162 Pa. 123, 29 A. 387, 24 L. R. A. 781; Prince v. Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; Walker v. City of Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24; Admiral Realty Co. v. City of New York, 206 N. Y. 110, 99 N. E. 241, Ann. Cas. 1914A, 1054; Chicago v. P., C., C. & St. L. Ry. Co., 244 Ill. 220, 91 N. E. 422, 135 Am. St. Rep. 316; Maffit v. City of Decatur, 322 Ill. 82, 152 N. E. 602.

Further in this regard, the case of People ex rel. Murphy v. Kelly, 76 N. Y. 475, dealing with the construction and acquisition of the Brooklyn bridge, affords a very clear illustration of the application of this distinction to a transfer wherein and whereby two public corporations took over and acquired all the property of a private corporation. Therein under a constitutional amendment effective January 1, 1875 (Const. art. 8, § 11), reading: "No county, city, town or village shall hereafter give any money or property, or loan its * * * credit to or in aid of any individual, association or corporation, or become directly or indirectly the owner of stock in, or bonds of, any association or corporation; nor shall any such county, city, town or village be allowed to incur any indebtedness except for county, city, town or village purposes," it was contended that an act passed May 14, 1875 (Laws N. Y. 1875, c. 300) providing that "the bridge in the course of construction over the East river, between the cities of New York and Brooklyn, by the New York Bridge Company, shall be a public work of the cities of New York and Brooklyn, and for the dissolution of said company, and the completion and management of the said bridge, by the said cities," was in conflict with the constitutional provisions just recited; but the court held that it was not the purpose or the effect of the act to make the city of New York a stockholder in the bridge company or to cause it to loan any money or credit to such company. It was the purpose of the act to extinguish the company and vest all its property in the two cities for a public purpose. The cities already owned most of the stock and property of the company, and a way was provided by which they could become the owners of the balance of the property. All the money they paid for stock or upon the debts of the company was simply in furtherance of the purpose to vest the property of the bridge in the two cities, and it was not paid to aid the company or to make the cities stockholders therein. The effect was to be the dissolution of the company and the transfer of its property.

Under the allegations of the complaint that on December 7, 1928, the defendant acquired the ownership of the East Bay Water Company properties, and is now in possession and in operation thereof, and it appearing that such acquisition was but the purpose and object of what was done, we can see no basis or support for the contention that the credit of the state or of the district was loaned or that section 31 of article 4 of the Constitution was in any way violated.

[6] It is contended further that the levy of August 28, 1929, was in violation of the constitutional provision prohibiting impairing the obligation of contract. Of course, if the said tax levy or the amendments of the organic utility act evidently relied upon by the district as warranting the making of said levy in the manner in which it was impaired the obligation of contract, they would be obnoxious to such provision; but within the meaning of the said prohibitory provision we cannot see that the district under the exercise of this power of taxation which the state has seen proper to grant to the district has impaired any one's contract or that there is any contract or contractual relationship with the district or with the state or with any one else that is shown to be affected or impaired by the tax levy in question.

[7] The other limitations relied on by plaintiffs to support their contention as to the illegality and invalidity of the purchase of December 7, 1928, and of the levy of August 28, 1929, are statutory and not constitutional limitations; and hence they are what may be changed or be entirely dispensed with at the will of the Legislature. Under the situation herein presented, we are of the opinion that the Legislature had the plenary power also to change, revoke, lessen, or enlarge the powers that are herein involved of the district, and that the scheme set forth in Statutes of 1921, p. 245, and amendments thereto, is framed on the ground and theory that there is reserved to the Legislature such plenary power and right so to amend when it may be deemed expedient or proper so to do—a power and right restrained only by the necessity of protecting vested rights. In the legislation and subsequent tax levy here involved, no vested rights on the part of the plaintiffs were affected or impaired. City of Sacramento v. Adams, 171 Cal. 458, 153 P. 908; La Mesa, etc., Irr. Dist. v. Halley, 197 Cal. 50, 239 P. 719; Wisconsin & Michigan Ry. Co. v. Powers, 191 U. S. 379, 24 S. Ct. 107, 48 L. Ed. 229; Spurrier v. Neumiller, 37 Cal. App. 683, 174 P. 338.

Entertaining the view that the levy of August 28, 1929, is supported by the taxing power granted the district under the terms of the organic act, and is in substantial conformity with the power so granted, and that the allegations of count 1 and the odd-numbered counts of the complaint relied on by the plaintiffs do not under the terms of the organic act set forth wherein the levy complained of is illegal or invalid by reason of anything prohibited by law, we hold that the

demurrer for insufficiency of facts, in this aspect was good.

The second cause of action, that set forth in the second count and in all the even-numbered counts of the complaint, will now be taken up. The substance of the allegations material and pertinent to the attacks made by the demurrer appear to be as follows:

That on December 8, 1928, the district acquired a distribution system, and that at all times since said date the defendant has been engaged in the business of distributing and selling water to the inhabitants of said district, and is the only medium distributing water to its inhabitants, the population of which exceeds 450,000 people, and has enjoyed a monopoly in the sale of such water; that at all times since said December 8, 1928, said utility district could and now can fix such charges for said water distributed and sold by it as aforesaid and at all times since last-mentioned date could and now can collect such revenues from the operation of said water system and public utility as will pay and meet all legal expenses and lawful obligations and render said district self-sustaining; that the district's sole revenue since December 8, 1928, is derived from the sale of water; that at all times since December 8, 1928, the annual expenses of the district exceed $6,700,000; the rates fixed by the district are such as to produce a sum which falls short of $6,700,000 by $2,200,000, thereby causing an annual deficit in the operation of said water system project and the maintenance of said district of more than $2,200,000; and to meet such deficit levied the tax in dispute in this action; that said tax was levied by said utility district to provide funds to meet and pay the interest on indebtedness assumed and incurred by it and to meet and pay the annual expenses of the government of said district and the operating expenses of said utility and to provide funds wherewith to pay and satisfy said indebtedness assumed by it.

It will be noted that the East Bay Water Company's system was taken over December 8, 1928, and that the tax levy herein attacked was made on August 28, 1929, and was for the fiscal year beginning July 1, 1929, and ending on June 30, 1930. The resolution making the said levy and the protest of plaintiffs against the tax have both been recited in the first part of this opinion. It thus appears that during the fiscal year of 1928 the defendant had operated the said water system for approximately seven months, and that at the time of the levy the second month of the fiscal year of 1929 was drawing to a close; and it would also appear from the recitals of the resolution that the board had determined that under the situation confronting the district, in that "the revenues thereof will not be sufficient to pay the principal or interest on the bonded debt of the District as it becomes due or to carry out the objects and purposes of the District," it was necessary to raise by taxation the sum of $2,031,650. To raise such amount, said tax of 50 cents upon each $100 of the assessed valuation of the property of the district was levied.

It is contended by plaintiffs that, the district having since December 8, 1928, engaged in the business of selling water to the consumers thereof in said district, and having the power to fix rates, it should have met all its legal obligations from the sale of such water at rates made high enough to effect such result, and, failing so to do, it was prohibited by law from thereafter levying or collecting taxes.

[8] The allegations of the complaint in so far as they may be regarded as dealing with or as asserting the "power" of the defendant district to make or fix rates without limit or restriction and its duty to do so, must, under the familiar rule in demurrer, be accorded only such force and effect as they derive from the law; in other words, such allegations are good and well pleaded only to the extent that they accord with the law.

At the time of the levy, the tax powers of the district in particulars pertinent to this consideration embraced, among others, the following provisions: "Sec. 12. Any municipal utility district incorporated as herein provided shall have power: * * * Fourth —To take by grant, purchase, gift, devise, or lease, or condemn in proceedings under eminent domain, or otherwise acquire, and to hold and enjoy real and personal property of every kind within or without the district necessary to the full or convenient exercise of its powers. The directors of the district may lease, mortgage, sell or otherwise dispose of any real or personal property within or without the district when in their judgment it is for the best interests of the district so to do. The provisions of this section shall apply to all sales or mortgages heretofore or hereafter made. * * * Eighth—To borrow money and incur indebtedness, and to issue bonds or other evidences of such indebtedness; also to refund or retire any indebtedness that may exist against or be assumed by the district; provided, no indebtedness shall be incurred exceeding the ordinary annual income and revenue of the district without the approval of a two-thirds vote of the electors voting on the proposition to incur such indebtedness; provided, however, that a further vote of the electors is not required for any indebtedness heretofore or hereafter incurred within the purposes and not exceeding the available amount of any previously authorized bond issue and as to such indebtedness the proceeds of any of such bonds unexpended in the treasury of the district, or the par value of any of such bonds which are unsold shall be deemed a

part of the ordinary annual income and revenue of such district." "Sec. 20. (1) If, in the opinion of the board of directors, the revenues will not be sufficient to pay the principal or interest on any bonded debt as it becomes due, or to carry out the objects and purposes of the district, then said board shall levy a tax for such purpose or purposes and fix the amount of money necessary to be raised therefor by taxation. The words 'revenue producing utilities' as used in this act shall be deemed to mean such utilities as those from which revenue is customary or may be derived by means of charges, rates, or rentals imposed upon or collected from users, consumers or customers thereof, together with such works, facilities and appliances used or useful in connection therewith or incidental thereto." Stats. 1929, pp. 63, 64 and 67, §§ 4, 8. "Sec. 18. Only revenue producing utilities shall be acquired, owned or operated by a district formed under the provisions of this act. The rates and charges for commodities or service furnished shall be fixed by the board of directors. As far as possible utilities shall be self-supporting but in order so to do the board shall not be required to fix a rate which in its opinion is unreasonably high, nor to cover large expenditures and the interest thereon required for future needs and development." Stats. 1929, pp. 66, 67, § 9. The latter (section 18) read as originally enacted (see Stats. 1921, p. 257) as follows: "Sec. 18. Only revenue producing utilities shall be acquired, owned or operated by a district formed under the provisions of this act. So far as possible the board of directors shall fix such charges for commodities or service furnished by any revenue producing utility, as will pay the expenses of the government of the district, including salaries, offices expenses, and other necessary disbursements; the operating expenses of the utility; the interest on any bonded indebtedness incurred for the acquisition, construction and completion thereof; and provide a sinking or other appropriate fund for the payment of the principal of such debt as it may become due, and also provide an appropriate fund for repairs, replacements and betterments; it being the intention of this section that the district pay all of such charges and expenditures, and the interest and principal of its bonded debt, from the revenues derived by the district from the operation of its public utilities, and that each public utility owned and operated by the district shall be self-sustaining." And subdivision 1 of section 20 as originally enacted (see Stats. 1921, p. 258) read as follows: "Sec. 20. (1) If from any cause the revenues of the district shall be inadequate to pay the principal or interest on any bonded debt as it becomes due, the board of directors must, or if funds are needed to carry out the objects and purposes of the district, which can not be provided for out of the revenues of the district, then the board of directors may, levy a tax for such purposes as herein provided. The board shall state the purposes for which such taxes are necessary, and must fix, by resolution, the amount of money necessary to be so raised by taxation."

[9] It will be noted that section 18 of the organic act as in effect at the time of the tax levy provides that, "as far as possible utilities shall be self-supporting but in order so to do the board shall not be required to fix a rate which in its opinion is unreasonably high, nor to cover large expenditures and the interest thereon required for future needs and development," and it will also be noted that said section 18 as originally enacted and until changed by amendment provided that "so far as possible the board of directors shall fix such charges for commodities or service furnished by any revenue producing utility, as will pay the expenses of the government of the district * * *" and make the district self-supporting. When we take into consideration the context and the manifest purpose of the act, in what sense are we to understand these words "so far as possible?" Are they to be understood to have reference to the exercise of a mere physical power or to have the exercise of power unrestricted by considerations involving the justness or fairness or propriety of so doing or the probable results thereof in so far as the district was concerned? The meaning to be attached to such words as "if possible," "as soon as possible," "as far as possible," "so far as possible," is very frequently, as it is here in our opinion with regard to "so far as possible," controlled and restricted by the context, the subject-matter, and the manifest result sought to be attained under the entire scheme projected. Such restricted signification will be and should be attached where it is manifest from the context, the subject-matter, and the obvious result sought to be attained, that considerations of propriety and reasonableness involving some range of judgment and discretion, inhere. Pyles v. Atchison, T. & S. F. Ry. Co., 97 Kan. 455, 155 P. 788; Forbes v. Mohr, 69 Kan. 342, 76 P. 827; Vanderslice v. Newton, 4 N. Y. 130.

[10] That conditions may arise in the launching of a utility district that may make it necessary and expedient to have recourse to the taxing power is a circumstance that has been noticed and recognized by the court in Re East Bay, etc., Water Bonds of 1925, supra. That the district is clothed under the organic act with a taxing power such as was made use of and exercised in this tax levy we think is clearly manifest from the terms of the act. The power is granted in express terms, and the levy made by the defendant is virtually cast in the express terms of the act.

[11] Moreover, as a general proposition the power of taxation is regarded as a most important and essential attribute of a public corporation or utility in order that there may be the ability to function generally and freely under exigencies and situations that may present themselves, and unless the exercise of such power is in the clearest of terms prohibited, it is never denied. Avery v. Job, 25 Or. 512, 36 P. 293; Attorney General v. Salem, 103 Mass. 138; Carlton v. Salem, 103 Mass. 141; Sinclair v. Mayor of Fall River, 198 Mass. 248, 84 N. E. 453; St. Louis-S. F. Ry. Co. v. Andrews, 137 Okl. 222, 278 P. 617; In re Orosi Public Utility Dist., 196 Cal. 43, 235 P. 1004; City of Pasadena v. Chamberlain, 204 Cal. 653, 269 P. 630; People ex rel. Woolsey v. Common Council of Long Island City, 76 N. Y. 20.

[12] Nor can it be thought that it was the intention or within the contemplation of the Legislature that the fact that the district needed the money or that it was under the necessity of raising money in a given amount should be considered as the controlling factor in fixing or setting a price or rate for the water which it was called upon to distribute to its patrons, and that any question of the reasonableness or fairness of such set price, relatively speaking, as compared with prices for water generally, should be ignored and disregarded. A fair market value or fair service value is not generally regarded as being dependent upon mere financial necessity or exigency, or as being such as will satisfy such necessity or exigency. Pond, Public Utilities, § 545; Feil v. City of Coeur d'Alene, 23 Idaho, 32, 129 P. 643, 43 L. R. A. (N. S.) 1095; Smyth v. Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819.

[13] The powers of the district particularly involved herein appear in the organic act (Stats. 1921, pp. 245 to 261) as amended by Statutes of 1927, pp. 61, 63, 65, 69, and as amended by chapter 31, Statutes of 1929, pp. 58 to 70, wherein, among other things, sections 18 and 20 were amended, effective August 14, 1929, and section 12 was amended, effective March 29, 1929, by amending subdivision 4 of said section 12 relating to the acquisition and disposing of real and personal property, providing the right to mortgage same and ratifying sales and mortgages and by amending subdivision 8 thereof relating to the indebtedness of such districts including "any indebtedness heretofore or hereafter incurred. * * *" We think that, under the powers so appearing to have been granted to the defendant, the express recognition by the Legislature of the prior existence of such power in the defendant and the ratification of past acts of the defendant referable to such powers, we must regard the defendant as having proceeded with legal warrant and in the exercise of a vested discretion in making the tax levy of August 28, 1929, as was done, notwithstanding the defendant at such time was in the possession of the water system and had been operating it since December 8, 1928. Accordingly, the allegations of the complaint are insufficient, in that they do not show on the part of the defendant and to the oppression of the plaintiffs any fraud, or any abuse of the authority and discretion granted by the Legislature. 2 High, Injunctions, § 1240; People ex rel. Carter v. Rice, 135 N. Y. 473, 31 N. E. 921, 16 L. R. A. 836, 850, 851.

In that the said allegations of count 2 and of each even-numbered count are insufficient, and that the allegations of count 1 and of each odd-numbered count are also insufficient as hereinabove mentioned, the judgment of the lower court should be affirmed. It is so ordered.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

126 Cal.App. 434

STICH et al. v. GORDON et al.

Civ. 8575.

District Court of Appeal, First District, Division 1, California.

Sept. 28, 1932.

Rehearing Denied Oct. 28, 1932. Hearing Denied by Supreme Court Nov. 25, 1932.

1. Landlord and tenant ⇐288.

Action in unlawful detainer is one for possession with right to recover damages as an incident and, ordinarily, lease involved is forfeited.

2. Landlord and tenant ⇐291(14).

In unlawful detainer, damages are limited to amount of rental where failure to pay rent is the breach, with treble damages if withholding is willful.

3. Chattel mortgages ⇐255.

In unlawful detainer, the chattel mortgage, so far as it secures payment of the rent incorporated in judgment for damages, is not destroyed.

4. Landlord and tenant ⇐291(14).

Where, in unlawful detainer, landlords claimed wrongful withholding and prayed for receiver, damages, and forfeiture, they could not recover damages during receiver's entire possession.

5. Landlord and tenant ⇐291(17).

Where tenant makes it obvious that privilege to restore lease by payment of damages is not desired, judgment in unlawful detainer need not offer such privilege (Code Civ. Proc. § 1174).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

6. Landlord and tenant ⇐291(17).

Where, in unlawful detainer, court appointed receiver but failed to find when he took possession, or whether his possession was entire, allowed landlords damages for period receiver was in possession, and forfeited lease, judgment must be reversed.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action in unlawful detainer by F. M. Stich and Charles D. Wilke against Olney G. Gordon and Anna A. Gordon, his wife, and others. From judgment for plaintiffs, named defendants appeal.

Reversed.

Clarence A. Linn, of San Francisco, for appellants.

Charles W. Lynch, of San Francisco, for respondents.

ANDERSON, Justice pro tem.

The action is in unlawful detainer. Plaintiffs, the landlords, prevailed. The defendants, who appealed, occupied the premises involved, consisting of an apartment house, as assignees of the original tenants. Unless otherwise indicated, the word "defendants" will apply to appellants only and the answer referred to will be their answer. The defendants had assumed the lease, which ran for ten years, from July 1, 1926; the rental being $1,850 per month, payable on the 15th day of each month. The rental falling due on May 15, 1930, and on June 15, 1930, was not paid. The complaint was filed June 30, 1930. It joined all necessary parties and contained all necessary averments. It prayed for possession, for damages, for forfeiture of the lease, and that a receiver should be appointed. The complaint alleged that notice, addressed to the defendants and requiring the payment of the delinquent rental or the surrender of the possession of the premises, was served on the various defendants on June 24, 1930. A receiver was appointed on July 17, 1930, upon plaintiffs' application. The answer of the appealing defendants was filed on September 25, 1930. The answer admitted the averments of the complaint and prayed that the plaintiffs be awarded damages in the sum of $3,820, the amount of rental figured for the period from May 15, 1930, to the time of the appointment of the receiver on July 17, 1930, and that interest should be allowed on this delinquent rental. The answer also prayed for a forfeiture of the lease. While the answer pleaded the appointment of a receiver on July 17, 1930, and that the receiver took charge of the premises, it failed to state the exact date the receiver obtained complete possession of the premises. Finding 4 recites the appointment of a receiver, but it fails to state when the receiver took possession. It was found that the appealing defendants—the defendants who had assumed the lease—left the premises, but continued to collect rent from subtenants through an agent. Summons was ordered published. The filing of the answer was delayed until September 25, 1930. The evidence showed that the defendants owned the furniture in the apartments. It had been mortgaged to secure the rent. Defendants finally offered to plaintiffs a certain amount of rental on condition the furniture should be delivered. The offer was not acted upon.

The case was not tried until October 20, 1930. Judgment was not rendered until December 16, 1930. The judgment shows that various subtenants had been served with summons and complaint and that they had defaulted. Exactly when they defaulted does not appear. The original lessees filed an answer, but they are not complaining of the judgment. It is not disputed that the order appointing the receiver continued in effect down to the date of the judgment on December 16, 1930.

The trial court awarded plaintiffs judgment for damages in the sum of $12,950. It fixed these damages by taking the amount of the rental for the full period from May 15, 1930, to December 15, 1930. Against this the judgment allowed as a credit the net earnings of the property involved during the period of receivership. These earnings had not as yet been determined by court order. The record indicates that they were later determined, and that they were received by plaintiffs. Neither side objects to the fact that this is irregularly shown by certain records in the clerk's transcript. Both sides concede that the average monthly earnings of the property during the receivership was far less than the monthly rental called for by the lease. The judgment declared the lease forfeited. The judgment contained a provision to the effect that if the damages awarded were satisfied within five days by the specified persons interested in the term of the lease, the defendants would be restored to their estate. But the record conclusively shows that defendants did not desire to avail themselves of this provision.

The appellants complain of the judgment only in so far as it allowed damages equal to the rental for the period of the receivership. The plaintiff Stich testified that the receiver took possession of the apartments on July 17, 1930, and had continued in possession thereof up to the time of the trial. The appellants rely on the case of Telegraph Avenue Corporation v. Raentsch, 205 Cal. 93, 269 P. 1109, 61 A. L. R. 366. That was a

case in unlawful detainer. A receiver was appointed at the instance of the plaintiff. It appeared in that case that the receiver, through attornment of subtenants or otherwise, took possession of all the property involved. It was ruled that it was error to allow damages for withholding the leased premises during the period of the receivership. The case is directly in point. Respondents point out that the Supreme Court denied a hearing after decision by the District Court of Appeal in the case of Wickstrom v. McGrath, 86 Cal. App. 651, 261 P. 326, and they state that the case last mentioned was one for unlawful detention of rented property, consisting of an apartment house; that a receiver was appointed; and that the plaintiff prevailed and that the damages awarded embraced the full amount of the rental unpaid at the time of judgment, together with interest thereon, and that in that case there was an abandonment of the premises and that this feature makes the citation applicable here. Assuming that in this case the acts of defendants evinced an intention to abandon the lease after the suit was instituted, and they had answered, still such an abandonment would not affect the question. If abandonment is accepted that would end the contract and the right to claim future rentals. In the case of Wickstrom v. McGrath, supra, judgment was rendered for the full amount of rental accruing up to the time of the trial, and the judgment recited nothing as to any credit that might result from the operation of the apartments by the receiver. But the opinion does not clearly disclose whether the receiver operated the property. It is at least clear that the point involved in this case was not raised. Any ruling in that case at variance with the case of Telegraph Avenue Corporation v. Raentsch, supra, is controlled by the latter case wherein the receiver appointed at the instance of the landlord did take possession of the leased premises, and wherein it was ruled that rental for the period of the receivership could not be awarded to plaintiff as damages.

[1-4] It is true that a lease may be so conditioned as that the landlord may, without seeking forfeiture, maintain an action for possession of the leased premises on account of a breach of the lease by the tenant. Brown v. Lane, 102 Cal. App. 350, 283 P. 78; Burke v. Norton, 42 Cal. App. 705, 184 P. 45; A. H. Busch Co. v. Strauss, 103 Cal. App. 647, 284 P. 966; Security Realty Co. v. Kost, 96 Cal. App. 626, 274 P. 608. But the point is that if a receiver is appointed at the instance of the plaintiff and the plaintiff prevails, the receiver is regarded as having held for the plaintiff. Moreover, the judgment here did not preserve the lease. The plaintiffs prayed for and obtained a judgment forfeiting the lease for acts done prior to the judgment. The judgment was predicated upon a notice to quit, served with a view to forfeiture, if the rent was not paid. The action in unlawful detainer is one for possession with the right to recover damages as an incident. Ordinarily the lease involved is forfeited. The right to the damages is limited to the amount of the rental, where failure to pay rent is the breach, the court having the power to treble the damages if the withholding is wilful. However, the effect of a chattel mortgage, in so far as it secures the payment of rental which is incorporated in the judgment for damages, is not destroyed. Ashcroft Estate Co. v. Nelson, 26 Cal. App. 400, 147 P. 101; Crittenden v. St. Hill, 34 Cal. App. 107, 166 P. 1016; Arnold v. Krigbaum, 169 Cal. 143, 146 P. 423, Ann. Cas. 1916D, 370. Plaintiffs did not elect to ask merely for a damage judgment. They claimed the premises were wrongfully withheld from them and that a receiver should be appointed, and they prayed for forfeiture of the lease. The legal effect of an adjudication that the premises were wrongfully withheld and that the lease should be forfeited was that if the receivership yielded amounts in excess of the stipulated rental this yield would go to the plaintiffs. This remedy, under the circumstances of this case, is, in the light of the law as declared by the Supreme Court, inconsistent with the right to claim damages during the possession of the receiver.

The receiver was appointed on July 17, 1930. The oral testimony indicates that he took possession on that day. But there is no finding that he did so. Finding 4 is merely that the receiver qualified on that day. Defendants were not to be found, and they were, through an agent, collecting rentals from subtenants. The court obviously considered that it was not necessary to receive evidence as to the exact time the receiver was able to receive full enjoyment of the entire premises. While under some circumstances a partial eviction may suspend the whole rent (36 Cor. Jur. p. 383), it may be inferred from the case of Telegraph Avenue Corporation v. Raentsch, supra, that the tenant may not in every case be entitled to avoid completely the rental obligation merely as the result of the appointment of a receiver who obtains but a partial possession. There was here extreme willingness in the defendants to escape the lease. Welcomed partial eviction is scarcely like ordinary partial eviction. If the evidence on a further trial should show that through subtenants, or otherwise, a part of the premises was withheld from the receiver, defendants should not be permitted to avoid en-

tirely the use of the rental obligation as a basis for damages. Under a variety of circumstances, it may be just to apportion rental and reduce the rental obligation in proportion to deprivation of possession. 36 Cor. Jur. pp. 383, 380, 341. If plaintiffs prevail on a new trial, the moneys in the hands of the receiver will be treated as belonging to plaintiffs. Such moneys represent earnings of property taken in possession by a receiver appointed at plaintiffs' instance.

[5, 6] Where the tenant makes it obvious that the granting of the privilege to restore the lease by paying the damages awarded would be an idle act, it is not necessary that the judgment in unlawful detainer should accord that privilege. Telegraph Avenue Corporation v. Raentsch, supra. While the judgment could be affirmed as to a limited amount of damages conceded by defendants and forfeiture of the lease directed in accordance with the principles announced in the case cited, defendants coupled the concession of forfeiture with a prayer that the damages should be limited to $3,820. The court may, on a new trial, increase the damages or find wilfulness in withholding the premises. If the damages are increased, the privilege of the tenant to have the estate restored by paying the damages as mentioned in section 1174, Code of Civil Procedure, is required to be a part of the judgment.

Under the circumstances a complete reversal of the judgment is necessary, and it is so ordered.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

126 Cal.App. 526

PEOPLE v. GUITEREZ.

Cr. 1220.

District Court of Appeal, Third District, California.

Sept. 29, 1932.

1. Criminal law ⇐419, 420(2).

Rule that person to whom child, too young to become competent witness, had made complaint concerning recent assault on her, may testify regarding fact that such complaint was made, does not authorize hearsay statement of circumstances concerning attack related by child.

2. Criminal law ⇐1036(1), 1044.

Exclusion of incompetent hearsay evidence *held* waived by failure to object thereto, or to move to strike it from record.

3. Criminal law ⇐681(1).

Permitting witness to testify that defendant admitted he was afflicted with gonorrhea without first proving that defendant's statement was voluntarily made *held* not error (Pen. Code § 288).

Admission of such testimony was not error, since the acknowledgment on part of defendant was not a confession of guilt under Pen. Code, § 288, of lewd and lascivious conduct toward a child, but was a mere admission of defendant's physical condition, which might tend to show a possibility of his guilt, and since the admission of a fact which does not itself involve criminal intent nor amount to confession of guilt may not be excluded from the evidence merely for lack of proof that it was voluntarily made.

4. Criminal law ⇐696(1).

Defendant seeking to exclude testimony regarding result of physical examination *held* to have burden of establishing that he was coerced into submitting to examination (Pen. Code, § 688).

5. Criminal law ⇐736(1).

Whether defendant, seeking to exclude testimony regarding result of physical examination, voluntarily submitted to examination, *held* for jury (Pen. Code, § 688).

6. Criminal law ⇐393(3).

Where defendant voluntarily submitted to physical examination, testimony regarding result thereof *held* admissible (Pen. Code, § 688).

7. Criminal law ⇐1186(4).

Failure of judge to sign charge given *held* not reversible error, where record fully disclosed exactly what transpired with respect to refusal or modification of instructions and charge which was actually given (Pen. Code, § 1127; Const. art. 6, § 4½).

Failure of the judge to sign his name to charge given, as required by Pen. Code, § 1127, was not reversible error, in view of Const. art. 6, § 4½, since the instructions given, as well as those refused, were in writing, and were transcribed by the reporter and certified by the judge and there being no controversy regarding the exact language of the instructions given, or of those refused, and the purpose of section 1127 being to preserve for review an exact record of the charge which is given.

8. Criminal law ⇐829(17).

Refusing instruction regarding defendant's testimony *held* not error in view of further instructions.

Refusing requested instruction that jury should consider defendant's testimony same as that of any other witness, and fact that he was defendant should not

prejudice his testimony in jurors' minds, was not error, where the court charged the jury that it was their duty to consider and weigh all the evidence in the case, and from such evidence to determine question of guilt or innocence of defendant, and further instructed that the weight which should be given to the testimony or the credit that jury should give to any of the witnesses in the case were peculiarly within the jury's province.

9. Infants ⊂⇒20.

Evidence supported conviction of lewd and lascivious conduct toward child (Pen. Code, § 288).

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Frank Guiterez was convicted of lewd and lascivious conduct toward a child, and he appeals.

Affirmed.

Barcroft & Barcroft, of Madera, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant was convicted under section 288 of the Penal Code of lewd and lascivious conduct toward a child. On appeal it is contended the verdict is not supported by competent evidence; that the defendant was coerced to furnish evidence against himself by unwillingly submitting to a physical examination; that the prosecuting officer and the trial judge were guilty of prejudicial misconduct; and that the court erred in giving to the jury and in refusing to give certain instructions.

It is conceded the child, Julia Donati, who was but 5 years of age, was incompetent to testify as a witness. At the trial it was not possible to persuade her to answer questions. After a fruitless effort to induce her to speak, the court said: "Let the record show the court finds that the child is evidently nothing but a mere baby yet, * * * and does not respond to the court's questions. * * * She does not appear to understand what the proceedings are all about." Thereupon the child's mother was sworn and testified to circumstances which were related to her by the child constituting lewd and lascivious conduct on the part of the defendant. It is now contended this testimony of the mother is hearsay evidence and incompetent, and that no other substantial evidence supports the verdict.

[1, 2] It is conceded that the person to whom a child, who is too young to become a competent witness, has made complaint concerning a recent assault upon her, may testify regarding the fact that such complaint was made. People v. Ewing, 71 Cal. App. 138, 234 P. 917, 919. But this rule does not authorize the hearsay statement of circumstances concerning the attack which may have been related by the child. It is said in the Ewing Case, supra: "The rule does not extend to the details of the acts complained of." In the present case the statement which was related by the mother of the child does include circumstances and details which, under a proper objection, would be inadmissible. Harmful as this evidence may have been, we are satisfied from a careful examination of the transcript its exclusion was waived by failure to object to the evidence or move to strike it from the record. The controversy between counsel regarding the admission of evidence of this nature consumes several pages of the transcript. Objections to several questions which were propounded by the prosecuting officer were sustained, and testimony thus adduced was stricken from the record. Respective counsel and the court seem to have recognized the correct limitation of the rule as above stated. It is difficult to distinguish the exact dividing line between competent evidence of the complaint of an infant child regarding a recent assault and the incompetent details thereof. This led to numerous objections and several orders striking out evidence from the record. The only statement made by the mother regarding the complaint of the child which remains in the record, with the exception of the evidence which was brought out by the defendant on cross-examination, is in reply to the following question: "Go ahead and state, now, what she told you." No objection was offered to this question. A portion of the answer is competent under the rule above stated. The balance of this answer regarding certain details of the affair may be conceded to be incompetent. The incompetent portion of this answer was waived by failure to object to the question or move to strike it from the record. People v. Gasser, 34 Cal. App. 541, 168 P. 157.

[3] Error is assigned in permitting a witness to testify that the defendant admitted he was afflicted with gonorrhea, without first proving that the statement was voluntarily made. The alleged admission was material. It tends to corroborate the child's accusation that he was guilty of lewd conduct toward her. His acts resulted in communicating to her a venereal disease. The examination of a physician soon after the commission of the alleged acts disclosed the fact that the child was also afflicted with the same disease. The acknowledgment on the part of the defendant was not a confession of guilt. It

was a mere admission of his physical condition which might tend to show the possibility of his guilt. The defendant both in court and out of court, asserted his innocence of the charge of lewd and lascivious conduct. This assignment of error is without merit.

It is the established rule that the admission of a fact which does not itself involve criminal intent, and which does not amount to a confession of guilt, may not be excluded from the evidence merely for lack of proof that it was voluntarily made. People v. Peete, 54 Cal. App. 333, 354, 202 P. 51.

[4-6] It is asserted the defendant was compelled to become a witness against himself contrary to the provisions of section 688 of the Penal Code, by adducing evidence of the result of a physical examination which was alleged to have been conducted by a physician without the defendant's consent. This contention is without merit, for the reason that it satisfactorily appears the defendant voluntarily submitted to the examination. Independent of the examination, the defendant admitted he was afflicted with gonorrhea. He became a witness at the trial in his own behalf, and did not deny that he then suffered from that disease. It is true the defendant was taken by a peace officer to Dr. Stone, who asked him if he had ever had that particular disease. To this inquiry, the defendant replied: "I have got it now." The doctor then told him that he was charged with attacking a little girl and conveying to her the disease. He then asked the defendant: "Are you willing to submit to a physical examination?" The defendant replied: "I do not object to an examination at all." The physical examination followed, with the result that the defendant was found to be afflicted with "a bad case of organism, known as gonococcus." The defendant testified regarding this examination that the officer "took me up to Dr. Stone, and had me examined, * * * just told me I had to be examined, never asked me if I was willing." This raises a conflict as to whether the defendant voluntarily submitted to the examination. The burden was upon the defendant to show that he was coerced into submitting to the examination. The question as to whether he voluntarily submitted to the examination was a problem for the determination of the jury under proper instructions. Evidence of the result of a physical examination of an accused person may not be excluded in a criminal action on the ground that it compels him to become a witness against himself, where the examination is conducted with the consent of the accused. 16 C. J. 567, § 1099. From a careful reading of the record it satisfactorily appears that the defendant voluntarily submitted to a physical examination by the doctor. Independently of the examination, he also admitted he was afflicted with gonorrhea. The result of the physician's examination was therefore merely cumulative.

[7] Error is assigned by the appellant for failure to charge the jury from written instructions or to "indorse and sign" the instructions which were given, in the manner provided by section 1127 of the Penal Code.

The court requested respective counsel to stipulate that oral instructions might be given to the jury. After a colloquy on this subject, the attorney for the defendant said: "We will not stipulate." The court then said: "Let the record show that the court proceeds to read such instructions as seems necessary to give from a written manuscript which is before it." The court then proceeded to read to the jury elaborate instructions containing all the essential elements of the offense. At the request of the court, these instructions were transcribed by the court reporter and filed as a record in the case. This written charge which was given by the court was not signed by the judge. It is contained in the transcript on appeal, and is certified by the judge as the correct charge which was given to the jury. Twelve other proposed instructions were submitted in writing to the court by the defendant. Each of these additional instructions was signed and indorsed by the judge as refused on the ground that they were "covered by other instructions."

Section 1127, supra, provides in part: "All instructions given * * * shall be in writing, unless both parties request the giving of an oral instruction, or consent thereto, and when so given orally, all instructions must be taken down by the phonographic reporter. * * * Upon each charge presented and given or refused, the court must indorse and sign its decision."

The instructions which were given to the jury in the present case, as well as those which were refused, were in writing. They were transcribed by the reporter and certified by the judge. There is no controversy regarding the exact language of the instructions which were given and of those which were refused. The only requirement of section 1127, supra, which was not fulfilled, is that the judge failed to sign his name to the charge which was given. The purpose of the statute requiring all instructions to be in writing, and designating the portions thereof which are given, refused, or modified, is to preserve for review an exact record of the charge which is given. This was done in the present case. The accuracy of the record of the charge in this case is just as certain as though every paragraph of the written manuscript from which the judge read had been separately signed by the judge. While the preserving of an accurate record in writing of all instructions given by the court and re-

fused is required by the statute and is mandatory, unless both parties consent to the giving of oral instructions, we are of the opinion the mere omission of the judge's signature is not reversible error, provided the record fully discloses exactly what transpired with respect to the refusal or modification of instructions and the charge which was actually given. The defendant was not prejudiced by the omission of the judge's signature or the procedure which occurred with respect to the court's charge.

The failure of the judge to sign his name to the written charge which was given in this case is a mere harmless error in procedure which is covered by the provisions of article 6, § 4½, of the Constitution, which provides in part: "No judgment shall be set aside * * * for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

We are satisfied there was no miscarriage of justice in the present case.

[8] The appellant charges error in the refusal of the court to give to the jury the following proposed instruction: "The defendant has offered himself as a witness in this case in his own behalf. You are instructed that he has the legal right so to do and that you shall consider his evidence the same as that of any other witness brought before you. The mere fact that he is the defendant in the action should not prejudice his testimony in your minds, but you should weigh the same in the same manner as you weigh the testimony of the other witnesses who have testified in this case."

The refusal of this instruction did not constitute error. The essential portions of this proposed instruction were included in the general charge of the court which was given to the jury. The court charged the jury that: "It is the duty of each of you to consider and weigh all the evidence in the case, and from such evidence to determine, if you can, the question of guilt or innocence of the defendant."

The court also instructed the jury as follows: "The weight that should be given to the testimony, or the credit that you shall give to any of the witnesses in the case * * * are peculiarly within your province, which you, as jurors, under your oaths, must determine for yourselves."

It is held improper to give an instruction which singles out a particular witness to enhance or detract from the weight of his testimony or the credibility to which he is entitled. Where the substance of a rejected instruction is covered by others which are given to the jury, the defendant may not complain. People v. Brown, 71 Cal. App. 181, 235 P. 72. In the case of People v. Gordon, 78 Cal. App. 167, 248 P. 289, it was held the defendant was not prejudiced by the refusal to give an instruction to the effect that he had a right to become a witness in his own behalf and that his testimony should not be discredited merely because he was the defendant, since the jury was elsewhere correctly instructed generally regarding the weight of evidence and the credibility of witnesses.

The instruction respecting the statement of the child, Julia Donati, appears to be a correct declaration of the law. It is as favorable to the defendant as he was entitled to. It contains a warning against the "extreme liability of a child to repeat what she had heard." This instruction was not prejudicial to the defendant.

Nor do we think there was prejudicial misconduct in the rulings of the court or the conduct of the prosecuting officer which are assigned by the appellant as erroneous. These assignments are too numerous and involved to merit detailed discussion.

[9] We fully realize the danger of convicting a man who is accused of lewd conduct toward an infant child upon her uncorroborated statement, particularly when the child is too young to become a competent witness, and her evidence is adduced from the story which she relates to her mother. Upon the contrary, we also realize the futility of the law which would afford no protection to an infant child under such unfortunate circumstances. In the present case the statement of the child which was related by the mother is supported by certain corroborating circumstances. The defendant was 21 years of age. He lived with his mother and stepfather near the Donati home in Madera for about a year. Julia Donati frequently visited the Guiterez home and associated with the defendant. The defendant also visited in the Donati home. He was afflicted with gonorrhea. Within about a week after the child complained to her mother about his lewd conduct toward her, it was discovered the child was also afflicted with the same venereal disease. A reputable medical expert witness testified that nearly 99 per cent. of those individuals who are afflicted with this loathsome disease incur it through sexual communication. These circumstances furnish ample evidence to support the judgment. There does not appear to have been a miscarriage of justice.

The judgment and the order are affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

126 Cal.App. 411

NORTH HOLLYWOOD MORTGAGE CO. v. HENSHEY et al.

Civ. 4566.

District Court of Appeal, Third District, California.

Sept. 27, 1932.

Rehearing Denied Oct. 27, 1932. Hearing Denied by Supreme Court Nov. 25, 1932.

1. Pleading ⇐204(3).

Judgment dismissing complaint on demurrer must be reversed, if any cause of action is good.

2. Quieting title ⇐10(5).

In corporation's action to have title to realty cleared from mortgages in favor of person dominating corporation, for whose assets plaintiff corporation, while under same control, issued its stock, plaintiff *held* not estopped to maintain action notwithstanding sale of stock was in violation of law if mortgages were executed without consideration.

3. Appeal and error ⇐518(4).

Where amended complaint to which demurrer was sustained states cause of action, absence of original complaint from record is immaterial.

4. Quieting title ⇐34(1).

In corporation's action to have title to realty cleared from mortgages in favor of person dominating corporation for whose assets plaintiff corporation while under same control issued its stock, complaint *held* to state cause of action.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action to quiet title by the North Hollywood Mortgage Company against Howard B. Henshey and others. From judgment dismissing plaintiff's second amended complaint on demurrer, plaintiff appeals.

Reversed and remanded, with directions.

Wheeler & Wackerbarth, of Los Angeles, for appellant.

Baillie, Turner & Lake and Howard B. Henshey, in pro. per., all of Los Angeles, for respondents.

Mr. Justice PLUMMER, delivered the opinion of the court.

The respondents' demurrers to plaintiff's second amended complaint were sustained without leave to amend, and thereafter the action was dismissed by the trial court of its own motion. The cause is here upon the plaintiff's appeal.

[1, 2] The complaint sets forth eleven causes of action, and, if any one of the causes of action set forth contains sufficient facts to require an order overruling respondents' demurrers thereto, the judgment must be reversed. With this in view we will set forth herein in regular order all the allegations constituting the seventh cause of action, which in effect prays for a judgment quieting title to the lands and premises now owned by the plaintiff. The several causes of action set forth in the complaint detail the issuance of stock, the sale of stock, and the transfer of stock in violation of the order of the corporation commissioner of the state of California. That these violations may have taken place prior to the plaintiff having acquired title to the premises now owned by it does not estop the plaintiff from maintaining its action to quiet title if the mortgages hereinafter referred to were executed without consideration.

On the part of the appellant it is argued that the plaintiff was not a party to the unlawful issue and transfer of stock. On the part of the respondents, it is claimed that the plaintiff corporation necessarily participated in the unlawful issue of stock. However, it does appear from the complaint that, if the plaintiff corporation did participate in the unlawful issue and transfer of stock, the participation was at a time when the defendant B. F. Tatem was the president and manager of the plaintiff corporation, and the plaintiff corporation did not derive any pecuniary benefit therefrom.

It is also contended by the respondents that, whatever profit the defendant B. F. Tatem derived from the stock, issues, and transfers, it was at a time when he was the president of the B. F. Tatem Finance Corporation, and that whatever moneys B. F. Tatem unlawfully acquired were taken from the assets of the B. F. Tatem Finance Corporation, and not from any property belonging to the plaintiff corporation.

On the part of the plaintiff it is contended further that the North Hollywood Mortgage Company, a corporation, is but a continuation of the B. F. Tatem Finance Corporation, and that the money so unlawfully obtained by B. F. Tatem really belongs to the plaintiff in this action.

If it be assumed that the plaintiff corporation is a separate and distinct corporation, and not a continuation of the B. F. Tatem Finance Corporation, as contended for by the respondents, the right of the plaintiff to have its title to the lands described in the complaint quieted as against fictitious mortgages is in no wise affected, as the illegal stock transfers do not trench upon or limit such right.

That the seventh cause of action set forth in the plaintiff's complaint may clearly appear, we set forth herein in chronological order all of the complaint which by appropriate references is included within said cause of

action, to wit: The complaint first alleges the corporate character of the plaintiff, and then that the B. F. Tatem Finance Corporation was a corporation organized under the laws of the state of California, on or about the 11th day of June, 1924, with an authorized capitalization of 50,000 shares of the par value of $10 per share, of which 20,000 shares were preferred and 30,000 shares were common; that thereafter the authorized capitalization was increased to 250,000 shares of the par value of $10 per share, 120,000 shares of which were preferred and 130,000 shares were common stock. The corporate character of the defendant Citizens' National Trust & Savings Bank is then alleged, and also the corporate character of the Virginia Investment Corporation. The complaint next alleges that B. F. Tatem was the president and director and general manager of the B. F. Tatem Corporation, and that he drew a salary therefrom as such manager.

It further appears from the complaint that on or about the 28th day of December, 1928, the B. F. Tatem Finance Corporation was regularly dissolved. It is then alleged that the plaintiff was incorporated on or about the 18th day of July, 1927; that the defendant B. F. Tatem was one of the incorporators, and was a director of the corporation, down to and including April 27, 1929; that the defendant B. F. Tatem was the president of the plaintiff corporation from the date of its incorporation down to and including May 23, 1928, and was the manager of the corporation during all of said period. The complaint further alleges that, during the time B. F. Tatem was the manager of the plaintiff corporation, he received a salary of $500 per month, and that during said time a contract, in form, was entered into between the plaintiff and the said B. F. Tatem, by which B. F. Tatem was to receive an additional compensation of 35 per cent. of the selling price of certain lands belonging to the plaintiff. It is then set forth in the complaint that, while B. F. Tatem was the manager of the B. F. Tatem Finance Corporation, he caused the books and records of said corporation to be destroyed in order to prevent the plaintiff from acquiring information as to the acts of said corporation and B. F. Tatem as the manager thereof. The complaint then sets forth that the property of the North Hollywood Mortgage Company is property acquired from the B. F. Tatem Finance Corporation, and that upon this property B. F. Tatem claims to hold two mortgages, one in the sum of $40,000 and the other in the sum of $80,000, as set forth in paragraphs contained in the fifth cause of action (which we will set forth in full hereafter). It is further alleged that under the plan in pursuance of which the North Hollywood Mortgage Company was organized, and the B. F. Tatem Finance Corporation dissolved, the said B. F. Tatem being manager of both of said corporations at the time, was that units of stock of the B. F. Tatem Finance Corporation were to be exchanged for a like number of shares of the North Hollywood Mortgage Company, the stock of the North Hollywood Mortgage Company to be distributed among the holders of stock of the B. F. Tatem Finance Corporation, and then the transaction to be completed by the transfer of all the assets of the B. F. Tatem Finance Corporation to the North Hollywood Mortgage Company, and that the said defendant B. F. Tatem was appointed to make the transfer of stock, as just set forth.

The complaint then sets forth a description of all and singular the real estate claimed to belong to the plaintiff, and for which it asks that its title be quieted, and then by appropriate references makes the following allegations a part of the seventh cause of action:

"That while said defendant was president and director of the plaintiff corporation he, as president of said corporation, executed in the name of said corporation a trust deed for the principal sum of eighty thousand dollars ($80,000.00), in which J. T. McElhaney was named as beneficiary and the North American Bond & Mortgage Company, a corporation, was named as trustee. That the said trust deed was made to secure the payment of a note in the principal sum of eighty thousand dollars ($80,000.00), the same bearing date on or about the 16th day of January, 1929, and bearing interest at the rate of seven (7) per cent per annum, payable quarterly from the 31st day of March, 1929, and said note being payable on or before one year after date. That as a matter of fact the said named beneficiary had no financial interest whatever in the said note or trust deed and advanced no part of any money and gave no consideration whatever for the said note and trust deed, as plaintiff is informed and believes and alleges the fact to be. Plaintiff is further informed and believes and alleges the fact to be that the said note and trust deed were executed for the benefit of said defendant B. F. Tatem. That said defendant B. F. Tatem claims to own said note and all moneys accruing thereunder. That plaintiff is informed and believes and alleges the fact to be that the said defendant Tatem gave no consideration whatever for said note; and plaintiff is informed and believes and alleges the fact to be that the said defendant B. F. Tatem did not give a consideration in the sum of eighty thousand dollars ($80,000.00) for said note or any consideration whatever. That said trust deed is recorded in book 8956, at page 273, of official records in the office of the county recorder of Los Angeles county, California. That the property described in said trust deed as security for the payment of said note is the same property as that described in paragraph III of the third cause of action here-

in, which has by reference (been) embodied in this fifth cause of action. That no part of said note has been paid but there is still unpaid the principal sum of eighty thousand dollars ($80,000.00).

"That while said defendant was president and director of the plaintiff corporation he, as president of said corporation, executed in the name of said corporation a trust deed for the principal sum of forty thousand dollars ($40,000.00), in which Howard B. Henshey was named as beneficiary and the North American Bond and Mortgage Company, a corporation, was named as trustee. That the said trust deed was made to secure the payment of a note in the principal sum of forty thousand dollars ($40,000.00), the same bearing date on or about the 9th day of February, 1928, and bearing interest at the rate of seven (7) per cent per annum, payable quarterly, and said note being payable on or before one year after date. That as a matter of fact the said named beneficiary had no financial interest whatever in the said note or trust deed and advanced no part of any money and gave no consideration whatever for the said note and trust deed, as plaintiff is informed and believes and alleges the fact to be. Plaintiff is further informed and believes and alleges the fact to be that the said note and trust deed were executed solely for the benefit of said defendant B. F. Tatem. That said defendant B. F. Tatem claims to own said note and all moneys accruing thereunder. That plaintiff is informed and believes and alleges the fact to be that the said defendant Tatem gave no consideration whatever for said note; and plaintiff is informed and believes and alleges the fact to be that the said defendant B. F. Tatem did not give a consideration in the sum of forty thousand dollars ($40,000.00) for said note or any consideration whatever. That said trust deed is recorded in book 8383, page 153, of official records in the office of the county recorder of Los Angeles county, California. That the property described in said trust deed as security for the payment of said note is the same property as that described in paragraph III of the third cause of action herein, which has been by reference embodied in this fifth cause of action. That no part of said note has been paid but there is still unpaid the principal sum of forty thousand dollars ($40,000.00)."

These allegations are followed by the setting forth of a claim on the part of the plaintiff that it is the owner of all and singular the real estate to which we have referred, that the defendants named in this action, and each of them, claim an interest in the property adverse to the plaintiff, that the claims of the defendants, and each of them, are without right, validity, or foundation whatever, and that the defendants, nor any of them, have any right, title, or interest in and to said property adverse to the title of the plaintiff herein.

The transcript shows, as we have stated, that the B. F. Tatem Finance Corporation was in existence from the 11th day of June, 1924, until April 27, 1929, and that the plaintiff corporation has been in existence since the 18th day of July 1927. It thus appears that the two corporations were in existence at the same time for nearly two years, and that the transactions involving the acquiring of money on the part of B. F. Tatem by the issuance and transfer of stock affected only the rights and interests of the B. F. Tatem Finance Corporation and its stockholders. There is nothing in the complaint, nor in any of the several causes of action set forth, which shows that the plaintiff in this action has acquired any right or interest in and to the recovery of any of the moneys secured by B. F. Tatem, if it be assumed that those moneys were wrongfully obtained from the B. F. Tatem Finance Corporation, and this is true, even though it be assumed that the plaintiff corporation is but a continuation of the B. F. Tatem Finance Corporation, because, so far as the complaint is concerned, it only shows that, at the time of the transfer of the units of stock of one corporation for units of stock in the other corporation, there was then transferred to the plaintiff the real estate set forth in the complaint and referred to in this opinion. This, however, does not limit the right of the plaintiff in so far as it may be entitled to a decree of the court holding that the mortgages or trust deeds held by the defendant B. F. Tatem are illegal and void and should be removed as a cloud upon plaintiff's title.

[3] We do not need to follow the arguments of respondents wherein it is claimed that the record upon this appeal is insufficient to enable this court to pass upon its merits. What we have said sufficiently shows that the record does contain all that is necessary for this court to consider in determining whether the seventh cause of action contains sufficient facts to entitle the plaintiff to a trial. If the respondents had desired a more complete record, they might have brought the same to the attention of this court by suggesting a diminution thereof. The original complaint was not brought up upon this appeal as part of the record, but, if the amended complaint sets forth sufficient facts, consideration of the original complaint becomes wholly immaterial. And this is doubly true by reason of the fact that we are confining what we have said strictly to the seventh cause of action, being of the opinion that the other causes of action set forth in the complaint are insufficient, without going through them in detail. What we have said in relation to the seventh cause of action shows practically all that is set forth in the other causes of action, and from

which it appears that the demurrers to the other causes of action were properly sustained.

[4] Being of the opinion that the demurrers to the seventh cause of action were improperly sustained, it follows that the judgment of dismissal should be reversed. And it is so ordered, and the cause remanded, with directions to the trial court to overrule the demurrers as to the seventh cause of action, permitting the respondents to file answers thereto within such time as the court may deem just, if so advised.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

126 Cal.App. 571

Ex parte HUSON.

Cr. No. 1232.

District Court of Appeal, Third District, California.

Oct. 4, 1932.

Rehearing Denied Oct. 19, 1932. Hearing Denied by Supreme Court Nov. 3, 1932.

1. Criminal law ⇐980(2).

It was unnecessary to fix degree of crime of attempted robbery before pronouncing sentence; such crime not being segregated into degrees (Pen. Code, §§ 211a, 664, 1192).

2. Criminal law ⇐980(2).

Defendant's attorney's admission that defendant was armed when he attempted robbery justified court in finding defendant guilty of attempted robbery of the first degree (Pen. Code, §§ 211a, 664, 1192).

Pen. Code, § 664, prescribes punishment for attempt to commit robbery. Section 1192 provides court shall, on plea of guilty of crime divided into degrees, determine degree before passing sentence, and section 211a provides that robbery by one armed with deadly weapon is robbery in the first degree.

Application by Louis Morgan Huson for a writ of habeas corpus directed to the Warden of San Quentin State Prison to secure petitioner's release.

Writ denied.

Louis Morgan Huson, in pro. per.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

Upon petition for a writ of habeas corpus, the petitioner contends he is entitled to his discharge from custody for the reason that the judgment of commitment is void for failure on the part of the court to determine the degree of his crime before pronouncing sentence.

The information which was filed against the defendant contained four counts. The second count charged him with an attempt to commit robbery. On June 6, 1928, the defendant appeared in court with his attorney and entered a plea of guilty of the offense charged in the second count. The other counts were thereupon dismissed. At that time the defendant waived time for pronouncing sentence, and the following proceedings occurred:

"The Court: * * * You have heretofore been duly and legally arraigned. * * * You have entered a plea of guilty to count II and you have waived time for the pronouncement of judgment, and your counsel stated you have no just cause or legal reason to show why judgment should not be pronounced against you. Have you anything to say to the court * * * before judgment is pronounced?

"Defendant Huson: No, sir. * * *

"The Court: Mr. Louis Morgan Huson, it is ordered, adjudged and decreed that you be sentenced to be committed to the state prison of the State of California at San Quentin, for the term prescribed by law. * * *

"Mr. Hill (attorney for defendant): As to counts I, III and IV, may we have an order. * * *

"The Court: Just a minute gentlemen. What about the degree? We didn't fix that.

"Mr. Lippold (district attorney): It is an attempted robbery, your honor. I don't know that there is a degree but there was a deadly weapon used, so if there is any degree it would be first degree attempted robbery.

"The Court: That is your understanding?

"Mr. Hill: Yes, if your honor please. The defendant informs me there were no bullets in the gun, but under the latest decision of the Supreme Court it would still constitute a deadly weapon.

"The Court: Very well. The court will find that this is attempted robbery in the first degree."

[1] It is unnecessary to fix the degree of the crime of attempted robbery. The penalty for an attempt to commit robbery is the same whether the offense be that of robbery of the first or the second degree. The penalty is the same whether robbery is committed with or without the use of a deadly weapon. People v. Arguero, 113 Cal. App.

424, 298 P. 520. section 664 of the Penal Code provides in part:

"Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts, as follows:

"1. * * * If the crime attempted is murder, robbery, burglary in the first degree or lewd and lascivious conduct the person guilty of such attempt shall be punishable by imprisonment in the state prison for a term of not more than twenty years."

Evidently the Legislature deliberately refrained from distinguishing between robbery of the first and robbery of the second degree, in fixing the penalty for an attempt to commit this offense. In the section last mentioned, a distinction was made between burglary of the first and second degrees. But an attempt to commit robbery is punishable by the same penalty, regardless of the nature of the circumstances attending such attempt. It is necessary for the court or a jury to fix the degree of a crime only for the purpose of determining the penalty which may be lawfully imposed. The statutes of California establish no degrees of the crime of attempted robbery.

[2] Even though the crime of attempted robbery were segregated into degrees, the record in this case sufficiently complies with the provisions of the statute. Section 1192 of the Penal Code, upon which the petitioner relies, reads: "Upon a plea of guilty of a crime distinguished or divided into degrees, the court must, before passing sentence, determine the degree."

Under the provisions of section 211a of the Penal Code, robbery which is perpetrated by one who is armed with a deadly weapon is robbery of the first degree. During the imposing of sentence, the defendant's attorney admitted that the accused was armed with a deadly weapon at the time of the attempted robbery. This admission is sufficient evidence of the fact upon which the court was justified in finding that he was guilty of attempted robbery of the first degree. People v. Paraskevopolis, 42 Cal. App. 325, 183 P. 585, 587. In the case last cited, the court says regarding the sufficiency of such evidence: "We think a voluntary statement or plea by the accused would be sufficient to uphold the determination by the court of the degree."

Upon this admission of defendant's attorney that the accused was possessed of a deadly weapon at the time of the attempted robbery, the court said: "Very well, the court will find that this is an attempted robbery in the first degree."

In spite of the fact that the court determined the degree of the crime immediately after he pronounced the formal language which committed him to state prison for the term prescribed by law, it is apparent the fixing of the degree of the crime was an inseparable part of the same proceeding of pronouncing sentence. The judgment of commitment which was issued on the same day the sentence was pronounced contains the following language:

"Whereas the said Louis Morgan Huson having duly pleaded guilty in this court of the crime of attempted robbery, a felony, as charged in count 2 of the information, which the court finds to be attempted robbery of the first degree,

"It is therefore ordered, adjudged and decreed that the said Louis Morgan Huson be punished by imprisonment in the state prison of the State of California at San Quentin for the term prescribed by law."

For the reasons that the California statutes provide for no degree of an attempt to commit robbery so far as the penalty is concerned, and because the record adequately conforms to the provisions of section 1192 of the Penal Code, even though it were necessary to fix the degree of the attempt to commit robbery, the judgment is valid.

The writ of habeas corpus is denied.

We concur: PRESTON, P. J.; PLUMMER, J.

126 Cal.App. 427

HASWELL v. COSTELLENOS et al.

Civ. 7933.

District Court of Appeal, First District, Division 1, California.

Sept. 28, 1932.

As Modified on Denial of Rehearing Oct. 28, 1932. Hearing Denied by Supreme Court Nov. 25, 1932.

Limitation of actions ⇨100(8).

Three-year statute did not begin to run against right of action on realty broker's bond until discovery of fraud (Code Civ. Proc. § 338, subds. 1, 4; St. 1923, p. 96, § 9a).

The complaint alleged that defendant licensed broker, while acting as plaintiff's agent, persuaded her to buy certain realty at price of $2,500, fraudulently concealing fact that it was held for sale at $1,000, and that such agent, through aid of another defendant, cheated plaintiff out of the difference. The action being founded on fraud, cause of action on broker's bond furnished under St. 1923, p. 96, § 9a, did not accrue until plaintiff discovered fraud, under rule that surety's liability is

measured by that of principal, and where, owing to concealed fraud of latter, statute has not commenced to run, surety cannot invoke protection of statute on ground that he was innocent of fraud.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Charles W. Haswell, as executor of the last will of Luiggia Beffa, substituted for Luiggia Beffa, deceased, against Constantine G. Costellenos, Nicholas J. Preovolos, and the Continental Casualty Company. From a judgment for plaintiff against defendant first named, but denying judgment as against defendant last named as surety on broker's bond, plaintiff appeals.

Reversed, with directions.

Charles W. Haswell, of San Francisco, in pro. per.

Redman, Alexander & Bacon, and Herbert Chamberlin, all of San Francisco, for respondents.

ANDERSON, Justice pro tem.

The trial of this case was by a jury. While the appellant complains of a nonsuit as to certain counts of the complaint, there was a judgment, general in its terms, entered in favor of defendant surety company upon a directed verdict. The notice of appeal is directed exclusively to this judgment. In fact, the clerk's transcript shows no entry of an order or judgment of nonsuit. After the appeal was taken, the original plaintiff, Luiggia Beffa, died, and the present plaintiff, the executor, was substituted. The word "plaintiff" will refer to the original plaintiff.

The appeal is upon a typewritten transcript. The entire record is 343 pages in length. From the briefs, it appears that the sole question involved is the question of statutory construction hereinafter stated. Therefore the court has not undertaken a close examination of the record represented by the reporter's transcript and which is 300 pages in length. On a few pages the nature of the case has been stated by the appellant's counsel, and, excepting for a few minor corrections, respondent's counsel has concurred in this statement. The action is one for fraud practiced by defendant Costellenos, a licensed real estate broker. The respondent surety company was joined in the action. It had bonded the broker under the provisions of section 9a of the Real Estate Brokers' Act (St. 1923, p. 96). The bond was given to cover the broker's liabilities incurred in the year 1926. The plaintiff prevailed against Costellenos, the principal named in the bond. The act referred to has been repeatedly amended as shown in Smithson v. Sparber (Cal. App.) 11 P.(2d) 90. Costellenos took no appeal.

The first count of the complaint charged that the said Costellenos, while acting as the plaintiff's agent, persuaded her to buy a piece of real property at a price of $2,500, fraudulently concealing the fact that it was held for sale at $1,000, that the agent, through the aid of defendant Preovolos, cheated plaintiff out of the difference of $1,500. The second and third counts charge frauds of the same character, except that Preovolos was not a party. In each of these the loss alleged was $300. During the progress of the trial, the plaintiff was permitted to add a fourth count to the complaint. This count duplicated the first count, and added nothing to the complaint. In view of the conclusions arrived at, consideration of the fourth count becomes immaterial.

The record contains the original complaint. It was filed on July 31, 1929. Appellant's opening brief recites that the transactions sued upon in the complaint occurred between May 7, 1926, and June 4, 1926. Respondent's brief does not challenge this statement nor the statement that evidence was offered tending to show that the plaintiff did not discover the frauds complained of until a point of time in the year 1927, which was less than three years prior to the commencement of the action.

As above indicated, the verdict and judgment went against the broker for $2,100, the amount claimed in the three counts.

Respondent's defense, which was sustained by the trial court, and which was the ground for the directed verdict in favor of the respondent surety company, was pleaded by way of amendment made at the trial. The defense was that each of plaintiff's causes of action was barred by subdivision 1 of section 338, Code of Civil Procedure; that the liability involved is a liability created by statute; that in such case the cause of action accrues when the fraud is practiced and not when it is discovered. It is argued that the bond was a statutory bond. It is urged: "The statute created both the right of the plaintiff against the surety and the correlative liability of the surety to the plaintiff. Without the statute neither the right nor the correlative liability would have existed." The appellant claims that the action is for fraud, and that under subdivision 4 of section 338 of the Code of Civil Procedure the cause of action accrued only upon discovery of the fraud, and that the complaint was filed within three years from discovery; that the surety became liable equally with the principal. It is the settled rule in this state that, where a public official fails to perform his official duty, and the wrong complained of is fraudulent in its nature, subdivision 1 of section 338 fixes three years as the limitation for

the commencement of an action on account of the resulting damages; that the statute begins to run when the wrongful act is committed and not when discovery occurs. The cases have dealt with the bond of a county recorder (County of Sonoma v. Hall, 132 Cal. 589, 62 P. 257, 312, 65 P. 12, 459); a notary public (Norton v. Title Guaranty & Surety Co., 176 Cal. 212, 168 P. 16); a receiver (United B. & T. Co. v. Fidelity & Deposit Co., 204 Cal. 460, 268 P. 907). In the case of Norton v. Title Guaranty & Surety Co., supra, the Supreme Court referred to the contention that the conduct of the notary in affixing his false certificate of acknowledgment to a mortgage and in concealing that fact was a fraud. The notary, to avoid discovery of the fraud, paid various amounts due upon the mortgage. The trial court's decision was in favor of the plaintiff. It ruled the case was a fraud case, and that, as to the surety, the statute ran only from discovery. But the Supreme Court reversed the case. It said, first referring to an earlier case (County of Sonoma v. Hall, supra): "It was sought to apply the statute of limitations relating to promises in writing founded upon a specialty or any agreement, contract, or promise, but the court held that the proper law for that purpose was the one prescribing the period within which actions against officers for nonfeasance and misfeasance in office might be commenced, the court saying, among other things: 'So far as actions of this character are concerned, the limitation acts upon the cause, not the form of action. And the effect of the statute cannot be evaded by any change of the form of action.' In the later case of County of Calaveras v. Poe, 167 Cal. 519, 140 P. 23, this court approved County of Sonoma v. Hall, holding that a cause of action for violation by a public officer of his statutory duty is governed by subdivision 1 of section 338, Code of Civil Procedure, as to the time within which it must be commenced. It is not necessary, therefore, to consider what statute of limitations might apply to an action against Dreischmeyer on account of his fraud and his breach of duty as attorney and agent, in carrying out a general rascally scheme of which the false acknowledgment was but a part. Sureties are never held beyond the strict terms of their agreements, and it would seem illogical to bind this defendant, not only for the violation by Dreischmeyer *of his official duty*, but for other and subsequent frauds against which it did not promise to indemnify persons doing business with the notary public, and without which the plaintiff must have discovered the illegal nature of the forged acknowledgment." (Italics ours.) Norton v. Title Guaranty & Surety Co., supra, pages 214, 215 of 176 Cal., 168 P. 16, 17.

The same rule was applied in Hellwig v. Title Guaranty & Surety Co., 39 Cal. App. 422, 179 P. 222, and in Peterson v. Title Guaranty & Surety Co., 35 Cal. App. 103, 169 P. 239. The remarks of the Supreme Court mean that, if official misconduct is an essential part of the facts causing the injury complained of, the case against the surety is not to be regarded as a fraud action, because of any misrepresentation or concealment involved. The Supreme Court used the word "statutory." It was not speaking of a private fiduciary. And, with one exception —a receiver—the cases cited have dealt with acts of strictly public officers. The Supreme Court has not ruled that, where fraudulent conduct is the basis of the cause of action and the nature of the office—a position of trust towards the party complaining—imposes on the officer a duty to refrain from concealment, the statute of limitations against the wrong runs from the time the wrong is committed. Seemingly without exception, the cases show that fraud of a fiduciary is entitled to no other name than that of fraud and to no other protection than the statute of limitations applying to concealed fraud. A real estate agent contracts to protect his employer. Confidence is imposed, and he acts in a fiduciary capacity and owes an affirmative duty of disclosure. This is elementary. Duff v. Duff, 71 Cal. 513, at page 532, 12 P. 570; Allsopp v. Joshua Hendy Machine Works, 5 Cal. App. 228, 90 P. 39. To bond the agent is to bond against breach of the duty referred to. The case of United B. & T. Co. v. Fidelity & Deposit Co., supra, dealt with a receiver's bond, and held that the rule of the cases first cited above applies to such a bond. While a receiver's powers and duties are not directly prescribed by statute, they are dependent upon the court's order of appointment. Code Civ. Proc. § 568.

As has been frequently declared, property held by a receiver is held in custody of the law. His position resembles that of a public officer, whose duties are to a great extent expressly prescribed by statute. Many of a fiduciary's obligations do not depend upon statutory enactment, even in those cases where he acts by court appointment. When an administrator of an estate commits a fraud, the liability which arises is not treated as a liability created by statute. The statute of limitations begins to run from the discovery of the fraud. In the litigation represented by the two decisions in the case next cited, the final decision being by the Circuit Court of Appeals for the Ninth Circuit, it was ruled that subdivision 4 of section 4054 of the Revised Codes of Idaho, which section reads the same as section 338 of our Code of Civil Procedure, applies to the fraudulent conduct of an administrator of an estate. Discovery of the fraud occurred many years after the wrong was committed. The administrator's surety was made a party and

made subject to the same ruling. Diamond v. Connolly (C. C. A.) 276 F. 87, at page 90; Diamond v. Connolly (C. C. A.) 251 F. 234, at page 241. Our Supreme Court denied a hearing in the case next cited. Fraud had occurred in the rendition of a guardian's accounts. The guardian was held liable for the fraud of the attorney whom the guardian employed. The court said: "The defendants claimed the action was barred by the statute of limitations. The very gist of the action is the alleged fraud of the defendants. The plaintiff was not bound to make outside inquiries, but was entitled to rely on the assumption that the defendants would treat him fairly. He was not bound to commence an action until he discovered facts showing that he had been treated otherwise. He commenced his action within one year after making the discovery of the alleged shortages. His action was commenced in time." Gaver v. Early, 58 Cal. App. 725, at page 730, 209 P. 390, 392. Where an executor or an administrator practices fraud upon a beneficiary of an estate, or where a guardian cheats and defrauds his ward, the statute of limitations does not begin to run until the discovery of the fraud. Powell v. Overton, 191 Iowa, 574, 181 N. W. 24; In re Anderson, 97 Wash. 688, 167 P. 71; Sunter v. Sunter, 190 Mass. 449, 77 N. E. 497; Lewis v. Welch, 47 Minn. 193, 48 N. W. 608, 49 N. W. 665; Morris v. Johnstone, 172 Ga. 598, 158 S. E. 308; Arrington v. McDaniel (Tex. Civ. App.) 4 S. W.(2d) 262; Rosenberg v. Rosenberg, 141 Wash. 86, 250 P. 947. Where a fiduciary commits a fraud and does not reveal it, the statute runs only from discovery or from the time of having means of knowledge. Levy v. Ryland, 32 Nev. 460, 109 P. 905; Irwin v. Holbrook, 26 Wash. 89, 66 P. 116; Vigus v. O'Bannon, 118 Ill. 334, 8 N. E. 778; Dumbadze v. Lignante, 244 N. Y. 1, 154 N. E. 645. And, as our Supreme Court has noted, where the duty is strictly official and statutory, and it is fraudulently performed, the statute of limitations, in some states, runs only from the time of the discovery, the surety being held along with the principal. Morrissey v. Carter, 103 Okl. 36, 229 P. 510; State of Missouri ex rel. Meinholtz v. American Surety Co. (Mo. App.) 254 S. W. 561; Skagit County v. American Bonding Co., 59 Wash. 1, 109 P. 197; Allen v. State, 6 Kan. App. 915, 51 P. 572.

Counsel for respondent points to the case of Blumenthal v. Larson, 79 Cal. App. 726, 251 P. 241. The case dealt with the liability of a surety on a bond which was given under section 5 of the Corporate Securities Act, as amended in 1923 (St. 1923, p. 90), and which guaranteed compliance by defendant Larson with the law while acting as a licensed broker under said act. The court held that the bond covered only breaches of the specified requirements of the Corporate Securities Act, such as the selling of securities when no permit had been issued. But the Corporate Securities Act was amended and the scope of the bond required was widened so as to include a case of ordinary fraudulent conduct of the broker. St. 1925, p. 967. It is now held that the "right of a party to sue a broker for actual fraud in the sale of securities is clearly recognized by the provisions of the act." Hogberg v. Landfield, 99 Cal. App. 360, at page 364, 278 P. 907, 909. The surety was held liable along with the principal.

The cases dealing with the Real Estate Brokers' Act make it obvious that its purpose was to regulate real estate brokerage business and give persons employing real estate agents protection. It has been repeatedly ruled that the bond given by the broker protects the employer against the fraudulent conduct of the broker and his employees. Dodge v. National Surety Co., 110 Cal. App. 618, 620, 294 P. 741. The employees are not deputies. They are not officials. The following late case quotes from an earlier case: "In the case of Dodge v. National Surety Co., 110 Cal. App. 618, 620, 294 P. 741, the precise point was passed upon. There it was said: 'It is argued that the Surety Company cannot be held liable for fraudulent acts of the brokers' employees because the bond ran to the brokers alone. The point is without merit.'" Smithson v. Sparber, supra, at page 92 of 11 P.(2d). The case last cited shows the care with which the act has been amended. If the object and purpose of the statute were to prevent fraud and to allow a recovery for fraud of a real estate agent, it is inconceivable that the act would be construed so as to permit the surety of a real estate agent who was sufficiently shrewd and clever to conceal his fraud for a period of three years to escape liability. This would simply put a premium upon high-class fraud. The general rule is that "a surety's liability is measured by that of his principal and where, owing to the concealed fraud of the latter, the statute has not commenced to run, the surety will not be permitted to invoke the protection of the statute on the ground that he was innocent of the fraud." 17 R. C. L. p. 866.

For the reasons stated, it is our conclusion that the trial court erred in ruling that the statute of limitations had run against the liability of the defendant insurance company and accordingly directing a verdict in its favor. The judgment in favor of said company based on said verdict is therefore reversed, with directions to re-enter the same in favor of said plaintiff and against said company for the amount of the principal sum specified in the bond.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. J. G. RUDDLE PROPERTIES, Inc., et al. *

Civ. 4439.

District Court of Appeal, Third District, California.

Sept. 27, 1932.

Rehearing Denied Oct. 27, 1932. Hearing Granted by Supreme Court Nov. 25, 1932.

1. Alteration of instruments ⇐29.

Finding that trust deed was not altered after execution *held* supported by substantial evidence.

2. Appeal and error ⇐1010(1).

Finding supported by substantial evidence is binding on appellate court.

3. Licenses ⇐39.

Presumption is that holders of corporate bonds secured by trust deed took them in usual course without notice that permit for issuance had not been obtained (St. 1917, p. 679, § 12).

4. Licenses ⇐39.

Corporation which failed to obtain permit for issuance of bonds secured by trust deed cannot set up its own wrong against innocent purchasers (St. 1917, p. 679, § 12).

5. Mortgages ⇐512.

Where trust deed securing bonds so provides, court on foreclosure may order property sold in one parcel, if not "impracticable" (Code Civ. Proc. § 694).

"Impracticable" means incapable of being effected from lack of adequate means, impossible of performance, not feasible, while "feasible" means capable of being done, executed, or effected, practicable; fit to be used, dealt with successfully, suitable; likely, probable, reasonable.

[Ed. Note.—For other definitions of "Feasible" and "Impracticable," see Words and Phrases.]

6. Mortgages ⇐209.

Trustee in trust deed securing corporate bonds need not see to application of proceeds, absent provision in trust deed imposing such duty.

7. Judgment ⇐208.

Absent contest among defendants to action to foreclose trust deed securing corporate bonds, court had no jurisdiction to decide their rights inter sese.

Appeal from Superior Court, Merced County; L. W. Fulkerth, Judge.

Action by the Security-First National Bank of Los Angeles against the J. G. Ruddle Properties, Inc., and others. From judgment rendered, named defendant and others appeal.

Modified and affirmed.

For prior opinion, see 12 P.(2d) 468.

See, also, 211 Cal. 346, 295 P. 343.

James F. Peck and Robert L. McWilliams, both of San Francisco, Gibson, Dunn & Crutcher, of Los Angeles, Stephen W. Downey, of Sacramento, Edward Bickmore, of Merced, and C. H. White, C. F. Rafferty, Louis Ferrari, and T. J. Bricca, all of San Francisco, for appellants.

O'Melveny, Tuller & Myers, Walter K. Tuller, and Homer I. Mitchell, all of Los Angeles, for respondent.

Mr. Presiding Justice PRESTON, delivered the opinion of the court.

A rehearing of this cause was granted for the purpose of giving further consideration to some of the contentions of appellants.

After a careful review of the case, we are satisfied that our original opinion is correct, and it is hereby adopted as the opinion of this court, to wit:

The Security-First National Bank of Los Angeles, having succeeded to all the rights and authority of the Los Angeles Trust & Savings Bank and the Pacific-Southwest Trust & Savings Bank, was substituted as plaintiff in this action.

Plaintiff brought this action to foreclose a mortgage or deed of trust executed by defendant J. G. Ruddle Properties, Inc., to secure $300,000 in bonds.

Plaintiff was named as trustee in said instrument, and judgment was rendered in its favor as said trustee for the sum of $466,580.97, foreclosing the said mortgage and ordering the property described therein to be sold and the proceeds applied to the payment of said sum.

The judgment further provided that defendant Hunter, Dulin & Co. has a lien on said property, subject to plaintiff's mortgages, for $26,338.17, that defendant Carl E. Wagner has a lien on said property, subject to the lien of plaintiff and to the lien of Hunter, Dulin & Co., for $33,283.01; and that defendant T. H. Carlon has a lien on said property, subject to the lien of plaintiff and the liens of Hunter, Dulin & Co., and Wagner, for $29,163.55.

From this judgment defendants Ruddle Properties, Inc., Carlon, Lemas, Pareira, Bettencourt, Silva, Petta, and Wagner have appealed.

This mortgage or deed of trust was given to secure the payment of bonds to the amount of $300,000, 275 of said bonds being of the denomination of $1,000 each and 50 of said bonds being of the denomination of $500 each.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 23 P.2d 1016.

Permit from the Corporation Commission was obtained for the sale of said bonds amounting to the sum of $225,000, but no permit was secured for the sale of the bonds amounting to the sum of $75,000.

The court found that all of said bonds were sold by appellant J. G. Ruddle Properties, Inc., to bona fide purchasers for value in good faith, before maturity, without notice of any defect or infirmity in said bonds, or any of them. The Hunter, Dulin Company acted as agents for J. G. Ruddle Properties, Inc., in negotiating the sale of said bonds.

The principal contention of appellants is that the mortgage or deed of trust was altered, in material respects, after its execution, without the knowledge or consent of appellant Ruddle Properties, Inc.

Allan Ruddle, a witness for appellants, testified that he was the vice president of Ruddle Properties, Inc., at the time the mortgage or deed of trust was executed. The original mortgage or deed of trust, together with a copy, was handed to witness by Hugh Landram, the attorney for Ruddle Properties, Inc. He took them home, and the next day, August 10, 1922, he, his father, since deceased, and his brother, Garland Ruddle, then secretary of said company, carefully read the said documents and that the two documents were identical. Witness testified that there were pencil alterations in both the original instruments and in the copy, and that the alterations were the same in each; that he retained possession of said documents until August 14, 1922, when he and his father and brother went to Merced, and in the office of their attorney, Landram, the original was signed and acknowledged; that at that time the pencil interlineations were still on the original after its execution; that Phil Brooks, the agent of Hunter, Dulin & Co., came to the home of witness on August 15, 1922, and brought the bonds which were signed by his father and brother and were delivered to said Brooks together with the mortgage or deed of trust; that Brooks said that, when he got back to Los Angeles, he would write in ink the pencil notations contained in the original; this witness also testified that there was a good deal of hurry and rush among the attorneys in order to get the papers in shape for the bond issue; that all papers regarding this matter were prepared in Los Angeles and sent up from there. The testimony of Garland Ruddle on behalf of appellants was substantially the same as that of Allan Ruddle.

An examination of the copy of the mortgage or deed of trust returned by Allan Ruddle, and which appellants introduced in evidence as their Exhibit No. 7, shows about thirty interlineations in pencil, whereas the original mortgage or deed of trust executed on August 14, 1922, shows none (being Plaintiff's Exhibit 1).

H. K. Landram, a witness for respondent, testified that he was the attorney who represented J. G. Ruddle Properties, Inc., in the matter of their bond issue of $300,000; that the deed of trust securing same was executed in his office in Merced and in his presence, and was acknowledged before him as a notary public; that the said instrument did not when so executed contain any pencil notations, nor did it have any of the pencil notations that appear on Appellants' Exhibit No. 7. He stated on cross-examination that he could not say whether or not he read the deed of trust over before it was executed. He had been instructed by Mr. North of the firm of Gibson, Dunn & Crutcher to be extremely careful that everything was done just right, and, while he could not say that the deed of trust produced in evidence by respondent was in the identical condition that the instrument was in when it was executed and acknowledged in his presence, he reiterated the statement that there was no pencil writing on that instrument at the time it was executed. R. L. North, a witness for respondent, testified that he was an attorney, and was associated with Gibson, Dunn & Crutcher of Los Angeles; that he had charge of legal matters connected with the bond issue of Ruddle Properties, Inc., and that he prepared the trust deed and other documents pertaining to the bond issue; that Landram was the attorney for said company, and that witness sent him the various documents relating to the transaction; that he sent Landram the deed of trust that was executed by the Ruddle Properties, Inc.; that Appellants' Exhibit No. 7 was an early draft of the proposed deed of trust; but that the deed of trust that he sent Landram for execution by the Ruddle Company was a completed instrument, and that the deed of trust is now in the same form it was when it was sent to Landram for execution; that the only writing with pen and ink that appears on the deed of trust is the filling in of certain dates which were placed there by witness before he sent it to Landram for execution; that a copy of this instrument was sent to the corporation commissioner a few days after its execution.

An inspection of Respondent's Exhibit No. 1, which is the deed of trust executed by the Ruddle Company, shows no pencil marks nor writings with pen and ink except the aforesaid dates.

One of the changes which appellant claims to have been made after its execution was that the deed of trust covers after-acquired property. On August 4, 1922, and again on August 11th following, resolutions were passed by the board of directors of the Ruddle Company authorizing the insertion of this clause in the deed of trust, and these resolutions were prepared by North.

Allan Ruddle testified that he discovered that changes had been made in the deed of

trust in 1928; that at the last-named date he found a letter written by Brooks to Landram dated August 17, 1922, in which Brooks requested Landram to send his copy of the trust deed to him in order that he might substitute corrected pages which were made in the original, and that, upon such substitution being made, he would return it to Landram for his files. Landram made no reply to this letter. He further testified that he had a certified copy of this deed of trust made in 1924 for the purpose of securing a loan or for use in selling some of said stock.

[1, 2] The trial court found that the mortgage or deed of trust was not altered in any respect after its execution on August 14, 1924. We are of the opinion that this finding is supported by substantial evidence, and, such being the case, this finding is binding upon this court.

[3] Appellants next contend that the bonds amounting to $75,000 having been issued without the permission of the corporation commissioner are void. Supporting this contention he cites section 12 of the Corporate Securities Act of Statutes of 1917, p. 679, which provides "every security issued by any company, without a permit of the commissioner authorizing the same then in effect, shall be void."

The $75,000 worth of bonds for which no permit was issued were all issued and sold by appellant Ruddle Company in 1923 and 1924 for value. None of them matured until 1926. While there is no direct evidence that the holders of these bonds took them without notice that a permit for their issuance had not been given by the corporation commissioner, yet the inference is that they took them in the usual course of trade without such notice.

In the case of Goodale v. Thorn, 199 Cal. 307, 249 P. 11, 12, the court said: "Upon proof by the defendant of fraud or illegality in the inception of the note, the burden is cast upon the indorsee to show that he is an innocent holder. This the latter may do by showing that he purchased the note before maturity, or from an innocent indorsee for value, in the usual course of business. When this is done, unless the evidence shows that the note was taken by the plaintiff under circumstances creating the presumption that he knew the facts impeaching its validity, the burden is cast upon the defendant to show, if he would defeat the plaintiff in his action, that the latter took the instrument with notice of the defendant's equities. Eames v. Crosier, 101 Cal. 260, 35 P. 873. To the same effect are the cases of Sinkler v. Siljan, 136 Cal. 356, 68 P. 1024; Bell v. Pleasant, 145 Cal. 410, 78 P. 957 [104 Am. St. Rep. 61]; Blochman Commercial Bank v. Moretti, 177 Cal. 256, 170 P. 419."

The trustee in this case, the respondent, is merely a nominal party in this action; the real parties in interest are the owners and holders of the bonds. In the recent case of Eberhard v. Pacific Southwest Loan & Mortgage Corporation (Cal. Sup.) 9 P.(2d) 302, 303, after stating that there was nothing whatever to show that plaintiffs were anything more than innocent victims of appellant, which was now seeking to profit by its own deliberate wrong, the court said: "The inhibitions of the Corporate Securities Act * * * against sales of securities to the public without permits are meant to protect the public from imposition and deception—not primarily to benefit the seller. The seller and the purchaser are therefore in no sense in pari delicto where this provision is violated. The fact that the transaction may be void at the behest of the purchaser is not to allow a premium for real wrong done by the seller. The fundamental maxim that 'no one can take advantage of his own wrong' (section 3517, Civ. Code), and other kindred principles, immediately recur to the mind. The above is but a recast of the doctrine abundantly supported by authority and applied in cases involving this very act done under similar circumstances. See Pollak v. Staunton, 210 Cal. 656, 293 P. 26; Michell v. Grass Valley Gold Mines Co., 206 Cal. 609, 275 P. 418; Tatterson v. Kehrlein, 88 Cal. App. 34, 263 P. 285, and Castle v. Acme Ice Cream Co., 101 Cal. App. 94, 281 P. 396; Hemmeon v. Amalgamated, etc., Co., 95 Cal. App. 400, 273 P. 74."

[4] So in the instant case, there is no showing made that the bondholders are other than innocent victims of appellant, Ruddle Company, which is now seeking to profit by its own wrong.

We are therefore of the opinion that, under these circumstances, the defense that no permit was given to sell these bonds cannot avail appellants.

[5] Appellants claim that the court erred in ordering the property described in the deed of trust to be sold in one parcel, as an entirety.

Where the parties have contracted that the property shall be sold in one parcel, the court, in ordering the sale, shall proceed in accordance with the contract. In Humboldt Savings Bank v. McCleverty, 161 Cal. 285, at page 289, 119 P. 82, 84, the court said: "We do not doubt that the parties to a mortgage or a deed of trust may contract that the premises shall be sold as a whole, and that their agreement to this end is enforceable." See Bank of Sonoma County v. Charles, 86 Cal. 322, 24 P. 1019.

In the instant case, the deed of trust provided that, under a judgment or decree of foreclosure, the whole of the property should be sold in one parcel, and as an entirety, unless such sale as an entirety is impracticable by reason of some statute or other cause.

The only evidence produced by either of the

parties upon this matter was that of Allan Ruddle. He testified that 1,800 acres of the premises were in the river bottom and were divided into six units of dairies, each having a barn and dairy equipment, and each leased and operated by different persons; that 1,900 acres of upland were divided into 400 acres of vineyards, 600 acres in peach trees, and about 700 acres of pasture land, the remaining consisting of 300 or 400 acres lying under the canal; that he had some experience in selling land in the neighborhood; and that, if this property be sold as a whole, it would not realize 50 per cent. of its value.

It is manifest that the court was authorized to order the sale of the premises in one parcel, unless such sale in one parcel would be impracticable by reason of some statute or other cause. In Humboldt Savings Bank v. McCleverty, supra, the court held that section 694 of the Code of Civil Procedure did not apply to a mortgage which provided that the premises be sold in one parcel.

4 Words and Phrases, First Series, 3443, defines the word "impracticable" as incapable of being effected from lack of adequate means, impossible of performance, not feasible. Practically the same definition is given in 31 Corpus Juris, 259. Webster's New International Dictionary defines "feasible" as follows: (1) Capable of being done, executed or effected, practicable; (2) fit to be used, dealt with successfully, suitable; (3) likely, probable, reasonable.

Appellants Ruddle Company and Wagner allege in their answers that the sale of the whole of said property in one parcel would be impracticable, for the reason that no purchaser could be found who would bid the market value of said property, and that it could not be sold as a whole for a sum approximating its value; that, if offered for sale in parcels and so sold, the proceeds realized therefrom would be in excess of the amount owing on the bonds.

Supporting these allegations is the testimony of Allan Ruddle which appears to have been received without objection. This testimony shows that the mortgaged property is not devoted to a single line of production, but included the growing of grapes and peaches and the operation of dairies. Under these conditions, it would appear that the practicable way of disposing of this large body of land so as to realize anything like its market value would be to segregate it into units. By this segregation purchasers who desired to purchase only the dairies would be given the opportunity of bidding for dairies, while those who desired the land planted to grapes or to peaches would be afforded the opportunity of bidding for these.

Appellants claim that the court erred in overruling their demurrers to the complaint. While they have failed to point out in their briefs the grounds upon which they rely to sustain this claim, we are of the opinion that it is without merit.

[6] They also claim that the trustee should have seen that the money realized from the sale of the $75,000 bonds was applied to the improvement of the mortgaged land. An examination of the deed of trust fails to show that the trustee was required to do this.

[7] Appellants also contend that the court had no authority to determine the priorities of the defendants' alleged liens among themselves, nor any authority to make the nunc pro tunc order, striking out of the judgment the clause entitling appellants Hunter, Dulin & Co., Wagner, and Carlon to have their said liens foreclosed.

In Rowley v. Davis, 169 Cal. 678, 147 P. 958, the court held that the conflicting claims of the defendants between themselves, in which the plaintiff was not interested, should be postponed for determination.

In the instant case, the pleadings showed no contest of appellants between themselves as to their liens or to the priorities thereof with respect to each other, consequently there was no issue raised that gave the court the right to pass upon their liens, or priorities of same, as between themselves. Such being the case, the matters involved in the appeal from the nunc pro tunc order are not necessary to be discussed by reason of the modification of the judgment hereinafter made.

The judgment is modified by striking out paragraphs III, IV, V, and VI of the judgment relating to the liens of Hunter, Dulin & Co., Carl T. Wagner, and T. H. Carlon; the judgment is further modified by striking out that part thereof requiring said mortgaged premises to be sold in one parcel and as an entirety and substituting for the part of said judgment so stricken the following words: "The property shall be segregated and sold in separate parcels or units"; the trial court to take evidence for the purpose of ascertaining into how many parcels or units said mortgaged property should be divided, and upon such hearing to divide said property into the parcels or units that appear from said evidence to be best adapted to produce the most advantageous sales of same, and thereupon to order said property to be so sold.

The judgment, as so modified, is affirmed; neither appellants nor respondent to recover costs on this appeal.

I concur: R. L. THOMPSON, J.

126 Cal.App. 473

PEOPLE v. HANEY et al.

Cr. 1197.

District Court of Appeal, Third District, California.

Sept. 28, 1932.

Rehearing Denied Oct. 13, 1932. Hearing Denied by Supreme Court Oct. 27, 1932.

1. Criminal law ⇐452(1).

Owner of personal property familiar with original cost is qualified to testify regarding value independently of knowledge of recent sales of similar secondhand property.

2. Criminal law ⇐452(1), 1153(2).

Qualification of witness to value is largely within sound discretion of trial court, reviewable only for abuse of discretion.

3. Larceny ⇐68(1).

Weight to be given to testimony regarding value of stolen property rests with jury in determining value in prosecution for grand theft.

4. Criminal law ⇐452(1).

Rancher's testimony regarding value of harness and saddle purchased by and stolen from him *held* competent in prosecution for grand theft.

5. Larceny ⇐83.

Where jury found accused guilty of grand theft, it necessarily found that value of property was in excess of $200.

6. Criminal law ⇐511(1).

Evidence *held* sufficient to corroborate accomplice in prosecution for grand theft.

7. Criminal law ⇐511(2).

Corroborating evidence need not be sufficient to establish accused's guilt independently of accomplice's testimony, nor furnish satisfactory evidence of all essential elements of crime (Pen. Code, § 1111).

8. Criminal law ⇐511(2).

Evidence corroborating accomplice is sufficient if it satisfactorily tends to connect accused with crime charged, even though it would be entitled to but little weight if standing alone (Pen. Code, § 1111).

Appeal from Superior Court, Modoc County; F. M. Jamison, Judge.

Ray Haney and another were charged with grand theft, named defendant was convicted, and he appeals.

Affirmed.

A. K. Wylie and Oscar Gibbons, both of Alturas, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PRESTON delivered the opinion of the court.

The appellant was charged jointly with Allen Curts with the crime of grand theft, consisting of the stealing of three sets of harness, seven horse collars, seven halters, several bridles, one saddle, one saddle blanket, trappings, and a pair of schaps, of a total value in excess of $200, belonging to W. H. Flournoy. The defendant Curts admitted his participation in the crime. The appellant was separately tried and found guilty of grand theft. The accomplice, Allen Curts, was the chief witness against him. From the judgment of conviction the defendant has appealed.

The appellant contends the evidence fails to support the verdict for the reason that there is a lack of corroboration of the testimony of the accomplice, and because the only evidence that the value of the stolen property exceeds the sum of $200 was furnished by the owner, Flournoy, who failed to qualify himself as a witness regarding the valuation on account of a lack of knowledge of recent sales of secondhand property of that nature.

[1] The owner of personal property who is familiar with its original cost and use is qualified to testify regarding its value, independently of his knowledge of recent sales of similar secondhand property. 1 Wigmore on Evidence 813, § 716; Hood v. Bekins Van & Storage Co., 178 Cal. 151, 172 P. 594; Klind v. Valley County Bank, 69 Mont. 386, 222 P. 439; Vukmanovich v. State Assurance Co., 82 Mont. 52, 264 P. 933; Third Dec. Dig. "Evidence," ⇐ 474 (19).

[2-5] The text of Wigmore on Evidence, above cited, reads as follows: "The owner of an article, whether he is generally familiar with such values or not, ought certainly to be allowed to estimate its worth." The primary question of the qualification of a witness to express an opinion regarding the value of property rests chiefly upon the sound discretion of the trial judge, exercised according to well-established rules of evidence. Except for an abuse of this discretion, the admission of such evidence will not be disturbed on appeal. The weight of the evidence must be determined solely by the jury.

In the present case Mr. Flournoy testified that he was the owner of the stolen property and knew the approximate value thereof, although he had not known of recent sales of such secondhand property in that vicinity. He said: "Any farmer has * * * some idea of the value of harness and other property on the ranch, or he would not be able to do business." He testified that the saddle cost him $104, but fixed its value at $75. He estimated the aggregate value of the stolen articles at $240. This does not seem unreasonable. A harness maker of Alturas, who

examined most of the stolen articles, estimated their aggregate value at slightly less than $200. He thought the saddle was worth only about $50. The testimony of Flournoy regarding the value of the stolen property was competent to be considered by the jury. The question of the actual value of the property was a problem for the determination of the jury. The jury found the appellant guilty of grand theft. By implication, we must assume, the jury thought the stolen property worth in excess of $200. The evidence is ample to support this finding.

[6] The record contains sufficient corroboration of the testimony of Allen Curts to support the verdict. The defendants had been associates for two years. Both were interested in horses. They had participated in rodeos. Mr. Flournoy was engaged in stock raising in Modoc county. The appellant was working for Harry Hughes, a neighbor of Allen Curts, his codefendant. He had been employed as a farm hand for about a month, and was sleeping in the granary. Within a few days after the theft occurred, the appellant was found with one of the stolen bridles and the saddle in his possession on the Hughes place where he was employed. When Mr. Flournoy and an officer arrived at the Hughes ranch in search of the stolen property, they were refused permission to examine the premises without a search warrant. Flournoy remained there while the officer procured a warrant. Both the saddle and the bridle were found. There was no previous claim of ownership or explanation of their presence. When they were discovered, the appellant said: "They didn't have nothing on him because that was his bridle." He then claimed it was his own bridle. Prior to the discovery of the saddle and bridle, the appellant negotiated with one Blodgett to trade the stolen saddle for another one. Blodgett testified to this fact. Mr. Hughes also testified that the appellant arranged with him to exchange one of the sets of stolen harness for another set. He said: "Mr. Haney said we (Curts and himself) have got one set of leather tug harness that you might as well take out there, because we want to plow, and we would like to have chain harness when we plow." These and other circumstances which are disclosed by the record corroborate the testimony of the appellant's accomplice in the theft sufficiently to support the verdict against him.

[7, 8] The corroborating evidence which is required by section 1111 of the Penal Code to supplement the testimony of an accomplice need not be sufficient to establish the guilt of the defendant independently of the testimony of the accomplice, nor furnish satisfactory evidence of all the essential elements of the crime. Such corroborating evidence is sufficient if it satisfactorily tends to connect the defendant with the commission of the offense, even though its weight be slight and is entitled to little consideration when standing alone. Section 1111, Pen. Code; 8 Cal. Jur. 178, § 256; People v. Davis, 210 Cal. 540, 293 P. 32; People v. Breitenstein, 111 Cal. App. 746, 296 P. 87.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

126 Cal.App. 643

GORDON v. GORDON et al. (JULIAN PETROLEUM CORPORATION et al., Interveners.)

Civ. 8151.

District Court of Appeal, Second District, Division 1, California.

Oct. 6, 1932.

Rehearing Denied Nov. 3, 1932. Hearing Denied by Supreme Court Dec. 5, 1932.

Appeal and error ⇐1010(1).

Trial court's findings of fact made on substantial evidence are conclusive.

Appeal from Superior Court, Los Angeles County; Louis P. Russill, Judge.

Action by Walter L. Gordon against Wilbur C. Gordon and another, wherein the Julian Petroleum Corporation and others intervened. From a judgment for interveners, defendants appeal.

Affirmed.

Charles S. Darden, of Los Angeles, for appellants.

Anderson & Anderson and A. G. Ritter, all of Los Angeles, for respondents.

HOUSER, J.

In an action brought by plaintiff against the defendants, Julian Petroleum Corporation intervened.

As far as concerns the facts which are material to the question submitted to this court, it appears that the defendants were the owners of a beneficial interest in a trust; that, arising from some anticipated services to be thereafter performed for the defendants by one White, it was assumed that in payment thereof compensation would become due to White; that White was indebted to the Julian Petroleum Corporation in the sum of $2,290.97; and that the latter was insisting that White pay to it the said debt. Thereupon, with knowledge of the facts, the defendants and White signed and delivered to Julian Petroleum Corporation an instrument in writ-

ing, a copy of which being as follows: "You are hereby authorized and directed to pay to the Julian Petroleum Corporation, or its order, the sum of two thousand two hundred ninety dollars and ninety-seven cents ($2,290.97), plus seven per cent (7%) interest from July 1, 1925, out of the first money due to us, or either of us, from Trust No. P-101, or from any other source or sources, subject to your claim or claims, and to charge this order to our account or the account of either of us. This order is not given or received as a payment of the above indebtedness, nor does it in any way release us from the obligation to the Julian Petroleum Corporation until the above amount, plus interest, is fully paid."

Upon receipt of such instrument, the trustee delivered to Julian Petroleum Corporation an acknowledgment thereof in the following form, to wit: "This will acknowledge receipt from you of order by W. C. Gordon, Desdemona L. Gordon, and J. W. White, directing the payment to you of the sum of two thousand two hundred ninety dollars and ninety-seven cents ($2,290.97) plus seven per cent (7%) interest from July 1, 1925, out of the first money available to the said assignors through this trust. The order has been duly filed and should any funds become available as provided in the order, we shall be pleased to pay such funds to you in satisfaction thereof."

More than one year thereafter, and following the receipt by the trustee of funds in amount more than sufficient to pay the sum represented by the assignment in question, by an instrument in writing signed by the defendants, the trustee was "instructed to cancel" the assignment theretofore made in favor of Julian Petroleum Corporation. From a judgment rendered in favor of Julian Petroleum Corporation on said assignment, the defendants appeal to this court.

With reference to the several reasons urged by appellants as affording a sufficient basis for the reversal of the judgment, it is noted that, founded on substantial evidence, the trial court made findings of fact which in the main preclude this court from disturbing the conclusion in substance and effect that the order given by the defendants to Julian Petroleum Corporation was an irrevocable assignment which was accepted by both the latter corporation and the trustee; that it was not subject to any defenses or equities of the defendants as against White; that it was supported by a sufficient consideration; that it operated as a transfer of a substantial right from the defendants to Julian Petroleum Corporation; and that the cause of action was not barred by the statute of frauds, "for the alleged reason that said order was given as an accommodation to J. W. White, mentioned in said order, or for a debt or obligation due from said White to said Julian Petroleum Corporation, or required a special promise to answer for the debt of said White." Moreover, the opinion in the case of Barlow v. Lande, 26 Cal. App. 424, 147 P. 231, together with the authorities therein cited, in principle constitute a complete and final refutation of all but the last of the several points suggested by appellants as a reason why the judgment herein should be reversed, to wit, that the right of the Julian Petroleum Corporation to enforce the assignment was barred by the statute of frauds. No authorities are cited by appellants in support of the last-mentioned point; nor is the application of the principle of law to the facts herein apparent to this court.

It is ordered that the judgment be, and it is, affirmed.

We concur: CONREY, P. J.; YORK, J.

126 Cal.App. 563

PATCH v. MORTGAGE GUARANTEE CO.

Civ. 8104.

District Court of Appeal, First District, Division 1, California.

Oct. 4, 1932.

1. Fixtures ⇐21.

Unrecorded instrument, whereby purchaser of land agreed to convey furnishings and appurtenances of proposed building to vendor, *held* ineffective as against subsequent encumbrancer in good faith without notice.

2. Appeal and error ⇐1011(1).

Trial court's findings on conflicting evidence could not be disturbed on appeal.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Janett D. Patch against the Mortgage Guarantee Company. From the judgment, plaintiff appeals.

Affirmed.

See, also, 116 Cal. App. 584, 3 P.(2d) 35.

Marshall Rutherford, of Oakland, for appellant.

John L. Reith, of Oakland, for respondent.

PER CURIAM.

Plaintiff and her son, Donald L. Patch, were the owners in fee simple as tenants in common of certain real property in Berkeley,

Cal. On April 30, 1927, plaintiff executed a deed, conveying her interest therein to her son, who on the same day executed to her his note for $10,437.50 payable on demand. The note contained the following clause: "In consideration of the aforesaid indebtedness I hereby grant, bargain, sell, convey and confirm to Janett D. Patch, her successors and assigns, all the equity which I may hereafter acquire in and to the furnishings, equipment and appurtenances of a certain proposed building to be erected upon the property described in a certain deed dated to-day from Janett D. Patch and George Patch, her husband, to Donald L. Patch, a single man; also I hereby grant, bargain, sell, convey and confirm to Janett D. Patch, her successors and assigns, all the equity which I may hereafter acquire in and to all improvements placed upon the property aforementioned."

Plans for the construction of an apartment house on the property had already been prepared, and after the above transaction the building was erected thereon. In the course of its construction certain refrigerating apparatus, consisting of seventeen Kelvinators with central units, tubing and boxes, seventeen Rip Van Winkle beds, and 4 electric light fixtures, were installed therein. The beds and light fixtures were paid for by plaintiff's son when the same were installed, but the Kelvinators were purchased by him under a conditional sale contract, title remaining in the seller until payment of the price. The same were described therein as "17—08 Evaporator Coils and 1 No. 5543 D. B. Compressor, serial No. 68124." The price of these articles was subsequently paid by the buyer.

On November 10, 1927, after the completion of the building and the installation therein of the above-described articles, defendant loaned to said Donald L. Patch the sum of $50,000, and the same was secured by a deed of trust of the real property. Subsequently upon default in payment the property was sold pursuant to the provisions of the deed of trust and purchased by defendant. The evidence shows that the installed articles were pointed out to defendant's agent by plaintiff's daughter at the time the apartment was being appraised for the purpose of making the loan. The instrument under which plaintiff claims was not recorded, and it is admitted that no notice of her claim was given to defendant until after the same last mentioned. It was testified that the amount of the appraisement included the value of the above articles and that the same were considered as material to the security. After the sale plaintiff attempted to remove the articles but was prevented by defendant, whereupon the present action was commenced to recover the same or their value, with damages for their detention.

The trial court found plaintiff to be the owner and entitled to the possession of "17 metal boxes kept in that certain apartment building (being the building referred to above), said boxes being units of and part of certain kitchen cabinets installed in said building and which boxes were used as the iceboxes in connection with said Kelvinator system." It also found that "the 17 Kelvinators together with central unit and all tubing used in connection therewith; 14 Rip Van Winkle beds and 4 electric light chandeliers" were at all times fixtures and the property of defendant. Judgment was entered in favor of plaintiff for the possession of the metal boxes or their value, with damages for their detention.

Plaintiff has appealed, claiming that she should have been awarded possession of all the property sued for.

According to section 660 of the Civil Code, "A thing is deemed to be affixed to land when it is * * * permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws."

[1] It will be unnecessary to review the evidence, which is voluminous, further than to say that it appears that the Kelvinator system, beds, and electrical fixtures were permanently affixed to the building and became fixtures within the rules declared in the following cases: Oakland Bank of Savings v. California Pressed Brick Co., 183 Cal. 295, 191 P. 524; Breyfogle v. Tighe, 58 Cal. App. 301, 208 P. 1008. Moreover, the facts bring the case within the rule that, without regard to the validity of the contract as betwen plaintiff and her son, it could have no force or effect against a subsequent incumbrancer who became such in good faith and without notice of the contract, which was the case here. Dauch v. Ginsburg (Cal. Sup.) 6 P.(2d) 952. See, also, Bell v. Mortgage Guarantee Co., 109 Cal. App. 203, 292 P. 660, which involved the heating system and water plant in the same building.

[2] It is urged by the respondent corporation—which, however, has not appealed—that plaintiff was not entitled to recover any of the property. It claims that the ice boxes were a part of the refrigerating system. As to this it will be sufficient to say that they were not purchased as part of the system, and the evidence is conflicting as to whether they were necessarily so or affixed to the building. There was in this connection enough evidence to justify the court's conclusion to the contrary, and its finding cannot be disturbed.

The judgment is affirmed.

126 Cal.App. 683

Josephine POHLE, Plaintiff and Respondent, v. BOLINAS BEACH REALTY COMPANY (a Corporation), Day's U-Drive Autos, Ltd., Edward J. Goldstein, John Doe, Richard Roe, and the Doe Company (a Corporation), Defendants; Day's U-Drive Autos, Ltd., Appellant.

Civ. 8516.

District Court of Appeal, First District, Division 1, California.

Oct. 10, 1932.

Motion to dismiss appeal by defendant or to affirm judgment of the Superior Court of Marin County, Edward I. Butler, Judge, in an action for damages for personal injuries sustained in an automobile accident.

Henry Heidelberg and Robert G. Partridge, both of San Francisco (John R. Golden, of San Francisco, of counsel), for appellant.

Daniel A. Ryan and Thomas O. Ryan, both of San Francisco, for respondent.

PER CURIAM.

Plaintiff brought this action for damages on account of personal injuries sustained in an automobile accident, naming as defendants Bolinas Beach Realty Company, a corporation, Day's U-Drive Autos, Ltd., a corporation, Edward Goldstein, and several fictitious parties. At the time the action was tried Goldstein's time for answering the complaint had not expired, and consequently as to him the cause was not at issue. The jury returned two verdicts, one against Bolinas Beach Realty Company for the sum of $17,500, and the other in favor of the defendant Day's U-Drive Autos, Ltd. Judgment was entered accordingly. Eight days thereafter Goldstein filed his answer, and approximately a month later the trial court granted plaintiff's motion for a new trial as against the defendant Day's U-Drive Autos, Ltd. The latter appealed from the order made in that behalf, and soon after its opening brief was filed plaintiff moved to dismiss the appeal or affirm the judgment upon the following grounds: (1) That the appeal was taken for the sole purpose of delay; (2) that none of the evidence is contained in the transcript on appeal; and (3) that appellant's brief does not conform to the requirements of section 3 of rule VIII of the Supreme Court and the District Courts of Appeal.

We find no merit in the first and third grounds urged; but the second ground presents a debatable question for the reason that the appeal was taken on a clerk's transcript alone, and it would seem that in the absence of a reporter's transcript or a bill of exceptions embodying part of the evidence, several of the essential factors upon which appellant bases its legal contention that the order appealed from should be reversed do not appear in the record upon which the appeal is taken.

However, respondent did not serve or file with her notice of motion, as required by the rules of the court (see rule XX), any memorandum of points and authorities, nor, as yet, has she filed any brief on the merits; and in view of the important legal problem presented by the motion we do not feel called upon to attempt its solution without the aid of some sort of a brief on the part of the party in whose behalf the motion is made. Obviously the point is one which may be urged in respondent's brief as ground for affirmance at the hearing of the appeal on the merits, as well as by motion.

Therefore the motion will be denied without prejudice to the right of respondent to follow such course if she so desires.

126 Cal.App. 566

TEC-ART STUDIOS, INC., OF CALIFORNIA v. FASHION FEATURE STUDIOS, INC., Limited.

Civ. 8036.

District Court of Appeal, Second District, Division 1, California.

Oct. 4, 1932.

Appeal and error ⇐1126.

Appeal by defendant, claiming fatal variance between supplemental complaint alleging two contracts and proof of one only, affirmed as presenting unsubstantial question (District Court of Appeals Rule 5, § 3).

The original complaint alleged and the answer admitted execution of both contracts, and the supplemental complaint was filed only for the purposes of including in the demand an additional amount accruing under the contract since the filing of the original complaint and substituting the correct name of corporate defendant.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the Tec-Art Studios, Inc., of California, against the Fashion Feature Studios, Inc., Ltd. Judgment for plaintiff, and defendant appeals. On respondent's motion to dismiss the appeal or affirm the judgment.

Motion granted, and judgment affirmed.

Milton M. Cohen, John M. Bowen, and C. M. Booth, all of Los Angeles, for appellant.

Don Marlin, of Los Angeles, for respondent.

CONREY, P. J.

Comes now the respondent and moves to dismiss the appeal of defendant from the judgment in this action, or to affirm the judgment, on the ground that the appeal is taken for delay only, and on the further ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. The motion is presented under section 3 of rule V of the Rules of Practice in this court. The text of said section 3, with some general comments thereon, may be found in Dalton v. Los Angeles College of Chiropractic (Cal. App.) 13 P.(2d) 546. It is a rule which provides for the dismissal of an appeal or affirmance of the judgment when in the opinion of the court the record justifies such dismissal or affirmance upon either of the grounds above stated.

In appellant's brief it is said that the judgment was based on the supplemental complaint which was filed in lieu of the original complaint by leave of court during the progress of the trial; that the supplemental complaint alleges that the defendant became indebted to the plaintiff in a stated sum "by virtue of a certain contract and lease dated September 21, 1929, and June 7, 1930, respectively"; that therefore it became necessary for respondent to prove the execution by appellant of the two contracts and to prove the amount due and owing under each contract; that the only contract in evidence is the contract of June 7, 1930. The only points presented in support of the appeal are that there is a total failure of proof, and that there is a fatal variance between the proof and the allegations of the supplemental complaint.

But the record shows that the original complaint did allege the execution of both contracts. As to each contract it was alleged that there had become due from defendants a stated sum. The answer of appellant, properly construed, admitted the execution of the contracts, but denied that the amounts of indebtedness alleged in the complaint had accrued. This was further confirmed by the separate defense, wherein appellant alleged the execution of each of said contracts.

The complaint named as defendants, "Fashion Feature Studios, Inc., Limited" (appellant herein), and "Fashion Feature News, Inc.," and certain individual defendants. The supplemental complaint named appellant as a defendant, but omitted the individual defendants and substituted the name, "Fashion Feature Studios, Inc.," instead of "Fashion Feature News, Inc." It appears from the reporter's transcript, p. 55, that the supplemental complaint was filed for the purpose of including in the demand an additional amount which had accrued under the contracts during the interval of time since the filing of the original complaint, and also for the purpose of making the substitution of corrected name as above stated. Under the evidence the substitution of names was really not material. This is so, because the evidence shows that there were not two corporations, but there was one corporation only, and appellant is that corporation. The confusion of names arose out of the fact that in the contract of September 21, 1929, appellant was named "Fashion Feature News, Inc.," although the officer who executed it was appellant's president, Mr. Gibson. The supplementary agreement of June 7, 1930, shows, as the testimony of witnesses also shows, by entirely clear inference, that the contracts were contracts of appellant, and that in all probability the named codefendant does not exist.

The amount of the judgment was determined by means of a referee's report, prepared from the books and records of the parties, under a stipulation for such reference. There were no exceptions to the referee's report.

The motion is granted, and the judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

126 Cal.App. 602

PERI v. CULLEY.

Civ. 8631.

District Court of Appeal, First District, Division 2, California.

Oct. 5, 1932.

Rehearing Denied Nov. 4, 1932.

Hearing Denied by Supreme Court Dec. 1, 1932.

I. Damages ⇐132(3).

$14,000 verdict in favor of motorcycle officer for severe head and body injuries *held* not excessive.

Evidence disclosed that plaintiff sustained severe skull fracture, fractured collar bone, nine fractured ribs, several broken teeth, and muscular hip injury and shock; that he remained in hospital two months; that he was unable to return to work until over three months after accident; and that, although he made good recovery in so far as broken bones were concerned, injuries to eye and hearing, resulting from skull fracture, continued at time of trial, which was three years and four months after accident. Evidence showed that loss of hearing was progressing and possibly would result in total deaf-

ness in one ear, and that fractured skull might result in epilepsy, and plaintiff's expenditures for medical care exceeded $1,000.

2. Appeal and error ⇐714(5).

Appellate court is bound to confine consideration to record as certified in transcripts, and cannot consider instructions quoted from appendix to brief and not contained in record.

3. Appeal and error ⇐928(4).

On defendant's appeal, court must assume in support of judgment that instructions complained of were given at defendant's request, nothing to contrary appearing.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Andrew Peri against Lester D. Culley. From a judgment in favor of plaintiff, defendant appeals, and plaintiff moves to dismiss the appeal or affirm the judgment.

Motion to affirm the judgment granted, and judgment affirmed.

See, also, 6 P.(2d) 86.

Jordan L. Martinelli, of San Rafael, for appellant.

Edward J. Jose, of San Francisco, for respondent.

STURTEVANT, J.

In an action brought to recover damages for injuries sustained in an automobile collision, the plaintiff recovered a judgment for $14,000. The defendant appealed from the judgment and has brought up a typewritten transcript. Later he filed his brief. Thereafter the plaintiff filed in this court a notice of motion to dismiss or affirm. Subdivision 3, rule V, of the Supreme Court and District Courts of Appeal. The plaintiff asserts that the questions on which the appeal rests are so unsubstantial as not to need further argument.

[1] The first point made by the defendant is that a verdict in the sum of $14,000 was excessive as a matter of law. The point is not sustained by the record. The accident occurred December 21, 1928. The plaintiff was riding on a motorcycle, and the defendant was driving an automobile, and the two met in a head-on collision. The immediate injury to the plaintiff consisted of shock, pain, a fractured skull, a fractured collar bone, nine fractured ribs, several broken teeth, and a muscular injury to his hip. In an unconscious condition, the plaintiff was immediately taken to a hospital. He remained unconscious for three or four days. He was confined in the hospital two months and five days. During all of that time he suffered intense pain in his head, chest, and hip. He was not able to return to his duties as a police officer until April 1, 1929; however, at that time, he returned to work. The trial was had March 31, 1932, three years and four months after the accident. According to all of the medical experts, the plaintiff made a good recovery in so far as broken bones were concerned. However, the fractured skull consisted of a break extending along the left temple commencing with the hard portion of the skull in which the eye is located and extending back into the occipital suture. That injury was such as to injure the nerve extending to the eye and the nerve extending to the ear. Soon after the accident, the plaintiff commenced to suffer a loss of hearing and a twitching of the eye. At the time of the trial both symptoms still continued according to the witnesses produced by the plaintiff. All of the witnesses agreed that the plaintiff's hearing in his left ear was injured by the accident and that the loss of hearing was progressing and possibly would result in total deafness in that ear. The witnesses for the plaintiff also testified that the fractured skull might result in epilepsy. The plaintiff expended $1,041.55 for medical care and treatment in the hospital. It is manifest that this point may not be sustained.

[2, 3] The defendant makes one more point. He complains because the trial court gave two certain instructions to the jury. He quotes from the appendix to his brief. There are two complete answers. This court is bound to confine its consideration to the record as certified in the transcripts. Neither the clerk's transcript nor the reporter's transcript discloses that any instructions whatever were given. If we were permitted to use what is contained in the appendix to the defendant's brief, we could not go further. That brief shows that certain instructions were given. Whether they were given at the request of the plaintiff, or the request of the defendant, or of the court's own motion, does not appear. In support of the judgment we must assume that they were given at the request of the defendant. Furthermore, taking all of the instructions together, it clearly appears that the trial court committed no error.

The motion to affirm the judgment is granted, and it is ordered that the judgment be, and the same is, affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

SHERWOOD v. JACKSON.

Civ. 8331.

District Court of Appeal, First District, Division 1, California.

Sept. 28, 1932.

Rehearing Denied Oct. 28, 1932.

1. Appeal and error ⇐1004(3).

Trial court's judgment as to whether verdict was excessive or was arrived at through improper influences will be accorded greatest deference.

2. Damages ⇐132(3).

$1,500 award for head wound, body bruises, and injury to general health *held* not excessive.

Record disclosed that defendant hurled a telephone instrument at plaintiff, striking her upon head and inflicting thereon deep wound over her right eye; that wound was through tissues to bone, and initial treatment required a number of stitches and further medication; that there was permanent scar of some magnitude; that there were bruises on other portions of plaintiff's body, resulting from defendant's effort to restrain plaintiff's immediate departure after the major assault; and that occurrence had detrimental effect upon plaintiff's nerves, heart, and general health.

3. Appeal and error ⇐1004(3).

After plaintiff's partial remission of damages upon court's order, verdict is reviewed as if returned in reduced amount.

4. Assault and battery ⇐40.

Evidence *held* to show severe and reckless assault and battery by defendant against plaintiff, justifying award of exemplary damages, and award of such damages, as reduced to $505, was not excessive.

5. Trial ⇐260(1).

Failure to give tendered instruction substantially incorporated in given instructions *held* not error.

6. Trial ⇐210(2).

Charging jury generally as to effect of jury's belief that any witness had sworn falsely in one part of testimony, instead of emphasizing possible application of legal principle involved to plaintiff, *held* proper (Code Civ. Proc. § 2061, subd. 3).

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Lavina Troyer Sherwood against Donald Bevins Jackson. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Jefferson E. Peyser, of San Francisco, for appellant.

Glensor, Clewe, Schofield & Van Dine, of San Francisco, for respondent.

ATTERIDGE, Justice pro tem.

In this action to recover damages resultant from an assault and battery, the verdict of the jury was initially in favor of plaintiff and respondent as against defendant and appellant for $2,500 actual damages, together with an award of $1,000 punitive damages. Subsequently, on motion for a new trial and as a required condition precedent to the denial thereof, the trial court exacted of plaintiff a remission of $1,000 of the amount awarded as actual damages, as well as $495 of the sum assessed as punitive damages. Plaintiff having filed her consent thereto, judgment in her favor in the reduced amounts was duly entered, from which defendant prosecutes this appeal.

[1] The main contention advanced by appellant is that the award for damages is so excessive in amount as to indicate that the jury in making its assessment thereof were animated by passion and prejudice. But the question as to whether or not any given verdict for damages is excessive in amount or arrived at through improper influences is always one for the primary consideration of the trial court which heard the cause or supervised the deliberations of the jury returning it. When that tribunal has fairly exercised its discretion in approving, disapproving, or modifying a given award in the manner and in the light of the considerations enjoined upon it by law, an appellate court must of necessity accord the greatest deference to the deliberately formed judgment of the trial court. This is because of the obviously superior and unrestricted opportunity which the latter alone possesses of passing upon the weight and effect of evidence, as well as of observing or determining just what influences, proper or otherwise, may have operated upon the collective minds of the jury. With these considerations in view our Supreme Court has repeatedly announced as a rule of law the precise evidentiary situation which must always exist and be presented by the record, before an appellant court is warranted in reversing a judgment upon the present ground thus urged by the appellant, as follows: "Unless we (the reviewing court) are able to say that the award of damages made by the jury and sustained by the trial court was so grossly disproportionate to any compensation reasonably warranted by the facts as presented to us on appeal as to shock the sense of justice and raise at once a presumption that it was the result of passion, prejudice, or corruption, rather than an honest and sober

judgment, this court may not exercise the power of revision." Kelley v. Hodge Transp. System, 197 Cal. 598, 242 P. 76, 81; citing authority. (Parenthetical insertion ours.)

[2] The record in the instant appeal wholly fails to present a case falling within the requirements of the rule last above stated. The evidence adduced on behalf of plaintiff, and to which the jury by its verdict gave credence and the trial court its ratification, tends to establish that she was the victim of a severe and reckless assault which had been committed on her by defendant. At the time of the assault the parties had been engaged as partners in the ownership of a telephone service operated for the convenience of physicians and dentists in the receiving and dispatching of their telephone calls. It was located in a building in San Francisco devoted exclusively to the tenancies of professionals of the given character. In the late afternoon of August 20, 1929, while plaintiff was peacefully engaged in the discharge of duties incident to the nature of their business, defendant became incensed in the course of a telephone conversation being participated in by and between the two parties (in different rooms but upon connected lines of communication) with a prospective employee. Thereupon leaving his room, the first words he addressed to plaintiff upon entering her office were: "God damn your soul to hell." He then committed an initial assault by throwing the telephone directory of the San Francisco metropolitan area at her, which plaintiff succeeded in dodging. After some further expression of profane language (which, however, should have afforded an interval for cooling time) following his initial assault defendant seized a telephone instrument (to which was attached an accessory termed a "Hush-a-phone," and which doubtless tended to intensify the danger of injury to plaintiff), and hurled it at plaintiff, striking her upon the head and inflicting thereon a deep wound over her right eye. The wound was through the tissues to the bone, and its initial treatment required a number of stitches and further medication. It left a permanent scar of some magnitude.

There was additional testimony as to the detrimental effect of the occurrence upon plaintiff's nerves, heart, and general health, which the jury were entitled to weigh and consider in making its award, as well as further testimony as to bruises on other portions of her body, resultant not from the major battery, but from an effort of defendant to restrain her immediate departure after the assault.

In our opinion a judgment of $1,500 actual damages based upon these circumstances falls short of establishing the inference of passion and prejudice whose presence has been earlier herein shown to be an indispensable requisite in order to warrant interference on the part of an appellate court.

[3] In this connection it is pertinent to further observe that after remission in part upon order therefor by the trial court, a verdict is reviewed on appeal as if it had been returned in the first instance by the jury in the reduced amount. Lynch v. Southern Pac. Co., 24 Cal. App. 108, 140 P. 298; Smith v. Brown, 102 Cal. App. 477, 487, 283 P. 132.

[4] Appellant further claims that the evidence is insufficient to justify the award of punitive damages even in the reduced sum ordered by the trial court. But the evidence upon which (under familiar rules of appellate practice) we are required to assume that the verdict of the jury was based is ample to establish a willful and unprovoked assault and battery. Aside from the proven facts that appellant was the sole aggressor, physically a member of the stronger sex, and that the element of self-defense is entirely absent from the case, his deliberate intention to be and remain belligerent is established by his second return to the attack, culminating, as it did, in a severe battery, after his initial assault had failed only because of the agility of plaintiff. The propriety of an award of exemplary damages under such circumstances is well established. Bloomberg v. Laventhal, 179 Cal. 616, 620, 178 P. 496; Bundy v. Maginess, 76 Cal. 532, 18 P. 668.

The sum allowed by the trial court (after reduction of the jury's assessment in a larger amount) does not exceed that of a similar award approved on appeal under somewhat analogous circumstances in Seelye v. Harvey, 46 Cal. App. 448, 189 P. 311.

We therefore rule that appellant's above specified claim is without merit.

Appellant also made the useless and futile attempt of causing a juror to impeach his own verdict by a recital of extraneous matters alleged to have transpired in the jury room. None of the matters set forth in the said juror's affidavit related to the definitely limited grounds upon which alone a juror is permitted to impeach his verdict (such as averments by the affiant that it was arrived at by "a resort to the determination of chance"), and the only effect of appellant's presentation of such an affidavit to the trial court on motion for a new trial and to this court in his briefs has been to unnecessarily add to the labors of both through the vain interjection of a false quantity into the case. As to the futility of such affidavits in derogation of a juror's verdict, see Fererira v. Silvey, 38 Cal. App. 346, 357, 358, 176 P. 371; Siemsen v. Oakland, etc., Ry. Co., 134 Cal. 494, 66 P. 672; 20 California Jurisprudence, pp. 61, 62.

[5, 6] The learned trial judge fully and fairly instructed the jury upon all the is-

sues of the case, and the claim of appellant that it erred in failing to give certain tendered instructions with respect to the duty and power of the jury in making its assessment of damages is without merit because all of the qualifications of the instructions referred to were substantially incorporated in the instructions elsewhere given by the court on the subject. Similarly a requested specific instruction relating to the effect of the belief of the jury if it found that "*plaintiff* had sworn falsely to a material allegation" was fully covered by the court's general instruction upon this subject in its broader application to *all* witnesses, in the event the jury should find any of them to have sworn falsely. The court merely gave the time-honored and approved instruction on this subject, which has for its basic doctrine subdivision 3 of section 2061, Code of Civil Procedure, which it will be observed refers to a "witness" rather than to a litigant. The trial court was eminently correct in charging the jury generally in this respect instead of specially singling out the plaintiff for an emphasized (possible) application of the legal principle involved.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

126 Cal.App. 291

BROWER (STATE COMPENSATION INSURANCE FUND, Intervener) v. ARNSTEIN.

Civ. 8358.

District Court of Appeal, First District, Division 1, California.

Sept. 26, 1932.

Rehearing Denied Oct. 26, 1932. Hearing Denied by Supreme Court Nov. 23, 1932.

1. Automobiles ⇐244(11).

Jury's implied finding that intersectional collision between defendant's automobile and plaintiff's motorcycle was result of defendant's negligence *held* sustained by evidence.

2. Automobiles ⇐146.

Motorist must keep proper lookout in anticipation of meeting persons at any point of street, keep machine under proper control, slow up, and if situation requires, must stop.

3. Damages ⇐132(8).

$1,680 award for permanent mutilation of right hand and pain, aside from damages for loss of wages, *held* not excessive.

Record disclosed that, as result of injuries, large finger of plaintiff's right hand had to be removed by amputation; that injuries to index finger required eight stitches, and it was left in such condition as to permit of but limited use thereof in future; that thumb was also left in weakened condition; that plaintiff was required to remain two weeks in hospital after accident; that amputation occurred another four weeks thereafter; and that injuries required further medication for additional period of three weeks; and evidence justified inference that plaintiff suffered considerable pain during all such time.

4. Appeal and error ⇐1004(1).

To warrant appellate court in setting aside jury's award for excessiveness, amount thereof, when compared with injury and damage, must produce in minds of court inference of passion and prejudice so great as to shock judicial sense of justice.

5. Appeal and error ⇐1170(9).

In action for automobile collision, court's failure directly to define legal principle embraced in term "proximate cause" *held* error, but not reversible under circumstances (Const. art. 6, § 4½).

Circumstances disclosed that effect of error was substantially mitigated by effect of defendant's very numerous and detailed instructions given by court, in which almost every conceivable element of the multitude of defensive principles of law open to and urged by him was specifically presented to jury.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by John Brower against Walter Arnstein, in which the State Compensation Insurance Fund was a plaintiff in intervention. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellant.

Ford & Johnson and Fletcher A. Cutler, all of San Francisco, for respondent.

ATTERIDGE, Justice pro tem.

Respondent, John Brower, as plaintiff in the court below, brought this action to recover damages for personal injuries alleged to have resulted from the negligent operation by defendant of his automobile. The action was tried before a jury, which returned a verdict in favor of plaintiff for $2,750. This award, however, is subject to a first lien in favor of the intervening plaintiff, State Compensation Insurance Fund, in the sum of $637.94, and some of the other elements entering therein

will be further discussed in our consideration of appellant's claim that the same is excessive as a matter of law. After seasonable motion for a new trial had been denied, appellant took this appeal from the judgment.

The accident resulted from a collision between defendant's automobile and plaintiff's motorcycle in the intersection of Bush and Larkin streets in the city of San Francisco. Prior thereto plaintiff, proceeding northerly on Larkin street, had momentarily stopped and rested his motorcycle in obedience to a sign or marker at this point reading, "Stop—Arterial." At that time, according to his testimony, he observed defendant's automobile more than half a block away proceeding easterly on Bush toward Larkin street. Shortly thereafter and at a time when the intersection was itself clear, plaintiff again started his motorcycle and had proceeded, at a speed of between three and four miles per hour, more than halfway across the medial line of Bush street on Larkin, where he was then struck on the left side of his motorcycle, between the middle and rear thereof, by the left front bumper and fender of defendant's automobile. This low rate of speed is clearly and reasonably accounted for by the necessity of starting the motorcycle in low gear and the consequential slowness of what is colloquially termed its "pick-up."

[1] Appellant states as his major contention that "the record fails to establish a case of liability against the defendant." By this we assume that in effect he contends that the evidence is insufficient to establish that the injuries were sustained as a result of negligence on his part. However, as we view the record it was entirely sufficient in this respect, particularly so in view of the repeated inconsistencies and self-contradictory changes with which defendant's testimony is replete, together with his marked absence of memory upon significant evidentiary factors connected with the accident, and his pronounced disposition to avoid giving direct answers to pertinent questions. This course of conduct undoubtedly left the jury in considerable doubt as to the accuracy of his entire testimony.

In addition to the inference of negligence which the jury could reasonably derive from the evidentiary situation already described (that is to say, a situation from which the jury could fairly find that the plaintiff, after first observing the precautions of stopping and looking, was struck by defendant's car at a time and place where he, plaintiff, had a right to be, after he had lawfully entered and had already traversed the major distance of the intersection prior to defendant's entry therein), it was further entitled to find that the defendant was under the existing circumstances guilty of active negligence in failing to stop his car in time to avoid the collision—for amongst others of the defendant's above-referred to contradictory admissions, was the following:

"I was almost half way across the intersection (of Larkin street).

"Q. When you *first* saw the motorcycle? A. Yes, I was about half way.

"Q. Do you mean by that, the front of your automobile was about half way across? A. Yes." (Italics ours.)

And again: "Q. You only saw the motorcycle just a second before the impact, did you not? A. Just a second?"

It will be noted that the answer to the last question is in the form of a counter interrogation, but appellant, who undoubtedly clearly understood the question by reason of his verbatim repetition of its substance, made no attempt to disclaim either then or subsequently the inference therein contained, and in view of his definite admission that he had progressed almost halfway across the intersection before he ever saw plaintiff, it follows as a certainty from his admitted speed of fifteen to twenty miles an hour, that less than a bare second's interval elapsed between the moment he first saw plaintiff and his almost immediate collision with him thereafter.

[2] It is the settled law of this state that a driver of an automobile is "bound to anticipate that he may meet persons at any point of the street, and he *must*, in order to avoid a charge of negligence, keep a *proper lookout* for them and keep his machine under such control as will enable him to avoid a collision with another person using proper care and caution, and *if the situation requires he must slow up and stop.*" (Italics ours.) Reaugh v. Cudahy Packing Co., 189 Cal. 335, 340, 208 P. 125, 127; Rush v. Lagomarsino, 196 Cal. 308, 317, 237 P. 1066.

In view of these principles and under the evidence heretofore referred to, the jury could and by their verdict impliedly did, find defendant guilty of negligence in failing to see plaintiff and stop his car in time to avoid the accident.

In avoidance of the inference of negligence that arises from his said failure to see plaintiff in time to avoid colliding with him, defendant stresses upon the claimed circumstance that when plaintiff stopped at the "arterial stop" sign hereinbefore referred to, he took up a position near the curb of the sidewalk on his right and that another automobile intervened between his said position and defendant's approaching car on the left. Plaintiff, however, definitely testified that his position was somewhat in advance of said intervening car (so that he could be easily observed). The jury of course was well within its province in believing plaintiff's version of

the situation and in rejecting the contrary inference which appellant thus sought to have them draw.

We therefore hold that there was sufficient evidence on the issue of negligence upon which the jury could properly predicate their verdict.

[3] Appellant also earnestly contends that the jury's verdict is excessive in the amount of damages awarded as a matter of law. The verdict, however, comes before this court sanctioned by the approving ratification of the trial court on motion for new trial where, as we observed from the record, similar considerations were elaborately urged and adversely determined by the trial judge. Reference is hereby made to the recent decision of the court in the case of Sherwood v. Jackson (Cal. App.) 14 P.(2d) 861, post, where the rule setting forth the limitations governing appellate courts in their consideration of claims of this character, as well as the weighty effect that must be accorded the trial court's approval of the jury's verdict, were both considered in such detail as to render further repetition thereof unnecessary herein. It is sufficient to say that the verdict now under review does not fall within the rule enunciated in Sherwood v. Jackson, supra. It was, as previously stated, for $2,750, of which the intervening plaintiff, State Compensation Insurance Fund, has already been allocated $637.94. The evidence shows that in the six months' period during which he was directly incapacitated from work as a result of his injuries, plaintiff proved a loss of over $400 in wages over and in excess of the amount allowed him from the State Compensation Insurance Fund. This leaves the net verdict for pain, suffering permanent injury, impaired future earning capacity, and permanent disfigurement at approximately $1,679.50.

Plaintiff's entire right hand was extensively mutilated as the result of his injuries. The large finger thereof was removed by amputation; injuries to the index finger required eight stitches and it was left in such condition as to permit of but a limited use thereof in the future; and the thumb was also left in a weakened condition. Plaintiff was required to remain two weeks in a hospital after the accident, the amputation occurred another four weeks thereafter, and the injuries required further medication for an additional period of three weeks. During all this time the jury could rightfully infer that plaintiff suffered some considerable pain. To illustrate:

"Q. Did any complications, so far as you know, set in that caused the amputation of that finger? A. The knuckle was removed down at the doctor's office.

"Q. What do you mean the knuckle was removed? * * * A. * * * He reached in with a pair of tweezers and pulled the knuckle out of the finger. As he did that the finger dropped off"—and the consequent amputation followed.

[4] The amount of the verdict thus complained of, when balanced and compared against the cumulated effect of the several elements of injury and damage above referred to, fails to produce in our minds that inference of passion and prejudice on the part of the jury which must always be present in such force as to shock the judicial sense of justice before an appellate court is warranted in setting aside the award of a jury, and so we hold that appellant's claim as to the alleged excessiveness of the verdict is without substantial merit.

[5] Appellant also urges various and sundry claims of error against instructions given and refused by the trial court. The most vigorously pressed of these claims relate to the alleged failure of certain so-called "formula" instructions to individually contain a recital of all the elements essential to recovery by plaintiff. If these instructions are by a process of dislocation from the general charge, so separated from each other as to then be viewed with overtechnical nicety, they would unquestionably be subject to the objections urged by appellant. But the very method of the giving of these so-called "formula" instructions indicates plainly that they were not intended to so operate or to have such effect. They were merely intended in the first instance to advise the jury how their verdict should go in the event the respective matters set forth in the pleadings were either established or failed of establishment one way or the other. In other words, the instructions were not intended to, nor did they purport to state the several elements essential to a verdict as such in detail, but, instead, those matters were made the subject of separate specific instructions; the court's intention being merely to *supply by reference* to the pleadings a statement as to how the verdict of the jury should go in the event plaintiff did or did not establish negligence as charged in his pleading, or in the event he did so establish such negligence, how in such event the verdict should then go if contributory negligence was or was not established. They were not "formula" instructions of the type condemned in Beyerle v. Clift, 59 Cal. App. 7, 9, 209 P. 1015, where the pleaded element of contributory negligence was entirely omitted from an instruction directing a verdict. However, the particular omission in the instructions upon which appellant places the most stress is their serious failure to at any time define or express in direct terms the principle of "proximate cause." This is indeed a most serious omission, and we are not unmindful that in reversing the case of Long v. Barbieri (Cal. App.) 7 P.(2d) 1082, 1087, because of certain instructions of a more obviously erroneous

character, we indicated the added weight that had been given the errors in question because of the similar failure of the trial court to define "proximate cause," by declaring: "It should be further noted that the trial court omitted to give any instruction whatsoever defining 'proximate cause,' and the jury were thus left to their own varying conceptions, if any, as to what might constitute this always related and ever essential principle of the doctrines of negligence and contributory negligence."

It must therefore be conceded that in failing to directly define and present to the jury for their consideration, the legal principle embraced within the term "proximate cause" the trial court committed an error of no inconsiderable magnitude. Its effect, however, is substantially weakened and mitigated in the present case by and through the effect of the very numerous and detailed instructions given by the court at the request of defendant, in which almost every conceivable element of the multitude of defensive principles of law open to and urged by him were specifically presented to the jury. These directly set forth the many and numerous circumstances upon which, in the event their existence was established by the evidence, the verdict of the jury must be for defendant, or plaintiff could not recover; and among these in connection with the terms "negligence" or "negligent" the word "proximately" is frequently used.

The jury was also instructed: "* * * Where negligence is charged, it devolves upon the person charging it, if he would prevail *as to that charge*, to establish * * * it by a preponderance of evidence." (Italics ours.) The court also, and as a part of its general charge, repeatedly instructed the jury in the utmost detail upon numerous matters that would constitute contributory negligence on the part of plaintiff, and thus defeat recovery. At no time did the appellant now urging the error of its omission, tender to the court an instruction defining "proximate cause," or request that qualifying instructions to those of which he complains be given.

The cumulative effect of these considerations leads us to place our determination of the merits of appellant's contention (that the failure of these instructions to define "proximate cause" is reversible error) fairly within the scope of the expression of a similar determination arrived at by our Supreme Court in Wirthman v. Isenstein, 182 Cal. 108, 110, 111, 187 P. 12, 13, where it is declared: "* * * where, as here, the court instructs that, to entitle respondent to recover, appellants must be guilty of negligence 'as alleged in the complaint,' and that respondent himself must be blameless and free from any contributory negligence, it must have been made perfectly clear to the jury that a finding by them that appellants were guilty of the negligence so described, the respondent himself being blameless, would of necessity amount to a finding that such negligence was the proximate cause of the injury. Weaver v. Carter, 28 Cal. App. 241, 152 P. 323. Furthermore, the court's instructions, so far as they went, correctly stated the law, and if appellants desired a qualifying instruction to the effect that, to entitle respondent to recover, appellants' negligence must be the proximate cause of the injury, it was incumbent upon their counsel to either ask the court to give such qualifying instruction, which it undoubtedly would have done, or have presented an instruction embodying it. Having failed to do either, appellants are in no position to complain of the instructions given. Weaver v. Carter, supra; Townsend v. Butterfield, 168 Cal. 564, 143 P. 760; O'Connor v. United Railroads, 168 Cal. 43, 141 P. 809."

We have carefully considered all the other claims advanced by appellant with respect to alleged errors of omission or commission in the giving of instructions, and find them to be of a much less serious and inconsequential character, and taken singly and collectively they do not, under section 4½ of article 6 of the Constitution, present errors of such sufficient magnitude as would justify a reversal of the judgment.

The judgment is affirmed.

We concur: CASHIN, J.; KNIGHT, Acting P. J.

126 Cal.App. 569

PEOPLE v. DANIELS.

Cr. 2253.

District Court of Appeal, Second District, Division 1, California.

Oct. 4, 1932.

Rehearing Denied Oct. 18, 1932.

Hearing Denied by Supreme Court Nov. 8, 1932.

1. Assault and battery ⇐91.

Evidence sustained conviction of assault by means and force likely to produce great bodily injury.

2. Assault and battery ⇐83.
Criminal law ⇐1169(1).

In prosecution for assault by means and force likely to produce great bodily injury, admitting in evidence automobile tools not directly proved to belong to stolen automobile being driven by defendant who assaulted officer attempting to make arrest *held* error, but not prejudicial.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Error was not prejudicial, for, even if the evidence had been excluded, it was not probable that the jury would have arrived at any different verdict from that which was rendered.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

James Daniels was convicted of assault by means and force likely to produce great bodily injury, and he appeals.

Affirmed.

H. N. Dial, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

CONREY, P. J.

On the 22d day of February, 1932, in the nighttime, while John J. Logan, a police officer, was lawfully attempting to arrest the defendant, the arrest was resisted by the defendant, who in making such resistance assaulted the officer and inflicted upon him severe injuries. That the offense was committed is an undisputed fact. But the defendant contended at the trial, and now contends, that he is not the man who was being arrested, is not the man who made the attack upon the officer, and in fact was not present at the time and place of commission of the offense.

The grounds of appeal upon which defendant relies are: That the evidence is insufficient to justify or sustain his conviction; and that the court erred in its ruling admitting in evidence People's Exhibit No. 5, which consisted of certain automobile tools.

[1] Appellant's claim that the evidence is insufficient to justify the verdict is entirely without merit. Officer Logan in his testimony positively identified the defendant, and this testimony is abundantly corroborated by other evidence.

[2] The automobile tools were not directly proved to have been tools belonging with the stolen car which other evidence tends to prove was being driven by the defendant at the time of the attempted arrest of defendant by Logan. The stolen automobile was found on the following day at Compton, near the home of defendant's brother, and the tools were found in the garage of said brother. The evidence shows that the tools were a kind commonly belonging with that kind of an automobile, but that was the extent of the identification. Although we think that the court erred in admitting in evidence the said exhibit, we are of the opinion that this error was not prejudicial to the defendant in any very appreciable degree. Even if the exhibit had been excluded, it is not probable that the jury would have arrived at any different verdict from that which was rendered. After reading the evidence, we are satisfied that a true and correct verdict was returned.

The judgment and order are affirmed.

We concur: HOUSER, J.; YORK, J.

126 Cal.App. 477

CARLSON v. KOLB'S BAKERY et al.

Civ. 4568.

District Court of Appeal, Third District, California.

Sept. 28, 1932.

1. Assignments for benefit of creditors ⇐250.

Where assignee for benefit of creditors breached agreement to sell assigned property to plaintiff and sold to another, and plaintiff secured judgment against such assignee for return of money, plaintiff had no cause of action to set aside transfer, absent showing of fraud or connivance or at least notice; plaintiff not being a creditor of assignor.

2. Assignments for benefit of creditors ⇐240.

Assignee for benefit of creditors not furnishing bond and inventory could not sell property (Civ. Code, §§ 3449–3473).

3. Assignments for benefit of creditors ⇐240.

Act of assignee for benefit of creditors in optioning property to plaintiff without authority was merely that of individual with but individual liability.

4. Assignments for benefit of creditors ⇐249.

Purchaser at sale by assignee for benefit of creditors, being neither creditor nor in privity with assignor, could not urge irregularity with reference to sale (Civ. Code, §§ 3449–3473).

5. Pleading ⇐225(2).

Where it is apparent from facts pleaded that no good cause of action could be framed thereon, leave to amend is properly denied.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Gustave A. Carlson against Kolb's Bakery and others. From a judgment of dismissal, plaintiff appeals.

Affirmed.

James A. Miller, of Los Angeles, for appellant.

Howard Hemenway and W. Cloyd Snyder, both of Los Angeles, for respondents.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

PARKER, Justice pro tem., delivered the opinion of the court.

This is an appeal by plaintiff from a judgment of dismissal entered after the general demurrer of defendants to the complaint of plaintiff had been sustained without leave to amend.

The nature of the claimed cause of action and the grounds of the appeal can be gathered from a detail of the complaint. After the preliminary allegations of incorporation and residence it is alleged:

That on or about June 25, 1929, the defendant Charles R. Warfel was appointed assignee for the benefit of creditors of Rye-Krax Corporation; that on or about July 12, 1929, said Warfel, while acting as assignee, took and received from the plaintiff the sum of $500 as a deposit on a bid for the purchase of certain real estate which had come into the control of said Warfel, assignee, as aforesaid; that thereafter the said Warfel was unable to complete the transfer of the real estate, and that plaintiff obtained a judgment against Warfel, as such assignee, for the sum of $500 and costs, which judgment has become final; that on or about September 12, 1929, Warfel, acting as assignee, sold and transferred to Kolb's Bakery the real property involved; that Warfel had not, at the time of the sale to Kolb's Bakery, or before or after said date, ever filed any bond as provided by section 3467, Civil Code; that at no time had Warfel ever filed any inventory, as assignee, setting forth the assets of the estate of his assignor, nor was such inventory ever filed at all; that Warfel has no other assets of the estate of his assignor. Plaintiff prays judgment that the sale from Warfel as assignee to Kolb's Bakery be canceled and set aside; that the said Kolb's Bakery execute sufficient instruments to reinvest the title to the property in Warfel, as assignee; and that Warfel be enjoined from further disposing of the property until the provisions of law governing assignments for the benefit of creditors have been complied with, being title 3, part 2 of division 4 of the Civil Code.

The defendants demurred on the general ground that the complaint did not state a cause of action. As noted, the demurrers were sustained, without leave to amend, and judgment followed.

It seems to be the theory of appellant that, inasmuch as the assignee had not complied with the provisions of the Civil Code, cited, the assignment was void. For the purposes of this discussion, this contention may be conceded. Yet little comfort comes to the appellant. If the assignment was and is void, it is necessarily void for all purposes. The result would be to leave the property still in the ownership of the assignor, and any dealing therewith negotiated by and through the assignee would fall. This latter result would include the claim of plaintiff.

[1] The plaintiff is not a creditor of the assignor, and claims no privity with the said assignor. Whatever steps the assignor or the assignee may have taken in subjecting the property of the former to the claim of creditors would be of no concern to plaintiff. The plaintiff dealt with Warfel as assignee, recognizing his assignment and his right to act thereunder. When Warfel agreed to sell the property to plaintiff, either he had the right so to do or he did not. It having developed, for some reason not stated, that a transfer could not be made, then plaintiff had open a variety of remedies. However, he chose to seek recovery of his deposit and pursued this remedy to judgment. This judgment, it may be assumed, remains unsatisfied, inasmuch as the complaint alleged that there are no other assets remaining in the hands of the assignee. The judgment against the assignee was a claim against the estate of the assignor. However, the statement of facts given by appellant indicates that this judgment was obtained at a date subsequent to the transfer of the property to Kolb's Bakery.

We may, as indicated, disregard the assignment altogether and view the case from the standpoint of two individuals transacting business. Plaintiff entered into the agreement of sale with Warfel. Warfel breached the agreement and sold to a third party. Plaintiff secured judgment against Warfel for the return of the money. It is obvious that plaintiff would have no cause of action to set aside the transfer to the third party, in the absence of some showing of fraud or connivance or at least notice.

Here there is no allegation that the judgment ever became a lien upon the property or that any judgment existed prior to the last transfer. There is no allegation throwing suspicion upon the sale as being in fraud of creditors, nor is there any allegation that the sale price was inadequate, or that the purchaser took with any notice, actual or constructive.

[2-4] Referring to division 4, part. 2, title 3, of the Civil Code, embracing sections 3449 to 3473, inclusive, we find outlined the entire subject of assignments for the benefit of creditors. It is provided that the assignor, or, in case of his neglect, the assignee, must file an inventory of all the assets of the assignor. Likewise is provision made for the making, approval, and filing of a good and sufficient bond. Section 3468 then provides as follows: "Until a verified inventory has been made and filed, either by the assignor or assignee, as required by the provisions of this title, and the assignee has given the bond required by the last section, such assignee has no authority to dispose of the property of the estate, or any part of it (except in the case of perish-

able property, which in his discretion he may dispose of at any time, and receive the proceeds of sale thereof); nor has he power to convert the property, or the proceeds of any sale of perishable property, to the purposes of the trust."

From the last clause it is apparent that, under the allegations of the complaint, the assignee had no power to sell the property in the absence of inventory and bond. He had no power to convert the property to the purposes of the trust. Thus limited, he had no power to act in any way or manner with reference to a sale of the property. As a consequence, the property itself could in nowise be affected or incumbered by any act of the assignee. Therefore when, without authority of any kind, he optioned the property to plaintiff, his act was merely that of an individual with but an individual liability to respond in damages or to return the moneys received. This liability has been fixed by judgment, and thereby the remedy of the plaintiff elected and exhausted. Whatever irregularity attached to the latter sale, plaintiff, being neither a creditor nor in privity with the assignor, may not urge the same.

[5] We have thus gone into detail to show the complete lack of any cause of action resting in plaintiff to set aside the sale, inasmuch as the order sustaining the demurrers denied leave to amend. Where it is apparent from the facts pleaded that no good cause of action could be framed thereon, the ruling of the court denying leave to amend was proper and an exercise of sound discretion. The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

126 Cal.App. 230

DE MARTINI v. WHEATLEY et al.

Civ. 4667.

District Court of Appeal, Third District, California.

Sept. 23, 1932.

Rehearing Denied Oct. 22, 1932.

1. Trial ⇐349(2).

Whether interrogatories should be submitted to jury rests in trial court's sound discretion (Code Civ. Proc. § 625, as amended by St. 1909, p. 193).

2. Appeal and error ⇐974(1).

Exercise of trial court's discretion respecting submission of interrogatories will not be interfered with unless abuse of discretion is shown (Code Civ. Proc. § 625, as amended by St. 1909, p. 193).

3. Trial ⇐349(2).

Where facts conclusively showed gross negligence of driver of colliding automobile, refusal to submit interrogatories whether plaintiff was passenger for hire, or respecting degree of driver's negligence, *held* not abuse of discretion (Code Civ. Proc. § 625, as amended by St. 1909, p. 193).

4. Trial ⇐127.

It is reversible error to introduce evidence that defendant is insured or by successful tactics purposefully suggest such fact to jury.

5. Appeal and error ⇐1060(1).

That defendant's counsel suggested that other defendant produce his insurance man and was met by retort that such counsel was himself representing insurance company did not require reversal of judgment for plaintiff, who took no part in such controversy.

6. Automobiles ⇐244(11, 20).

Evidence sustained finding that driver of automobile in which plaintiff was riding drove car into intersection recklessly, without looking, and that driver of other colliding automobile was likewise negligent (St. 1923, p. 553, § 113, as amended by St. 1927, p. 1436, § 30; p. 560, § 131, as amended by St. 1929, p. 541, § 55).

7. Automobiles ⇐200.

Where occupant suffered injury by concurrent negligence of operators of both colliding automobiles, negligence of each operator was proximate cause of injury.

8. Appeal and error ⇐930(1).

Appellate court must construe evidence to support verdict if reasonably possible.

It is duty of appellate court to construe evidence to support verdict if it may be done reasonably by accepting as true such evidence as tends to sustain the verdict, unless it be inherently incredible, and to reject as untrue those portions of evidence which conflict therewith.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by Florence De Martini against J. W. Wheatley and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

T. C. Boone, of Modesto, Robert G. Partridge, of San Francisco, and Len H. Honey, of Stockton, for appellants.

T. B. Scott, of Modesto, for respondent.

JAMISON, Justice pro tem., delivered the opinion of the court.

This appeal is from a judgment in favor of plaintiff upon the verdict of a jury for damages sustained by plaintiff resulting from the collision of two automobiles.

The complaint and its amendment contains two counts, in one of which it was alleged that plaintiff was riding as a passenger for hire in the automobile driven by appellant Belle Cardoza, at the time of the collision; and, in the other, it is alleged that plaintiff was riding as a guest therein.

It appears from the evidence that on June 20, 1931, respondent was riding in an automobile operated by Belle Cardoza, and that, at the intersection of two highways, the car driven by Belle Cardoza collided with one operated by appellant Wheatley.

Respondent brought this action against Belle Cardoza and the said Wheatley, as the operators of said automobiles, and joined Joe Cardoza and Frances Cardoza, the parents of Belle Cardoza, as parties defendant, because Belle Cardoza was a minor and her application to operate an automobile had been signed by her said parents. Separate briefs have been filed on this appeal by appellants Cardoza and by Wheatley. Appellants Cardoza's sole ground for a reversal of the judgment against them is based upon the refusal of the trial court to submit to the jury two special interrogatories requested by them. The said interrogatories were as follows: "No. 1. At the time of the accident in question, had the plaintiff Florence De Martini, either paid, or agreed to pay defendants Cardoza, or either of them, for being transported in the Cardoza car? No. 2. Of what degree of negligence, if any, was Belle Cardoza guilty at the time and place of the accident in question? (State whether the same was gross negligence, or ordinary negligence, or slight negligence.)"

[1, 2] Since the amendment of section 625 of the Code of Civil Procedure in 1909 (St. 1909, p. 193), the determination of whether or not the interrogatories should have been submitted to the jury rests in the discretion of the trial court (Eaton v. Southern Pacific Co., 22 Cal. App. 461–468, 134 P. 801, Estate of Witt, 198 Cal. 407–426, 245 P. 197); and such discretion will not be interfered with unless an abuse is shown (24 Cal. Jur. 905; Oberholzer v. Hubbell, 36 Cal. App. 16, 171 P. 436). No contention is made by appellants Cardoza that the evidence did not support the verdict, nor that the instructions of the court did not fully and fairly cover every issue in the case.

[3] The evidence as to whether or not respondent was a passenger for hire is conflicting, but the facts conclusively show that appellant Belle Cardoza was guilty of gross negligence at the time of the accident.

We are of the opinion that the trial court did not abuse its discretion in refusing to submit the said interrogatories to the jury.

[4, 5] Appellant Wheatley contends that the judgment against him should be reversed for the reason that certain remarks were made by counsel of appellants Cardoza to the effect that appellant Wheatley was insured, and that counsel for Wheatley was appearing in the case as a representative of an insurance company. The remarks to which reference is made occurred as follows: The attorney representing the Cardozas was cross-examining Wheatley, and in the course of that examination asked the witness if he had not made a statement regarding the accident to a certain person. Thereupon the following conversation took place between Mr. Boone, the attorney for Wheatley, and Mr. Honey, the attorney for the Cardozas:

"Mr. Boone: We object to any reference to that statement, I am going to insist on that. He is not being fair. Let him bring that Insurance man here, whoever it is.

"Mr. Honey: That isn't an Insurance man, if anybody happens to ask you, that is a gentleman in my employ.

"Mr. Boone: I know the fat boy.

"Mr. Honey: You are the one representing the Insurance Company here, I am not.

"Mr. Boone: We will let the jury decide that."

No request was made by Mr. Boone that the court instruct the jury to disregard the remarks of Mr. Honey, though the court, in its instructions, did state to the jury that no insurance company was a party to, or interested in, the action.

The rule is well settled that, where the plaintiff introduces evidence that the defendant is insured, or by deliberate purpose or by successful tactics purposefully suggests this fact to the jury, it constitutes reversible error (Hodge v. Weinstock-Lubin & Co., 109 Cal. App. 393, 293 P. 80); and it is improper for counsel to endeavor to get such a fact before the jury by questions designed solely for that purpose (Nichols v. Nelson, 80 Cal. App. 590, 252 P. 739, Citti v. Bava, 204 Cal. 136, 266 P. 954). In the instant case respondent made no effort to bring to the attention of the jury the fact that Wheatley was insured, and took no part in the controversy between the attorneys who represented appellants. Boone, Wheatley's attorney, began the controversy by suggesting to Honey that he produce his insurance man, and was met by the retort from Honey that he (Boone) was representing the insurance company. It would seem that each was attempting to create the impression that the other was insured.

However, no authority has been cited that would require a reversal under these conditions, nor have we been able to find any. Appellant Wheatley next contends that there is no evidence to support the verdict against him.

[6] The accident in this case occurred at the intersection of Kierman and Tooms avenues, which cross each other at right angles. Kierman avenue runs east and west, while Tooms avenue extends north and south. The Cardoza car was traveling east on Kierman avenue, and the Wheatley car was going south on Tooms avenue. There was a vineyard along the north side of Kierman avenue, extending to the intersection of said avenues, the vines being in full foliage, and about 4 feet high, and on the west side of Tooms avenue there was a barn standing 15 feet from said avenue and north of said intersection 250 feet. Belle Cardoza testified that, seated in her automobile, at points 150 feet, 100 feet, and 50 feet west of said intersection, while driving on Kierman avenue, she had no difficulty in seeing Tooms avenue from the intersection as far north as the barn; that the vines in the said vineyard did not prevent her from seeing Tooms avenue, because the car was higher; that she could see along Tooms avenue for 200 feet north of said intersection, when she was 50 feet west of the intersection, but saw no automobile on Tooms avenue; that she was traveling at a speed of 25 to 35 miles per hour as she entered the intersection, and did not see the Wheatley car until it was within one foot of her car. The Wheatley car struck the Cardoza car on the left hind wheel, causing the Cardoza car to turn completely over at least once, after going a distance of 50 feet from the place of impact. Wheatley testified that he did not see the Cardoza car until his car was 25 feet north of the intersection; at that time the Cardoza car was 150 feet west of the intersection in Kierman avenue, and was traveling at a speed of 35 or 40 miles per hour, and that the speed of said car seemed to be increasing; that his car was proceeding at less than 15 miles per hour when he first saw the Cardoza car. He also testified that when he first saw the Cardoza car it was distant from him about 25 feet. Some five days after the accident he made a statement to an investigator, a Mr. Rains, regarding the accident, and in that statement he admitted that he told Rains that as he came to the intersection he looked to the left and saw the road clear in that direction, and then he looked toward the right, and for the first time saw the Cardoza car, squarely in front, slightly to his right, and that, before witness could do anything, the front of his car struck the left hind wheel of the Cardoza car, and that the Cardoza car entered the intersection just a little before his car. He also testified that his car was equipped with four-wheel brakes, and that he applied them when he was 25 feet from the intersection; that the front frame of his car struck the Cardoza car a heavy blow on the rear left wheel, sufficient to make a dent in the wheel and bend the front frame of his car. He testified that his view of Kierman avenue was somewhat obscured by the vines of the said vineyard as he approached the intersection, but by looking carefully he could see the tops of the cars moving thereon. Respondent was reading a time-table when the accident happened, and did not see the Wheatley car before it struck the Cardoza car, but she testified that to the best of her belief the front part of the Cardoza car had passed the center of the intersection when the collision took place.

Section 113 of the Motor Vehicle Act (as amended by St. 1927, p. 1436, § 30) provides that the speed of the car shall not exceed 15 miles per hour when traversing an intersection, where the driver's view is obstructed at any time during the last 100 feet of his approach to the intersection when he does not have a clear and uninterrupted view of the intersection and of all traffic upon all highways entering such intersection for a distance of 200 feet.

Section 131 of said act (as amended by St. 1929, p. 541, § 55) provides that a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection. Appellant Wheatley admitted that the Cardoza car entered the intersection before his own car. His car struck the Cardoza car such a heavy blow that it dented its left hind wheel and bent the front framework of his car.

We are of the opinion that there was evidence that warranted the jury in finding that Belle Cardoza drove her car upon the intersection in a reckless manner, without first taking the precaution of looking to see whether vehicles were approaching the said intersection upon Tooms avenue. We are also of the opinion that Wheatley, by his own admissions, was negligent in the operation of his car. This collision took place at 6:30 a. m.; the day was clear and the sun shining, and, from the evidence, the jury had the right to believe that each of said cars was visible to the other for a distance of at least 200 feet from the intersection, had the drivers thereof taken the precaution to look. It is apparent that both approached the intersection at a speed that was not careful or prudent under the circumstances that then existed.

[7] If respondent suffered the injury by the concurrent negligence of both Belle Cardoza and Wheatley, then such negligence of each is the proximate cause of her injuries, and she may recover from either or both of

them. Merrill v. Los Angeles Gas & Electric Co., 158 Cal. 499, 111 P. 534, 139 Am. St. Rep. 134, Springer v. Pacific Fruit Exchange, 92 Cal. App. 732, 268 P. 951.

[8] It is the duty of the reviewing court on appeal to construe the evidence so as to support the verdict, if it may be done reasonably; that is to say, to accept as true such evidence as tends to sustain the verdict, unless it be inherently incredible, and to reject as untrue those portions which conflict therewith. Truitner v. Knight, 83 Cal. App. 655, 257 P. 447; Neher v. Kauffman, 197 Cal. 674, 242 P. 713.

We find no error in the record, and therefore the judgment against all of the appellants is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

126 Cal.App. 397

HIBERNIA SAVINGS & LOAN SOC. v. SUPERIOR COURT IN AND FOR YUBA COUNTY et al.

Civ. 4700.

District Court of Appeal, Third District, California.

Sept. 27, 1932.

Rehearing Denied Oct. 27, 1932. Hearing Denied by Supreme Court Nov. 25, 1932.

1. Equity ⇐66.
One who seeks equity must do equity.

2. Equity ⇐39(1).
When equity court takes jurisdiction, it takes jurisdiction for all purposes.

3. Prohibition ⇐1, 5(1).
Writ of prohibition should not issue for trivial causes, nor to restrain ordinary course of procedure.

4. Prohibition ⇐5(3).
Mortgagee *held* not entitled to prohibition to restrain mortgagor from proceeding with action to enjoin mortgagee from proceeding with sale under notice of sale published after mortgagee commenced pending foreclosure action, notwithstanding mortgagor did not specifically tender any amount.

Mortgagee was not entitled to prohibition, since mortgagee, by its foreclosure action, tendered an issue which had been joined, and when equity takes jurisdiction, it takes jurisdiction for all purposes, and the mortgagee could not oust the court of jurisdiction by a claimed right under the mortgage inconsistent with its action, and, since the mortgagor admitted its obligation but sought to have the exact amount thereof determined by an accounting impliedly offering its property of a greater value than the claimed indebtedness as security for the payment of the debt, the court which had taken jurisdiction of the foreclosure action had jurisdiction to proceed and determine on what equities, if any, relief would be accorded.

Application to the Supreme Court, by the Hibernia Savings & Loan Society, for a writ of prohibition to compel the Superior Court of the State of California in and for the County of Yuba, and Hon. K. S. Mahon and another, Judges of the Superior Court who alternate in holding sessions of the court in the County of Yuba, to desist from any further proceedings in certain litigation, wherein an alternative writ issued, returnable before the Court of Appeal.

Writ discharged.

Tobin & Tobin, of San Francisco, Rich, Weis & Carlin, of Marysville, and George A. Clough, of San Francisco, for petitioner.

Richard Belcher, of Marysville, for respondents.

PARKER, Justice pro tem., delivered the opinion of the court.

This is an original proceeding seeking a writ of prohibition to compel respondent court and the judges thereof to desist from any and further proceedings in certain litigation. The application was first made to the Supreme Court, out of which the alternative writ issues, returnable before us. The general nature of the proceedings and the grounds urged in support thereof will follow.

On April 18, 1930, or thereabouts, the Ellis Estate Company, a corporation, made and delivered to Hibernia Savings & Loan Society its promissory notes in and for the amount of $64,000, payable one year after date. The said notes were secured by mortgage upon certain real estate and improvements thereon, all situate in the county of Yuba. This mortgage was in the usual form, providing that the mortgagee was entitled to possession upon default and upon said default the mortgagee might apply for the appointment of a receiver to husband the rents, profits, etc. Likewise did the mortgage clothe the mortgagee with the right to liquidate all liens for taxes or otherwise. The said mortgage contained a power of sale in the following language: "And the mortgagor hereby empowers the mortgagee to sell and convey said mortgaged property at any time after default made in the payment of said promissory notes, or the interest thereon, or any of said installments as provided in said promissory notes, or after breach of any ob-

ligation for which this mortgage is security; and such sale may be public or private at the option of the mortgagee and may be for such price and on such terms as to payment or otherwise as the mortgagee may deem proper; at any such sale the mortgagee in its own name, or in the name of any person, shall have the right to purchase; and the mortgagor hereby authorizes and empowers the mortgagee to execute and deliver in the name of the mortgagor a good and sufficient deed and conveyance of said property, or any part thereof, and any recitals contained in any conveyance of the mortgaged property which may be made by the mortgagee must be deemed conclusive evidence of the facts recited."

Default having been made in the payments, the Hibernia Society, mortgagee, did on October 30, 1931, commence an action in the superior court, in and for Yuba county, seeking to foreclose the said mortgage. This action is now at issue, and was at issue when the alternative writ was issued herein.

At the time of the commencement of the proceeding to foreclose, the plaintiffs therein obtained, upon ex parte application, an order appointing a receiver to take possession of the mortgaged premises, which said receiver duly qualified and took possession of the property and the proceeds therefrom.

Thereafter, upon motion of the defendant mortgagor, made after due and regular notice, the court in which said foreclosure action was pending did make and enter an order rescinding and setting aside the order theretofore made appointing said receiver. An appeal was taken to the Supreme Court from the last order and said appeal is now pending after motion to dismiss the same was denied. 13 P.(2d) 929.

On September 24, 1931, the mortgagee Hibernia Savings & Loan Society filed for record in Yuba county "Notice of Breach of Obligation Secured by Mortgage, and of Intention to Sell Real Property Described therein," declaring a breach of the obligation secured by the mortgage and the intention of the mortgagee to sell the property described in the mortgage. Thereafter notice of sale under power of sale given in mortgage was published and after passing of the original date of proposed sale an additional or new notice of sale was published giving public notice that the property would be sold on March 7, 1932.

The proceeding or action against which the alternative writ of prohibition is now outstanding now follows:

The mortgagor Ellis Estate Company on the 15th day of January, 1932, commenced an action in the county of Yuba against Hibernia Savings & Loan Society to enjoin and restrain the latter from proceeding under the notice of sale.

A preliminary order was entered restraining defendant in the action from any and all further proceedings under the power of sale and defendants' demurrer to the complaint and to the amended complaint was overruled and defendant allowed ten days within which to answer and the restraining order continued in force until the trial of said action.

The particular point stressed here by the petitioner is that the court below is without jurisdiction to proceed with the trial on the sole ground that the plaintiff in the action does not specifically offer to do equity by tendering or offering to pay to petitioner the amount of its mortgage debt or any amount.

[1] It is a very general principle of equity jurisprudence that one who seeks equity must do equity. However, it is another thing to hold that by a failure so to do no jurisdiction vests in the tribunal in which relief is sought.

The right of the chancellor to withhold relief presupposes his jurisdiction to determine what relief he will withhold. In the action under discussion the plaintiff admits the mortgage debt; it makes no attempt to abridge the debt, but, on the contrary, admits it. It alleges that the property subjected to the mortgage is of a value far in excess of the mortgage debt and alleges that funds have come into the hands of the mortgagee as a credit against the mortgage debt, the exact amount of which funds being peculiarly within the knowledge of the mortgagee, and asks for an accounting thereof before any sale is permitted.

Another controlling feature of the entire case is the fact that the petitioner herein first sought the aid of the court in its action to foreclose the mortgage. By that action it tendered an issue which has been joined.

We have not before us the pleadings in the foreclosure action. There is but one action to foreclose a mortgage, and from the recitals and admissions in the record we assume that the action brought is in the usual form of a foreclosure action wherein plaintiff seeks a decree determining the lien of mortgage and ordering the sale of the property encumbered.

[2-4] When a court of equity takes jurisdiction it is elementary that it takes jurisdiction for all purposes, and the petitioner herein having submitted its claim and its rights thereunder it will not be permitted to oust the court of jurisdiction by a claimed right under the mortgage inconsistent with its action.

There has been a receiver in charge of the property who has collected rents therefrom; there have been payments made upon the mortgaged debt to the extent that the sale under the power given by the mortgage would

be to discharge an obligation indefinite in amount.

The petitioner herein has sought from the courts a relief that is in all ways adequate, merely a foreclosure of the mortgage. In this proceeding the court will determine the amount due after a complete accounting and enter its decree accordingly. The restraint of the sale under the power given on the mortgage in no way can affect any substantial right of the petitioner under the facts of the instant case.

When the petitioner herein submitted its mortgage and the debt claimed thereunder to the equitable cognizance of the courts it submitted for determination the entire controversy. After such a submission the chancellor would be empowered, by appropriate procedure, to restrain further proceedings as to a sale, without the necessity of a separate action. All that the restraining order before us and all that the action out of which said order emanated can accomplish is the maintenance of the status quo pending the determination of the foreclosure action.

If the writ herein should be made absolute, its effect would be to dismiss the foreclosure suit now at issue, to render moot the questions presented on the appointment of the receiver and the vacating of the order of appointment. It would still leave in issue the accounts of the receiver and the settlement thereof and all the expense, time, and trouble of the mortgagor incurred at the instance of the mortgagee would be as naught.

We have been cited to no direct authority that a failure of a plaintiff to offer, in his pleadings to do equity, deprives the court of jurisdiction. True, there is an abundance of authority, both here and elsewhere, that equitable relief will be denied or withheld one who himself refuses to do equity, but where one comes in and admits an obligation but seeks to have determined the exact extent or amount thereof, impliedly offering his property of a greater value than the claimed indebtedness, as security for the payment of the debt, we think that the court has jurisdicton to proceed and determine upon what equities, if any, relief will be accorded. We feel that the writ of prohibition should not issue for light or trivial causes nor should the usual and ordinary course of procedure be hampered or restrained by these extraordinary remedies.

If the action of the Ellis Estate Company proceeds to judgment as prayed, the net result thereof will be simply to defer the sale to the time of decree in foreclosure by which decree all of the rights of the parties will have been determined. On the other hand, should the action itself be stopped and the sale under the power of sale proceed, there will follow accounting and, perhaps, a multiplicity of suits involving the validity of the power of sale and the proceedings thereunder.

All that is involved in the entire controversy is the mortgage debt and the property mortgaged. The court below has acquired ample jurisdiction, at the instance of the petitioner herein, over all of the issues involved and over the parties and the subject-matter. Whatever equity that must be done by either party is within the power of the court to decree, as a condition of any relief. Full, complete, and adequate remedy may be obtained without the interposition of this court.

The alternative writ heretofore issued is discharged.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

126 Cal.App. 544

FRUDDEN v. PEPPERS FRUIT CO.

Civ. 8457.

District Court of Appeal, First District, Division 2, California.

Sept. 30, 1932.

Rehearing Denied Oct. 29, 1932.

1. Frauds, statute of ⇐116(3, 4).

Corporation's guaranty of individual's account being required to be in writing, its agent's authority to execute agreement was also required to be in writing (Civ. Code, §§ 1624, 2309, 2793).

2. Corporations ⇐432(5).

Grocer could not recover on corporation's guaranty of individual's account, in absence of evidence that corporation's agent, who executed guaranty, had authority to do so.

3. Frauds, statute of ⇐156.

Pleading and proof in action on corporation's guaranty of individual's account for groceries *held* to show that individual was principal debtor, so as to preclude recovery, in absence of written authority of corporation's agent to execute guaranty (Civ. Code, §§ 1624, 2309, 2793, and § 2794, subd. 2).

The record showed that groceries were billed to individual and account carried in his name, correspondence between plaintiff and defendant corporation's agent showed that they were dealing with guaranty of individual's account, and complaint was based on alleged agreement of corporation to answer for individual's debt.

4. Frauds, statute of ⇐23(1).

Corporation's guaranty of individual's account *held* not original undertaking, not re-

quired to be in writing, because given before and contemporaneously with creation of account (Civ. Code, §§ 1624, 2309, 2793, and § 2794, subd. 2).

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Carl Frudden, an individual doing business under the name and style of Frudden's Grocery, against the Peppers Fruit Company, a corporation. Judgment for plaintiff, and defendant appeals.

Reversed.

Rohe & Weikert, of Los Angeles (G. V. Weikert, of Los Angeles, of counsel), for appellant.

Charles B. Rosendale and Edson G. Thomas, both of Salinas, for respondent.

SPENCE, J.

Plaintiff furnished groceries to one J. M. Islas and sought to recover the balance due therefor from the defendant corporation. From a judgment in favor of plaintiff, defendant appeals.

Plaintiff based his claim against the defendant corporation upon a written guaranty of the account of said J. M. Islas, which guaranty was executed in the name of the defendant corporation on March 2, 1931, by one J. L. McMahon, an employee of the defendant corporation. This guaranty was revoked in writing by said J. L. McMahon on March 21, 1931, at which time Islas was indebted to plaintiff in the sum of approximately $380. Thereafter plaintiff continued to extend credit to Islas and received payments from him in excess of the balance due at the time of the revocation of the guaranty. Islas failed to pay his account in full, and plaintiff brought this action against the defendant corporation.

Plaintiff alleged in his complaint that the defendant executed a "guarantee in writing * * * whereby the defendant agreed to answer for the debt of J. M. Islas * * *"; that plaintiff thereafter "sold and delivered to said J. M. Islas" merchandise of the value of $1,150.69, of which Islas had paid $530.14, leaving a balance of $620.55; that plaintiff demanded said balance of said Islas, but he failed and refused to pay any part thereof; and that thereafter plaintiff demanded of defendant that it pay said balance, but it failed and refused to do so. By way of answer, defendant denied, among other things, that it executed any guaranty, and alleged that said J. L. McMahon was not authorized in writing or otherwise to execute the purported guaranty. The trial court made findings in favor of plaintiff and against the defendant on the issues thus made by the pleadings.

[1, 2] In our opinion, the judgment of the trial court must be reversed. The agreement to answer for the debt of said J. M. Islas was required to be in writing (Civ. Code, §§ 1624, 2793), and, as said J. L. McMahon was merely an employee or agent of the appellant corporation, his authority to execute the written agreement was likewise required to be in writing. Civ. Code, § 2309; Clement v. Young-McShea Amusement Company, 70 N. J. Eq. 677, 67 A. 82, 118 Am. St. Rep. 747; Lindhorst v. St. Louis Protestant Orphan Asylum, 231 Mo. 379, 132 S. W. 666; Power v. Immigration Land Co., 93 Minn. 247, 101 N. W. 161. The testimony offered by appellant showed that said J. L. McMahon had no authority whatever to execute the agreement in question, and it is conceded by respondent that there was no evidence of any written authority. It follows that the findings of the trial court relating to the execution of the guaranty by the appellant corporation and relating to the authority of McMahon to execute the same on behalf of the appellant corporation are not sustained by the evidence.

[3] In support of the judgment, respondent contends that said J. L. McMahon had sufficient authority to execute the agreement, and that written authority was unnecessary. He argues that this is an original obligation of the corporation rather than an agreement to answer for the debt of another, and therefore not required to be in writing by virtue of the provisions of subdivision 2 of section 2794 of the Civil Code. Respondent's contention cannot be sustained. The record shows that the goods were billed to said J. M. Islas, and that the account was carried in his name. The correspondence between respondent and said J. L. McMahon, including the original guaranty and revocation, shows that they were not dealing with an account of the appellant corporation but with a guaranty of the account of the said J. M. Islas. Respondent's complaint was based on an alleged agreement of the appellant corporation "to answer for the debt of J. M. Islas." The section relied upon by respondent has no application under its terms, unless the agreement is such "as to render the party making the promise the principal debtor, and the person in whose behalf it is made, his surety." There was neither pleading nor proof of such an agreement here, but, on the contrary, the pleading and proof showed that Islas was the principal debtor.

[4] Respondent further contends that, as "the alleged guarantee was given prior to and contemporaneously with the creation of the account," it was an original undertaking, and therefore a writing was not required. This contention is likewise without merit. The only authority referred to by respondent in this connection is the language found in 12 California Jurisprudence, 866, § 19, and the

early California cases cited in the footnote. These cases are not helpful. They were decided under an earlier statute of frauds, unlike the present statute, and, with one exception, there was a writing signed by the party to be charged in each of those cases. In Clay v. Walton, 9 Cal. 328, the single exception mentioned above, there was no writing, and the court held that the agreement was invalid, regardless of the time when it was made. In the following section of the text (12 Cal. Jur. 867, § 20) it is said: "But if any credit is given the beneficiary of the contract, or he is in any degree liable for the indebtedness, then another's promise to answer for the debt is merely a guaranty, and void unless written." The authorities cited in the footnote amply support this portion of the text. In the present case credit was given to said J. M. Islas and he was liable for the indebtedness. The guaranty did not purport to make the appellant corporation the principal or original debtor. It was required to be in writing, and the authority of said J. L. McMahon to execute it was likewise required to be in writing.

We deem it unnecessary to discuss the further contentions of appellant, as it appears that the conclusions above set forth will be determinative of this litigation.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

126 Cal.App. 331

BENSON et ux. v. HAMILTON et al.

Civ. 8528.

District Court of Appeal, First District, Division 1, California.

Sept. 27, 1932.

1. Fraud ⇐64(2).

Existence of intent at time of promise not to perform is always fact question (Civ. Code, § 1574).

2. Appeal and error ⇐994(3), 1012(1).

Credibility of witnesses and weight of testimony are for trial court rather than appellate court (Code Civ. Proc. § 1847).

3. Appeal and error ⇐1010(1).

Trial court's findings may be overthrown only when they totally lack support of substantial evidence.

4. Appeal and error ⇐1011(1).

In case of conflicting evidence, trial court's decision will not be interfered with where there is substantial evidence supporting decision.

5. Fraud ⇐58(1).

In action for fraud predicated on promise made as part of negotiations for exchange of properties that defendant would pay taxes and interest and leave certain equipment on land, trial court's finding of no fraud *held* supported by evidence.

6. Fraud ⇐4.

In action predicated on fraud, essence of fraud is existence of intent at time of promise not to perform it.

7. Fraud ⇐66.

Finding that plaintiffs were not induced by fraudulent representations, to make agreement, and that allegations of false promises were not true, *held* sufficient as finding there was no promise made without intention to perform it.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Martin Benson and wife against M. F. Hamilton and others. From the judgment, plaintiffs appeal.

Affirmed.

John C. Scott, of Oakland, for appellants.

Frank O. Nebeker, of Oakland, for respondents F. J. and May F. White and M. L. Blaikie.

GEORGE H. THOMPSON, Justice pro tem.

In October, 1928, the plaintiff Martin Benson and the defendant F. J. White, each being then the owners of certain interests in real property, orally negotiated on certain terms (questions as to whether these terms embraced certain promises on the part of F. J. White, and, if such promises were made, whether they were made without any intention of performing them, have given rise to this action) an exchange of their properties. The properties were incumbered; the incumbrances taking different forms. As the result of such oral negotiation, deeds and transfers were on October 27, 1928, executed and delivered by the respective parties, and, with the object of equalizing the values of the properties exchanged, Martin Benson made and delivered to F. J. White a promissory note payable in thirty days for $250. At the time of the said negotiation there were on the property of White certain special improvements or equipment consisting of a gas tank, a pump, a power saw, pipe, wire, and electrical fixtures that White had been making a special use of, and also on this property there was interest due in the amount of $50.49, and a personal property tax, a lien upon the premises, in the amount of $197.02. The negotiation was, as has been remarked, oral. Plaintiff Benson claims that White promised he would pay the said

interest and taxes, and would leave as part of said premises the said special improvements or equipment hereinbefore mentioned. White did not pay either said interest of $50.49 or said taxes of $197.02, and, on vacating the premises, took with him said equipment; his position being that he had made no such promises as Benson claimed. Benson had one of White's trucks attached under attachment proceedings which he initiated; some feeling ensued; a personal interview failed to adjust matters; and on December 5, 1928, a notice of rescission was served by plaintiff on defendants reading: "You will please take notice that by reason of your failure to pay Personal Property Taxes appearing on the Tax Bills for the property in the City of Albany you caused to be conveyed to us on the 27th day of October, 1928, and likewise by reason of your failure to pay interest on the respective loans and contract due and accrued to October 27, 1928, we hereby rescind all transactions we had in relation to the exchange of properties and demand that you convey back to us the lands deeded to you and situated in Stanislaus County, California, and return to us the note for $250.00; and we hereby offer to you a deed for the property conveyed to us situated in Albany, California, and also to re-assign to you the contract of purchase and sale of certain other lots. The description of all of said property is fully and completely known to you."

Thereafter the plaintiff brought this action for fraud, predicated upon the proposition of a promise made without any intention to perform, and asked for judgment and decree that the said transaction and the said agreement of exchange be declared and decreed to be rescinded, for restoration to plaintiff, and for return of note, etc. The defendants denied the allegations of plaintiffs' complaint. The case was tried before the court, and judgment went for the defendants. On the issues presented by the pleadings, the court (among other things) found: "4. That plaintiffs were not induced to make said agreement upon any false and/or fraudulent representations of defendants, or either of them. 5. That the allegations of false promises and false misrepresentations on the part of defendants, as alleged in paragraph VII of plaintiffs' amended complaint are not true." The trial court concluded that the plaintiffs failed to make out any case for rescission of the contract of exchange, and that the plaintiffs were not entitled to take anything.

It is, of course, clear that a promise made without any intention of performing it, committed by a party to a contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract, is actual fraud (section 1572, subd. 4, Civ. Code), and that, when such fraud is established, the deceived party is entitled to rescission or other appropriate relief. This doctrine has received exposition in many California cases: Newman v. Smith, 77 Cal. 22, 18 P. 791; Hays v. Gloster, 88 Cal. 560, 26 P. 397; Lawrence v. Gayetty, 78 Cal. 126, 20 P. 382, 12 Am. St. Rep. 29; Matteson v. Wagoner, 147 Cal. 739, 82 P. 436; Becker v. Schwerdtle, 141 Cal. 386, 74 P. 1029; Martin v. Lawrence, 156 Cal. 191, 103 P. 913; Millar v. Millar, 175 Cal. 797, 167 P. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184.

[1] In an action predicated on this ground, the essence of the fraud is the existence of an intent at the time of the promise not to perform it. Becker v. Schwerdtle, supra, at page 390 of 141 Cal., 74 P. 1029. The existence of such intent at such time (actual fraud) is always a question of fact. Section 1574, Civ. Code; Bechtold v. Coney, 42 Cal. App. 563, 183 P. 841.

[2-5] The question presented to the trial court was whether the actual fraud alleged by the plaintiffs had been committed. The transcript discloses that there was conflict in the evidence bearing on this question of actual fraud. The defendants had denied it in their answer, and at the trial, as against the testimony of the plaintiff Benson, produced testimony to the effect that White had not as a fact undertaken to pay the said interest or the said taxes, that he was given the right to remove the said pipes, gas tank, pump, wires, etc., and that he acted in good faith as he had understood the agreement. As to the right to remove the equipment, there was testimony that White, at the time of making the deed, said to Benson: "If I make this deed now * * * I have a tank and a pump out in the back yard, * * * and also I have wires that lead from the back porch to the garage, I have there now, * * * these of course pertain to the trucking business, * * * and I would like to take them off the place when I go;" that Benson said: "You can have them. They will be of no use to me, because * * * I am going to trade the property, and they won't be any good." There was likewise testimony produced that Mrs. White said to the plaintiff Benson that she had an electric light in the kitchen that she had bought, that there were also some flowers, and asked if she could take them, and that plaintiff Benson said: "Yes, you can take anything you want to, Mrs. White." It was of course the province of the court to weigh this testimony and to attach to it its proper value. The credibility of the witness, as well as the weight to be given the testimony, are questions for the trial court. Section 1847, Code Civ. Proc.; Dunphy v. Dunphy, 161 Cal. 380, 119 P. 512, 38 L. R. A. (N. S.) 818, Ann. Cas. 1913B, 1230; Rolland v. Porterfield, 183 Cal. 466, 191 P. 913; Dozier v. Hillman, 105 Cal. App. 127, 131, 287 P.

116. Findings of the trial court are to be overthrown on appeal only when they totally lack the support of substantial evidence. Dunphy v. Dunphy, supra, In case of a conflict of evidence, the decision of the trial court will not be interfered with, where there is substantial evidence to support the decision. Bank of Italy v. Zerga, 97 Cal. App. 285, 275 P. 476; Dowd v. Joyce, 85 Cal. App. 377, 259 P. 368; Estate of Burke, 198 Cal. 163, 244 P. 340, 44 A. L. R. 1341; Richardson v. Marshall, 201 Cal. 584, 258 P. 47; Bank of Italy v. Cadenasso, 206 Cal. 428, 270 P. 931, 274 P. 536; Murray v. Tulare Irrigation Co., 120 Cal. 311, 49 P. 563, 52 P. 586; Rolland v. Porterfield, supra; McRae v. McRae, 67 Cal. App. 480, 485, 227 P. 933. In this aspect, it cannot be held that the determination of the court was without substantial support in the evidence.

[6] It is further contended that, as this action is for fraud predicated upon the proposition of a promise made without any intention to perform it, the finding of the court hereinbefore recited is insufficient; in other words, it is contended that there is no finding made upon the issue of the alleged promises made without any intention of performing them. As against this contention, it seems proper to repeat what has already been said: In an action predicated on this ground, the essence of the fraud is the existence of an intent at the time of the promise not to perform it. Becker v. Schwerdtle, supra.

[7] In the case of Lawrence v. Gayetty, supra, where the complaint had averred (page 128 of 78 Cal., 20 P. 382) promises made without any intention of performing them, and where the court's finding in connection with such averment was "(8) 'That there has been no false representation nor fraud in fact * * *'" (see page 130 of 78 Cal., 20 P. 382, 384), a like contention was made that the judgment was not supported by the findings (see page 132 of 78 Cal., 20 P. 382, 385); but the Supreme Court said: "It will be noticed that upon the question of fraud the findings are in favor of the defendants. The finding is that 'there were no false representations nor fraud in fact.' This effectually disposes of that branch of the complaint." It would therefore seem that the finding of the trial court attacked herein is sufficient. As against such a finding as the trial court made, there could be no fraud. We think that the findings of the court should be held sufficient to dispose of the issues tendered by the plaintiffs.

No error sufficient to warrant reversal appearing in the record, the judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

126 Cal.App. 300

PEIS v. MOHR et al. (Hansen et al., Interveners).

Civ. 8195.

District Court of Appeal, First District, Division 1, California.

Sept. 26, 1932.

1. Courts ⇐92.

Courts' dicta should not be permitted to overcome long line of contrary authorities, unless urgently impelled by highly persuasive reasons not previously considered.

2. Divorce ⇐254, 255.

Trial court should not assign and dispose of community or homestead property by interlocutory divorce decree, but such award constitutes error of law, remediable only on seasonable motion for new trial, other appropriate motion, or appeal.

3. Divorce ⇐255.

Failure to move for new trial or appeal from interlocutory divorce decree, disposing of parties' property, within limitation period, renders decree final adjudication of property rights.

4. Divorce ⇐255.

Husband's failure to attack interlocutory divorce decree, awarding community property to wife, within statutory time, finally vested ownership thereof in her.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Holger Jensen Peis, also known as Holger Jensen, against Ernest Mohr, as administrator of the estate of Hedwig Jensen Peis, also known as Hedvig Caroline Jensen, deceased, in which Clara Thomine Marie Hansen and another intervened as parties defendant. Judgment for defendants, and plaintiff appeals.

Affirmed.

Hazel Utz, of San Francisco, for appellant.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco (C. Coolidge Kreis, of San Francisco, of counsel), for respondents.

ATTERIDGE, Justice pro tem.

Plaintiff appeals from an adverse judgment in an action brought by him to quiet title in and to his alleged interest in certain real property in process of administration in the estate of his deceased wife.

Some six months prior to his wife's death an interlocutory decree of divorce had been entered in her favor against appellant upon the ground of extreme cruelty. No appeal or other attack upon this interlocutory judg-

ment had been taken within any of the periods of final limitation prescribed by statute for such attack either by appeal or motion. By its terms the interlocutory decree purported to settle the property rights of the litigants. Its language in this respect was: "* * * The following described *community* property * * * shall be and *is hereby awarded* and assigned to * * * plaintiff * * * to be hers absolutely and forever." (Italics ours.)

Prior to the institution of the divorce suit, the wife had declared a homestead upon the particular property which is the subject of the present quiet title action. It is the contention of respondents that the effect of the interlocutory decree of divorce was to dissolve the homestead and to award the property previously supporting it absolutely and forever to the now deceased wife, and that, by reason of appellant's failure to attack the same within six months, it became and is a final adjudication against all and singular property and survivorship rights of the present plaintiff in and to the said community and homesteaded property.

In support of their contention, respondents rely upon a long line of cases, of which Abbott v. Superior Court, 69 Cal. App. 660, 664, 232 P. 154, and Klebora v. Klebora (Cal. App.) 5 P.(2d) 965, are fairly representative. Those cases in effect hold that, where an interlocutory decree has been entered which therein affirmatively determines how the community property of the spouses is awarded, and all periods of time have expired within which it might have been attacked either by appeal or motion, it thereupon becomes at the end of such periods of limitation a conclusive adjudication of all property rights embraced within its provisions.

[1] In opposition to respondents' above-stated contention, appellant urges that a trial court is without power to effect a final determination of the property rights of the spouses in and to community and homesteaded property until such time as the marriage is actually dissolved by final decree. His argument in this respect is that, since rights in both homestead and community property of the given character are essentially and fundamentally based and dependent upon the present and continuing existence of the marriage status, it consequently follows that such rights can only be overcome, divested, or altered by an immediately effective change of such legal status, and that such change can only be effected by a final decree of divorce. It must be conceded that much color is lent to the force of appellant's argument in this respect by certain extensive declarations to that effect which are to be found in the cases of Remley v. Remley, 49 Cal. App. 489, 193 P. 604, 605, Strupelle v. Strupelle, 59 Cal. App. 526, 211 P. 248, and Radich v. Radich, 64 Cal. App. 605, 222 P. 182, and also that the correctness of appellant's said position may not be successfully gainsaid if the certain referred to expressions of opinion contained in the above-mentioned decisions are accepted according to their apparent tenor without further qualification or attempted differentiation. But it is to be noted that in each of the above referred to cases an appeal was taken within the statutory period, and it therefore follows that many of the referred to expressions were in the nature of dicta, as indeed they are so characterized in the case of Klebora v. Klebora, supra. Expressions of the given character ought not be permitted to overcome the long line of authority expressing, in so far as they relate to the situation presented by the present appeal, a contrary view (which will be found cumulated in an annotation contained in 76 A. L. R., at page 293), unless some highly persuasive reason not hitherto considered urgently impels such action.

It should be further stated that these very cases were aptly distinguished from those declaring the more generally recognized rule (as contended for respondents) in the case of Abbott v. Superior Court, supra, upon the precise ground that in each of them appeals had been taken from the interlocutory judgments. By reason of the fact that the dicta of these decisions have frequently cropped out in one form or another in this and kindred appeals and have thereby had a manifest tendency to unsettle the state of the law upon matters which are frequently the subject of litigation, we deem it advisable to later herein point out another simple and fundamental ground of distinction, which does not appear to have been heretofore stressed upon, although it is but a corollary of the distinction pointed out in Abbott v. Superior Court, supra.

The basic decision upon which two of the three cases in question ground their respective enlarged premises is Remley v. Remley. The opinion in that case in so far as it appertained to the matters then properly before the court for decision, simply *held* that a trial court by interlocutory decree of divorce should merely determine how community or homestead property *ought* to be assigned, "but in such interlocutory judgment the trial court *should not* attempt to destroy the homestead character of the property, nor to make an assignment thereof." (Italics ours.) Considered by itself, this language falls quite short of authoritatively determining that a trial court is without power to or cannot in any event make the determination thus criticized, even though its act in so doing be concededly erroneous. It is true that the last above-quoted portion of the opinion is followed by the further declaration: "At the time of the dissolution of the marriage, *and at that time only*, the homestead character may be abolished, and the

property assigned to the respective parties pursuant to the determination made by the court at the time of the trial"—but, in so far as the language last quoted relates to the validity and finality of an interlocutory decree *actually* making such determination and disposition of community or homestead property and from which no appeal has been taken, the same must be held to be mere dictum. No such situation (i. e., one involving the effect of a failure to appeal from an interlocutory decree) was before the court. On the contrary, the court *was* considering only a direct appeal from an interlocutory judgment and reviewing an assigned error of law, as it obviously had a right to do. This dictum was subsequently made the basis of the following more extensive declaration: "* * * The [trial] court *could not* assign or dispose of the community property * * * until such time as the marriage was dissolved absolutely by the final decree of divorce" (italics ours)—in Radich v. Radich, 64 Cal. App. at page 607, 222 P. 182, 183, although it was given a requisite and we think more correct qualification in conformity with the original expression thereof in the application given it in Strupelle v. Strupelle, supra, where the reviewing court contented itself in passing upon a direct appeal from an interlocutory decree of divorce with the following declaration: "The court therefore *should not* assign or dispose of the community property or homestead until such time as the marriage is absolutely dissolved. * * *" (Italics ours.)

[2, 3] From our review of the several cases bearing upon the question presented for our consideration, we conceive the true rule to be as follows: A trial court *should not* by interlocutory decree of divorce eo instante assign and dispose of community or homestead property, athough it may determine therein how such property shall be ultimately awarded and assigned when the marriage is dissolved by final decree of divorce; but, if such court by its interlocutory decree does in fact make such determination and award, its act in so doing constitutes an error of law which can be remedied only on seasonable motion for new trial or other appropriate motion or upon direct appeal. It follows that a consequent failure to pursue any of these remedies within any of the prescribed periods of limitation (of which the longest thereof is six months) renders such decree absolute as a final adjudication of the property rights involved, and as such immune from further or collateral attack. It should not escape observation that, in every divorce suit where the trial court obtains jurisdiction of the parties and the subject-matter of the action, including the matter of settlement of property rights, such court does not exceed its jurisdiction in making by interlocutory decree the final disposition of such rights thus criticized and condemned on direct appeal in Remley v. Remley, supra, but by so doing merely proceeds irregularly by erring in the exercise of such jurisdiction. Such errors and irregularities may be reviewed and remedied only in the manner hereinbefore pointed out.

[4] It follows from these considerations that the failure of the present appellant to initiate any attack upon the interlocutory decree directly awarding to his wife the property involved in the present quiet title action within the time prescribed by statute had the effect of finally vesting in the wife before her death ownership of said property, and that the judgment of the court below was in this respect correct. In view of this determination, it becomes unnecessary for us to discuss a further point urged by respondents in which they assert that a certain alleged "decree" of another department of the superior court, made in the exercise of its probate functions, had the effect of a conclusive adverse determination of appellant's rights in the present action.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

126 Cal.App. 623

PEOPLE v. NOLAN.

Cr. 2173.

District Court of Appeal, Second District, Division 1, California.

Oct. 6, 1932.

Rehearing Denied Oct. 18, 1932.

1. Criminal law ⇐589(2).

Objection that trial court abused discretion in denying continuance for accused's attorney to recover from illness *held* not sustained.

The record disclosed that, because of illness of accused's attorney, trial was continued for 1½ days, at expiration of which accused's attorney was present at court and thereafter without objection or requesting any further continuance announced readiness to proceed therewith.

2. Judges ⇐51(3).

Written statement of accused and supporting affidavit purporting to show trial judge's bias and prejudice *held* not to state sufficient facts to merit consideration, and were properly stricken (Code Civ. Proc. § 170).

Gist of reasons assigned in accused's statement that he would not receive fair and impartial trial if it were presided over

by judge whose disqualification was sought to be established, was that theretofore judge had denied accused's request for postponement for one week, that judge's manner toward accused was harsh and arbitrary, his language, expression, and attitude were indicative of extreme and violent dislike, and that on one occasion judge stated from bench that he was opposed to having cases of such kind continued, and that they ought to be tried right away. Facts disclosed that several continuances or postponements of trial had preceded such remarks of the judge.

3. Criminal law ⇐300.

Denial of motions for leave to add plea of "not guilty by reason of insanity" *held* not abuse of discretion, where motions were made without any supporting facts (Pen. Code, § 1016).

4. Criminal law ⇐265.

Refusal of motion for leave to add plea of "not guilty by reason of insanity" after murder trial had commenced *held* not abuse of discretion though motion was supported by affidavits (Pen. Code, § 1016).

5. Homicide ⇐179.

Excluding certain testimony respecting irrational acts of accused in homicide case *held* not error.

Specifications of error were to effect that, though witness was permitted to testify that accused appeared irrational, he was not permitted to state as a fact that accused was irrational, and that, after same witness had testified that accused appeared to have irrational ideas concerning his fellow policemen, witness was not permitted to respond to the question to "tell us about that."

6. Criminal law ⇐1170(3).

Any error in excluding testimony of expert witness as to accused's capacity of forming or doing intentional or purposeful acts *held* not prejudicial, where substantially same testimony was subsequently admitted.

7. Criminal law ⇐1144(12).

Presumption was that court in striking out medical expert's testimony did not refer to testimony striking out of which would constitute error.

8. Criminal law ⇐1163(1).

Error cannot be presumed, but party claiming error must show error.

9. Criminal law ⇐798(½).

Refusal to instruct that jurors' oath was not mere empty formality, but that accused had right to expect that each juror took oath without any mental reservations, *held* not error.

Though the requested instruction constituted correct declaration of legal principles, refusal thereof was not error, because it embodied nothing that was new or novel and contained no idea or thought which was not within universal knowledge of all persons of ordinary intelligence.

10. Criminal law ⇐829(1).

Refusal of requested instruction substantially covered by instructions given was not error.

11. Criminal law ⇐53.

Any departure of accused from normal mental state induced by voluntary intoxication is no defense.

12. Criminal law ⇐774.

Instructions that voluntary intoxication did not constitute sufficient defense for commission of crime or furnish foundation for related defense of insanity *held* proper under evidence.

Though alleged defense of insanity was not specifically pleaded, defendant under general plea of not guilty was permitted to introduce evidence of consumption by him of large quantity of intoxicating liquor, and that either as result thereof, or as induced by some other cause, defendant was unbalanced, mentally irresponsible, and consequently incapable of forming an intent at the time when the act of which he was charged was committed.

13. Criminal law ⇐822(1).

Instructions must be considered as entirety.

14. Criminal law ⇐1162.

Mere error, unless it is prejudicial, does not constitute sufficient reason for reversal of judgment.

The prejudicial effect of an alleged error must be not only apparent, but must be so harmful as to clearly indicate that in its presence defendant actually, or at least probably, was deprived of the fair and impartial trial guaranteed to him by Constitution and statutes.

15. Homicide ⇐308(3).

Instruction that homicide committed in perpetration of, or attempt to perpetrate, mayhem, constitutes first degree murder, *held* warranted under evidence (Pen. Code, §§ 189, 203, 664).

16. Criminal law ⇐1037(2).

Prosecuting attorney's argument asserting facts rather than inferences properly deducible from evidence and criticizing conduct of accused's attorney *held* not so prejudicial as to require reversal, in absence of objection and request to disregard.

The alleged misconduct of deputy district attorney in argument, among other things, was that he expressed opinion that

defense was outrageous; that defendant had been able to successfully walk around trying to balance a chip on his shoulder because he was ex prize fighter; that he had struck deceased in same manner that prize fighter would have struck her; that deputy district attorney proposed to examine evidence to determine whether defendant had honest genuine defense, and that he did not think blow on head which defendant received when 6 years old had anything to do with case; that man who was in habit of drinking on job probably drank a good deal when he was not on job also; and he also made caustic criticisms of manner in which defendant's attorney conducted defense as respects defenses of mental incapacity, and intoxication.

17. Criminal law ⇐719(3).

Aside from fair argument respecting effect of evidence, no attorney should venture bald opinion stated as fact respecting issue or effect or value or weight of evidence.

18. Criminal law ⇐723(1).

Deputy district attorney's statement in argument that defendant in murder case had only appeal *held* improper.

19. Homicide ⇐232.

In view of jury's implied finding supported by substantial evidence that homicide was result of attempt to perpetrate mayhem, no evidence was necessary to establish that killing was willful, deliberate, and premeditated (Pen. Code, § 189).

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Edward P. Nolan was convicted of murder, and he appeals.

Affirmed.

William J. Clark and Nathan M. Dicker, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Frank Stafford, Deputy Dist. Atty., both of Los Angeles, for the People.

HOUSER, J.

From a judgment of conviction of the crime of murder and from an order by which his motion for a new trial was denied, defendant appeals to this court.

[1] Appellant complains that the trial court abused its discretion "in denying appellant a reasonable continuance for his attorney to recover from the illness with which he was confined to his room at the time the trial started." In that connection, in substance, the facts are that, although on the date when the action was set for trial, by affidavit it appeared that because of his then illness the attorney who represented defendant was unable to be in court, the record also discloses the fact that, because of the inability of said attorney to be then present, the commencement of the trial was actually continued for 1½ days, at the expiration of which said attorney was present in court, and then and there, without objection on his part to the commencement of the trial, or without requesting any further continuance thereof, announced his readiness to proceed therewith. Nor does the record show that at any time thereafter any request was made, either by defendant personally or by his attorney, that because of the illness of the latter the commencement of the trial be postponed either for that or for any other reason, or that after the trial had started a continuance thereof be granted. Nor is there any intimation by appellant that, because he was forced to go to trial at the time the trial actually was commenced, he was in any wise prejudiced in his substantial rights in the premises. It is therefore apparent that, without taking into consideration the rule that in the denial of a motion for a continuance of the time of trial, unless an abuse of discretion on the part of the trial judge is shown to have influenced the ruling, an appellate court will not disturb it, appellant's objection is not well taken. See Flynn v. Fink, 60 Cal. App. 670, 213 P. 716, where the authorities bearing on the question are cited.

[2] Appellant contends that the trial court was without jurisdiction to try the action against defendant for the reason that, on the day of, and immediately preceding, the commencement of the trial, under the provisions of section 170 of the Code of Civil Procedure, defendant presented to the trial court and filed with the clerk thereof a written statement and supporting affidavits by which he sought to show the bias and prejudice against defendant of the judge who presided at the trial of the action, notwithstanding which the trial court ordered the said statement and affidavits "stricken from the record" of the court.

A portion of section 170 of the Code of Civil Procedure is to the effect that, where the disqualification of a judge is made an issue, "the question of the judge's disqualification shall be heard * * * by some other judge." But in the case of People v. Berman, 117 Cal. App. 334, 4 P.(2d) 226, in substance it is ruled that, unless as a conclusion of law the written statement and the affidavits presented by the moving party contain allegations of facts from which the bias of the trial judge in favor of the opponent of such party, or the prejudice of such judge against the moving party, reasonably may be deduced, the trial judge is justified in disregarding the

statement and affidavits presented in the matter and is authorized to make, and is warranted in making, an order by which such statement and affidavits will be stricken from the record and the files of the court. It therefore becomes of importance that, preliminarily, the question of the sufficiency of the statement and the affidavits which were presented by defendant to the trial court should receive attention. The gist of the reasons assigned by defendant for his conclusion that he would not receive a fair and impartial trial if it were presided over by the judge whose disqualification was sought to be established was that theretofore, in spite of what by defendant was deemed a sufficient showing of relevant facts, the said judge had denied to defendant his request for a postponement of the trial of the action for a period of one week (as to which reference hereinbefore has been had), and, in addition thereto, that the manner of such judge toward defendant was harsh and arbitrary, his language, expression, and attitude were indicative of extreme and violent dislike, and that on one occasion "said Marshall McComb (the judge) stated from the bench that he was opposed to having cases of this sort continued: that they ought to be tried right away."

Regarding the first "fact," which related to the denial of the motion for a postponement of the trial, as hereinbefore has been indicated, neither in the order itself, nor in any circumstance connected with its rendition, was any inference correctly deducible on which the ultimate fact showing either bias or prejudice on the part of the trial judge could properly or legally be rested. Nor does the second "fact," which dealt solely with generalities and which for its conclusion, as is admitted by appellant, depended at most upon "an inference drawn from conduct," rest upon a more substantial foundation. The only definite and concrete fact relied upon by defendant to establish the bias or the prejudice of the trial judge, to wit, his statement that "he was opposed to having cases of this sort continued; that they ought to be tried right away," even in the most extraordinary circumstances, could present no more than slight evidence of prejudice against the defendant which might exist in the mind of the trial judge. But, in the circumstances herein portrayed by the record, which include several continuances or postponements of the trial which preceded the remark to which attention has been directed, the foundational fact upon which the conclusion of "bias and prejudice" depended fell far short of presenting a situation which, in accordance with the requirements of the statute, legally demanded that the question of the alleged disqualification of the trial judge "be heard and determined by some other judge." In other words, the "facts" upon which defendant placed reliance for his "inference" that the trial judge was legally prejudiced against him were so feeble and insignificant in their nature and effect as to constitute no sufficient reason for a consideration of the motion, and justified the action of the trial court in striking from the record and files in the action the written statement and the supporting affidavits which defendant theretofore had presented in the matter. It therefore becomes unnecessary to herein consider either other possible defects in the proceedings by which the disqualification of the trial judge was sought to be established; or, on the other hand, to discuss and to determine the consequences which might ensue because of the fact that the trial of the action was had before a disqualified judge.

[3, 4] Appellant predicates error upon an order made by the trial court, after the trial of defendant had commenced and had been in progress for several days, by which was denied the motion made by defendant that he be permitted to add a plea of "not guilty by reason of insanity" to the former plea interposed by him of "not guilty."

It appears that, on a day which by three days antedated the date set for the commencement of the trial, one of the attorneys who then represented defendant orally requested leave of the trial court to enter "the additional plea of not guilty by reason of insanity." No evidence or affidavit or explanation of any kind was then offered. In denying such request, among other things, the judge then presiding made the statement that "the defendant has had ample time during all these months to enter that plea without delaying the trial, which has been delayed once at his request. I will deny it (the motion) with prejudice. Then the question cannot be raised again and waste a lot more time."

It further appears that again, on the day when the trial was commenced, in the absence of any "showing" of facts to support it, the trial court denied a motion presented by defendant that he be permitted to interpose such additional plea. Still later, and at a time which was several days after the trial had commenced, but during the progress thereof, for a third time defendant presented to the court his motion that he be permitted to add to his former plea the plea that he was "not guilty by reason of insanity." The last motion was accompanied by certain supporting affidavits, to which the people answered by counter affidavits. For the third time the motion was denied.

The several pleas which may be made by a defendant to an indictment or an information respectively returned or filed against him are specified in the language contained in section 1016 of the Penal Code. Following such specification it is then provided that: "A defendant who does not plead guilty may enter one or more of the other pleas. A defendant who

does not plead not guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged, provided that the court may for good cause shown allow a change of plea at any time before the commencement of the trial. A defendant who pleads not guilty by reason of insanity, without also pleading not guilty, thereby admits the commission of the offense charged."

Relative to a situation such as is here involved, in the case of People v. Northcott, 209 Cal. 639, 654, 289 P. 634, 640, 70 A. L. R. 806, the Supreme Court said:

"Appellant's motion to be permitted to change his plea from 'not guilty' to the plea of 'not guilty by reason of insanity' was based upon several purported affidavits, the substance of which was that two doctors had examined appellant, and reached the conclusion that he was insane when examined by them, and that certain attorneys were present when the doctors made such examination, and heard them say the appellant was insane. Section 1016 of the Penal Code provides that a defendant who does not plead not guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged, 'provided that the court may for good cause shown allow a change of plea at any time before the commencement of the trial.' We concur in the view of the prosecution that 'good cause' was not shown in the affidavits presented, and that the trial court did not abuse its discretion in refusing to grant appellant's motion.

"When the appellant was arraigned he was represented and apparently well advised by counsel. He was fully informed as to, and aware of, his rights. From the affidavit of his own counsel it appears that he stubbornly resisted any advice and effort to have him enter the additional plea, 'not guilty by reason of insanity.' His sole plea, 'not guilty,' was not ignorantly induced, nor was it made through motives of hope or fear unduly operating upon his volition. In such a situation it was not an abuse of discretion for the trial court to refuse to permit the interposition of the additional plea. People v. Bostic, 167 Cal. 754, 141 P. 380; People v. Murphy, 62 Cal. App. 709, 711, 217 P. 810."

In the instant case, since no attempt was made by defendant on either the first or the second presentation of the motion to show "good cause," it is plain that no error was committed by the trial court in its order by which the requested leave was denied. As to the third of such applications, aside from the sufficient reason for its denial found in the clear indication contained in the language of the statute, that, even assuming that "good cause" may appear, the motion must be made "before the commencement of the trial" (which was not done in the instant case), the ruling in People v. Northcott, 209 Cal. 639, 654, 289 P. 634, 70 A. L. R. 806, to which attention hereinbefore has been directed, is to the effect that the determination of such an application rests within the discretion of the trial court. Since the record herein discloses the situation that the facts which appeared by the several affidavits of the respective parties afforded ample justification for the conclusion reached by the trial court on determination of the motion, it follows that the said court did not abuse its discretion in making the order of which complaint is made.

[5-8] Appellant complains that the trial court erred in sustaining certain objections to questions propounded by counsel for defendant to some of the witnesses introduced in his behalf, as well as in striking from the evidence certain testimony given by such witnesses. One of such specifications of error is that, although a witness was permitted to testify that defendant "appeared irrational," the witness was not permitted to state as a fact that defendant was irrational. Another item of complaint is that, after the same witness had testified that defendant appeared to have "irrational ideas concerning his fellow policemen," the witness was not permitted to respond to the so-called question to "tell us about that." In the opinion of this court, neither of such specifications of error merits serious consideration. The third of such criticisms of appellant of the action of the trial court relates to an order made by it by which, in the first instance, an answer given by a physician as an expert witness to the effect that he did not "think" defendant was "capable of forming an intent or doing an intentional or purposeful act," was ordered stricken out. Aside from the fact that the question asked of the witness was whether he had an opinion regarding the mental capacity of defendant, and consequently that the answer given was not directly responsive to such question, an examination of the entire testimony given by the witness leads to the conclusion that in substance the fact contained in the answer here under consideration was later repeated by the witness and permitted to remain in the evidence for the consideration of the jury. It therefore becomes apparent that, even assuming original error on the part of the trial court, no substantial injury resulted to defendant by reason thereof. A fourth criticism by appellant along the same line is that after another physician, who also was called as an expert witness, had testified generally to certain ailments theretofore suffered by defendant during a term of years, and in that connection the treatment which the physician had prescribed for defendant, the following situation, which is the concrete subject of appellant's present complaint, appears in the record, to wit:

"Q. Was he under your treatment later that year after that? A. Yes, he was.

"Q. And what did you treat him for then? A. For nervousness and a cough and some sweating at night. I did not make a diagnosis at that time.

"Mr. Clark: I think that is all.

"Mr. Moses: At this time I move to strike out the testimony as incompetent, not within the issues, not tending to prove or disprove the issues here.

"The Court: Motion granted."

Appellant's contention that the intention of the trial court was to order stricken from the record, not the last statement made by the witness, but his entire testimony, cannot be sustained. It is possible, though not probable, that such was the intention of the trial court. But such a course might have constituted error; and error cannot be presumed. It is the duty of the party claiming that error has occurred to show that it actually did occur. Defendant had ample opportunity to make certain just what testimony of the witness was included in the order made by the trial court, but failed in that regard. In reason, he cannot expect this court to "guess" that error was committed, when the record does not affirmatively show that such was the case. Besides, the probability that by its order in the premises the trial court had no intention of striking out all the testimony of the witness is more or less evidenced by the fact that, in similar conditions which affected the testimony given by the very next witness who was called to testify in the action the trial court refused to grant a motion which, had it been granted, would have presented the identical question which appellant now raises.

[9] A series of complaints is registered by appellant which arises from the refusal of the trial court to give to the jury certain instructions which were proposed by defendant. In substance, the first of such instructions was to the effect that the oath taken by the jurors that they would render a true verdict in accordance with the evidence adduced and the law as given to them by the court "was not a mere empty formality," but that both the law and defendant had a right to expect that such oath was taken by each of the jurors "without any mental reservations whatsoever."

That such an instruction would have constituted a correct declaration of legal principles may not be properly denied. But with reference thereto the presence of such a condition does not present a situation from which it inevitably must follow that, because the trial court refused to give the instruction to the jury, defendant was deprived of a substantial right in the premises, and which latter condition must result in a reversal of the judgment. The statutory oath which presumptively was given to the jury contains the essentials of the law which relates to the duty of the jurors. The proposed instruction embodied nothing that was either "new or novel." It contained no idea or thought which was not within the universal knowledge of all persons of ordinary intelligence. In such circumstances no error was committed by the trial court in its order by which the instruction was refused. People v. Daskam (Cal. App.) 11 P.(2d) 670; Beers v. California State Life Ins. Co., 87 Cal. App. 440, 466, 262 P. 380.

[10] In connection with other instructions which were proposed by defendant to be given to the jury, but which were refused by the trial court, the record discloses the fact that each of the legal principles therein contained was substantially given to the jury by means of other instructions. Hence appellant has no just cause for complaint.

[11, 12] Appellant also presents objections to certain instructions which at the request of the prosecution were given to the jury. The first seriously presented attack on such instructions is directed against that portion thereof which relates to drunkenness, or to voluntary intoxication, either as constituting in itself a sufficient defense for the commission of a criminal act, or as furnishing a foundation for the related defense of insanity. In that connection, appellant contends that, since the alleged insanity of defendant was not an issue in the action, for the trial court to instruct the jury as it did with reference to the legal effect which might be produced by the voluntary intoxication of defendant as far as his sanity was concerned, was argumentative, and hence damaging to defendant's rights. However, no definitive attempt is made by appellant to point out any "argument" which is contained in the instruction in question. If any argument therein is discernible to appellant, its prejudicial effect on the rights of appellant is not apparent. From time immemorial it has been considered good law, which has been enunciated by countless authorities, that any wavering or departure in a defendant from a normal mental state, which has been immediately induced by his voluntary intoxication, affords no basis for either justification, excuse, or any other so-called "defense" for the commission by him of a criminal act while in such condition. Under the general plea of "not guilty," defendant was permitted to introduce evidence of the consumption by him of a large quantity of intoxicating liquor, and either as a result thereof, or as induced by some other cause, that defendant was "unbalanced," mentally irresponsible, and consequently incapable of forming an intent at the time when the act of which he was charged was committed. Hence, in that connection, it was proper that the jury should be correctly informed regarding the legal responsibility of defendant for his acts, if any, which were committed at a time when as a direct result of an overindulgence by him of intoxicating liquor his "rational or reasoning powers were suspended."

Appellant also complains of certain other instructions or parts of instructions, which, at the request of the prosecution, were given to the jury; not that from a legal standpoint they were fundamentally wrong, but that they dealt with abstract legal principles which were inapplicable to the situation presented by the facts portrayed by the evidence.

[13, 14] Although reviewed singly, literally, and without regard to its relation to other unobjectionable instructions, it might be possible to reach a conclusion in harmony with the argument of appellant, when considered in its broader effect, and as inducement to other proper instructions, in nearly every instance the questioned instruction becomes absolved from fault and consequently freed from merited criticism. In order to rightly understand the effect of that which otherwise might appear in some of the instructions as prejudicial to the substantial rights of defendant, it is only necessary to remember that instructions must not be considered singly, but as an entirety; that mere error no longer constitutes sufficient reason for reversal of a judgment; but that the prejudicial effect of an alleged error must be not only apparent, but as well it must be so harmful as to clearly indicate that in its presence the defendant actually, or at least probably, was deprived of the fair and impartial trial, which, by the Constitution and the statutes, is guaranteed to him. So considered, even the fact that in strictness some of the instructions may not be apposite to the facts adduced in evidence will not in itself afford a compelling reason for a reversal of the judgment. This court is clearly of the opinion that none of the instructions of which appellant complains constituted such an invasion upon defendant's right that he be given a fair trial on the merits, as for that reason would justify a reversal of the judgment which was rendered against him.

[15] But, with reference to the instructions given to the jury at the request of the people, as well as those offered by defendant for the consideration of the jury, and by the court refused, appellant's major attack is directed against the law as laid down by the trial court, which related to the implied intent which follows from an attempt to commit the crime of mayhem. It was as follows: "The court instructs the jury that if a person in the perpetration of, or attempt to perpetrate mayhem, takes the life of a human being, intentionally or unintentionally, it is murder of the first degree."

A summary of the immediate facts in evidence, upon which said instruction was based, is as follows: "Defendant rushed into a room where the deceased and a Mr. Williams were dancing. Defendant was wild eyed; he called Mrs. Duncan (the deceased) a double-crosser and other names; also accused her of kissing Williams, which she denied. Defendant then 'slapped her down and knocked her on the bed'; he then walked over to Williams, and upon Williams' denial that he had kissed the deceased, he knocked Williams to the floor. Williams got up and went into the bathroom, and then the defendant directed his attention to the deceased, who was lying on the bed, and said: 'I have not marked you yet, but I will'; and punched her in the eye, and then 'Mrs. Duncan turned over on her stomach on the bed.' The testimony of the autopsy surgeon discloses the fact that the left ethmoidal sinuses of the deceased were found to contain fat and blood from the left orbital cavity, the wall of which had been burst toward the mid-line; that the blow upon the eye apparently was one of the contributing causes of death, and could have been sufficient of itself to have caused the death of decedent." Respondent's brief.

By section 203 of the Penal Code it is provided that mayhem may consist of unlawfully and maliciously putting out an eye; and an attempt, although unsuccessful, to commit such an offense, is a felony. Section 664, Pen. Code. So, specifically, by section 189 of the Penal Code, in effect it is provided that a murder which is committed in the perpetration, or in the attempt to perpetrate, mayhem, is of the first degree. It is therefore apparent that whether defendant's efforts to "mark" the woman whom he was accused of having attacked actually would have resulted in the loss of the sight of one of her eyes was not in itself determinative of the correctness of the instruction.

As a witness in his own behalf, defendant denied having had any intention to commit a homicide; but, considering the evidence which related to the attack made by defendant upon the woman, it is obvious that it furnished a substantial basis for the implied conclusion reached by the jury that the declaration made to the victim that "I have not marked you yet, but I will," was but expressive of his intention to "put out an eye," or, in its legal result, to commit the crime of mayhem. And if from the evidence it may be inferred that it was the intention of defendant to "mark" the woman, and that in accordance with the several statutory definitions of mayhem, of "attempt" generally, and of the legal consequence which follows from an attempt to commit mayhem, the attack made by defendant in law constituted an attempt to commit the crime of mayhem; and that, although, even as a matter of fact, defendant was unsuccessful in his attempt to commit mayhem, the homicide was the result of such unlawful act, it would seem clear that the several provisions of the Penal Code to which attention has been directed would authorize the giving of the instruction of which appellant complains.

A general statement of the law with reference to the legal effect of a homicide which may result from an attempt to commit a felony has no application in the face of specific language of a positive statute which expressly provides to the contrary of that so generally announced. With reference to the several authorities from other jurisdictions cited by appellant in support of the legal principle for the application of which he here contends, it may be observed that, however well sustained by text-writers or by judicial opinions, neither theory nor abstract reasoning may prevail as against positive and specific statutory declaration. And so, in view of the provision contained in section 189 of the Penal Code to the effect that a murder which is the result of an attempt to commit mayhem "is murder of the first degree," authorities to the contrary from other jurisdictions in which it does not appear that in reaching such conclusion therein a statutory provision similar to that of this state was taken into consideration can have no compelling weight.

[16] It is urged by appellant that, because of misconduct of the deputy district attorney in charge of the prosecution of the defendant in the trial of the action, the judgment should be reversed. Such alleged misconduct occurred during the closing argument to the jury, and consisted, principally, in two different classes of improper remarks: First and foremost, of expressions of opinion by the deputy district attorney relative to asserted facts rather than to inferences which properly should be drawn from the evidence; and, secondly, as to certain criticisms which related to the conduct of the attorney who represented defendant.

As examples which occurred in the first group, it appears that either expressly or by implication the deputy district attorney expressed his opinion to the jury that the defense interposed by defendant was "outrageous"; that, as affected the question of whether defendant had a hallucination regarding the conduct of his wife, the deputy district attorney "thought" that defendant was justified in assuming that something was wrong; that the explanation of why, during the greater part of his lifetime, defendant had been able to successfully walk around "trying to balance a chip on his shoulder," was that he was an ex prize fighter; that defendant struck the deceased in the same manner that a prize fighter would have struck her; that the deputy district attorney proposed to examine the evidence for the purpose of determining whether defendant had "an honest, genuine defense"; that he did not "think" that the blow on the head which, at the age of 6 years, defendant had received, had "anything to do with the case"; that "a man, who is in the habit of drinking on the job is probably drinking a good deal when he is not on the job also"; that he thought "a great big foot would make more than one impression on the tender skin of a woman"; and, with reference to the headaches from which defendant appeared to have suffered, that the deputy district attorney would have suffered similarly if he had been "staying in jail waiting to go to trial on a murder charge."

In the second group may be found either some rather caustic criticisms, or some adverse insinuations, regarding the manner in which the attorney for defendant had conducted the defense. As illustrations of such oral castigations may be noted the remark in effect that, although there were readily available to defendant several medical experts whose testimony "cannot be purchased like a commodity," none of them had been employed, "yet we find him (defendant) putting on a doctor to establish this defense"; also a broad insinuation that, if the homicide had not occurred (as it did) in the presence of witnesses, a defense entirely different from that actually interposed by defendant would have been presented; that "Mr. Clark (attorney for defendant) is too familiar with petit mal and grand mal to permit his doctor to try to convince you Mr. Nolan walked around in a petit mal trance five or six hours, and they edged away from that and got into this amnesia"; that the prosecution did not appear in behalf of, nor owed any allegiance to, a private client, but that "we are here to present the facts or evidence to the court and to the jury"; that, although immediately preceding the homicide, defendant was under the influence of intoxicating liquor, because he had consumed such liquor in an asserted attempt to alleviate pain that was a necessary incident of the headache from which he was suffering, "it was misconduct for the deputy district attorney to attack defendant's counsel with the statement that we expected to show involuntary intoxication"; and that "it was his (attorney for defendant) obligation to employ all the sophistry that his experience and genius can suggest."

In addition to the foregoing, appellant specifies as misconduct of the deputy district attorney the fact that, in the course of his argument to the jury, he stated: "The defendant has the only appeal in a case of this kind. The People have none. He has been tried here by a jury practically of his own choosing. * * *"

[17, 18] It should "go without saying" that aside from fair argument as to the effect of the evidence, or as to what inferences properly were deducible therefrom, no attorney should venture a bald opinion, stated as a fact, with reference to an issue or as to the effect, or value, or weight, of the evidence, as it may affect any ultimate fact in the

case. That, in its purity and strictness, the rule was violated by an officer of the court, whose particular duty demanded that he abstain from any conduct that might even in the slightest degree embarrass the administration of justice, is apparent. It is likewise obvious that, from the facts as hereinbefore indicated, the deputy district attorney in charge of the prosecution is not to be commended, but rather to be censured, not only on account of his having in effect endeavored to impress upon the jury his own unsupported opinions, not as related to proper deductions which might be made from the evidence adduced, but as to facts not in evidence, but as well by reason of the gratuitous criticisms and animadversions which were heaped upon a brother practitioner, who, as far as the record discloses, was free from fault. Nor in his statement to the jury that "the defendant has the only appeal in a case of this kind," etc., can this court find any justification for the deputy district attorney. It was a suggestion that might have been calculated to place defendant at a disadvantage. The statement embraced the possibility that no matter how great or important the error, or howsoever numerous such errors, which might be committed by the trial court against the prosecution, the people of the state were helpless, in that they were without remedy or relief. In ordinary circumstances, such a statement might have created a tendency on the part of the jury to strike a balance, which would effectually operate against defendant and his substantial rights in the premises. At the outset, it should be noted that with reference to none of the occasions to which reference has been had and as to which it is claimed by appellant that the deputy district attorney was guilty of misconduct, did the learned and widely experienced attorney for defendant protest or offer to the trial court the slightest objection relative to such objectionable remarks. It is true, as has been repeatedly ruled, that, where it appears that the remark is of such a nature and character that an objection thereto by the aggrieved party, followed by an order of the trial court striking such remark from the record and admonishing the jury to disregard the remark, could not have the effect of removing from the "mind" of the jury the prejudice against the defendant which the remark undoubtedly or most probably created, a failure on the part of the aggrieved party to make timely objection and motion with reference thereto will not deprive him of the right to urge such misconduct as a ground for reversal of the judgment. But to this court it is not perceivable that such a situation is here presented. An examination of each of the several remarks made by the deputy district attorney to which attention has been directed readily discloses the fact that, in itself, the remark in question was not of that importance, or so far-reaching in its effect, that its influence, if any, might not easily have been destroyed by means of proper objection and motion presented by defendant, followed by appropriate order and instruction to the jury by the trial court. It is conceivable that defendant feared that, by making constant objection to what he might characterize as prejudicial remarks made by the deputy district attorney, he might annoy the jury, and thus damage rather than help his defense. But, if he chooses to let the objectionable incident pass without remonstrance upon his part, he should not ordinarily be permitted to urge that he has been prejudiced by reason thereof. It is only by considering the several derelictions of the deputy district attorney as a whole that any prejudice to the substantial rights of defendant becomes apparent. But since it is obvious that, by timely and appropriate action on his part, defendant might have, and probably would have, prevented the occurrence of many of the several remarks of which he complains, or that failing in that regard the said remarks would have been stricken from the record and the jury would have been instructed to disregard them in arriving at its verdict, and that the damage of which he now complains would thus have been averted, it follows that the present contention by defendant that because of the situation he was not accorded a fair trial cannot be sustained.

[19] In substance, appellant further contends that the evidence adduced on the trial of the action was insufficient to show premeditation on the part of defendant in the commission of the homicide, and consequently that the verdict of "guilty of murder * * * of the first degree * * *" and the ensuing judgment cannot be sustained. But, in view of the implied finding by the jury, which is supported by substantial evidence, to the effect that the homicide was the result of an "attempt to perpetrate mayhem," no evidence was required to establish the fact that the killing was willful, deliberate, and premeditated. Section 189, Pen. Code; People v. Nichol, 34 Cal. 211; People v. Long, 39 Cal. 694.

The judgment and the order by which the motion for a new trial was denied are affirmed.

We concur: CONREY, P. J.; YORK, J.

HANSEN et al. v. COVELL.*

Civ. 4051.

District Court of Appeal, Third District, California.

Oct. 4, 1932.

As Modified on Denial of Rehearing Nov. 3, 1932.

Hearing Granted by Supreme Court Dec. 1, 1932.

1. Damages ⇐68.

Where owner paid certain mechanics' lien claimants, which constituted pro tanto part payment of sum due contractors, contractors *held* not entitled to interest from such date on amount of part payment (Code Civ. Proc. § 1193).

2. Contracts ⇐295(1).

Contractors substantially performing *held* entitled to sum due on contract price, less amount reasonably required to complete building.

3. Damages ⇐68.

Contractors substantially performing *held* entitled to interest only on difference between contract price and amount due owner by reason of contractors' failure, and allowance of interest on full contract price was error.

4. Damages ⇐124(1).

Alleged delay of architect in furnishing plans, chiefly due to contractors' misdirecting letter to architect, *held* not ground for allowing damages to contractors, especially in view of contract.

Contract provided that time during which contractors might be delayed by act or neglect of owner or his employees, or those under him by contract or otherwise, or by strike or like trouble among mechanics or laborers, should be added to time of completion of contract.

5. Damages ⇐124(1).

$1,000 allowance of damages to contractors for architect's delay in furnishing plans *held* unsupported; evidence not showing any work was discontinued.

6. Damages ⇐124(1).

Allowing damages to contractors for owner's failure to furnish details for painting lobby *held* erroneous, where contractors never painted lobby.

7. Damages ⇐124(1).

Allowing contractors damages for owner's failure to select hardware *held* erroneous, where delay due to merchant's refusal to ship hardware on contractors' credit was not segregated by evidence from delay due to owner's acts.

8. Damages ⇐124(1).

Allowing contractors damages for owner's failure to let heating contract and subcontractor's delay in installing elevators *held* erroneous, in view of contract, especially where evidence failed to show progress of work on building was delayed.

Contract provided in substance that time during which contractors might be delayed by act or neglect of owner or his employees or those under him should be added to time of completion of contract.

9. Damages ⇐124(1).

Allowing contractors damages because prevented from using passenger elevator for hoisting building materials *held* erroneous under contract and evidence.

Allowance of such damages was improper, in view of testimony that contractors could not point to any loss suffered as result of being prevented from using such elevator and covenant in contract that obligation of contractors included furnishing of necessary labor, materials, and mechanical workmanship, including tools, implements, and appliances required, and all other things necessary for doing of work, and in view of further fact that contractors had own elevator for hoisting building materials and discontinued use thereof and began using passenger elevator, and that use of such elevator was not contemplated when contract was signed by contractors.

10. Damages ⇐124(1).

Where contract provided for time extension for completion of building in event of delay caused by owner, parties *held* to have adopted such method of remedy in lieu of monetary compensation.

11. Damages ⇐123.

Notwithstanding finding that contractors substantially performed contract, owner *held* entitled to reimbursement for expenses necessarily incurred in bringing building up to standard contemplated.

12. Damages ⇐123.

Where bathtubs as installed did not comply with specifications and building laws, owner *held* entitled to reimbursement for expenses incurred in properly installing bathtub.

13. Damages ⇐189.

In action by contractors, finding that owner's delay in making installment payment caused filing of liens by materialmen and prevented contractors from paying off such liens *held* not sustained by evidence (Code Civ. Proc. § 1193).

Such finding was not sustained where against such installments there was sum due owner for expenses in completing building, diminishing installment payment more than one-half, and liens aggregated sum six times amount of money actually owing contractors, especially where record did not show that contractors had any

*For subsequent opinion see 24 P.2d 772.

financial responsibility, and there was evidence to effect that they were without credit, indicating cause for filing liens.

14. Contracts ⇐295(1).

As regards question of substantial performance, equity courts have adopted rule giving very liberal construction to building contract, so that contractor may be paid for work actually performed, and owner reimbursed for necessary expenses in completing building.

15. Contracts ⇐295(1).

In determining question of substantial performance, application of rule of liberal construction to building contract *held* largely within trial court's discretion.

16. Principal and surety ⇐59.

Rule of strict construction ordinarily applied to private voluntary sureties *held* inapplicable to surety for compensation on building contract.

17. Mechanics' liens ⇐315.

Where alleged delay caused by owner did not increase liability of building contractors' surety for compensation, owner *held* entitled to recover against surety excess over contract price which owner was required to pay to clear property from mechanics' liens (Code Civ. Proc. § 1193).

18. Mechanics' liens ⇐161(4).

Allowing mechanics' lien claimants interest from filing of liens until judgment *held* error, where demands were unliquidated and could be determined only by judgment (Code Civ. Proc. § 1183).

19. Appeal and error ⇐1173(2).

Where contractors' surety did not appeal from judgment erroneously allowing interest to mechanic's lien claimants, appellate court, although striking allowance of interest from judgment as against owner, did not modify judgment in such respect as against surety.

20. Damages ⇐73.

Record *held* not to show that building owner's attorney's fees for defending suit by contractors consolidated with suits by mechanic's lien claimants were substantially enhanced by lien cases, and hence contractors were not chargeable with portion of owner's counsel fees.

21. Costs ⇐32(2).

In contractors' suit for contract price and damages for delay, where, after deduction of owner's offset, balance remained in contractors' favor, owner *held* not entitled to costs.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

On rehearing.

Judgment modified, and, as modified, affirmed.

For prior opinion, see 8 P.(2d) 856.

A. J. Carlson, of Modesto, and E. V. McKenzie, of San Francisco, for appellant.

Hartley F. Peart, of San Francisco, J. M. Walthall, of Modesto, M. G. Gallaher, of Fresno, and Sylvester J. McAtee and Gus L. Baraty, both of San Francisco, for respondents.

Mr. Justice PLUMMER delivered the opinion of the Court.

The plaintiffs had judgment for a balance alleged to be due for and on account of the contract price agreed to be paid to the plaintiffs by the defendant for the erection of a four-story and basement hotel building on lots 15 and 16 in block 67 in the city of Modesto. From this judgment the defendant appeals.

In the same proceedings the defendant had judgment against the plaintiffs as an offset to their claims in the sum awarded the defendant as his costs for reinstalling a number of bathtubs in said building. From this portion of the judgment the plaintiffs appeal.

The record shows a notice to the clerk, of the defendant's contemplated appeal, and a notice directed to the plaintiffs in this case setting forth the defendant's appeal from the judgment. The wording of the latter notice would apparently limit the appeal simply as to the plaintiffs named in the title of this action, and exclude consideration of all questions affecting lienholds and the bonding company that had executed the bond to insure the faithful performance of the conditions and provisions of the building contract involved herein.

On the part of the plaintiffs it is contended that the defendant's appeal is limited only as to Hansen and Buchen, but a consideration of the terms and provisions of the notice given to the clerk shows that it is sufficient to bring the whole case before this court for consideration. The matters set forth in the notice to the clerk are substantially the same as were contained in the notice involved in the case of Anderson v. Standard Lumber Company, 60 Cal. App. 445, 213 P. 65. Upon the authority of that case and the case of Estate of Nutt, 180 Cal. 422, 181 P. 661, it must be held that the notice given to the clerk was sufficient to bring all parties before this court upon appeal.

On or about the 25th day of May, 1923, the above-named plaintiffs and the defendant entered into a contract in writing, whereby the plaintiffs agreed, for and in consideration of the sum of $125,500, to be paid to them by the defendant in installments provided for in the contract as the work pro-

gressed, to erect for the defendant a hotel building in the city of Modesto, on the lots described, in accordance with the plans and specifications prepared by an architect named A. W. Cornelius. Work was begun upon the erection of said building by the plaintiffs, and continued thereon until about the 21st day of February, 1924, upon which date the plaintiffs, as contractors, ceased work, and thereafter demanded of the architect employed by the owner a certificate of completion, which certificate was not furnished by the architect, due to the fact that the hotel building had not been finished by the contractors according to the plans and specifications referred to in the contract.

Prior to the 21st day of February, 1924, there had been paid by the defendant to the plaintiffs, on account of the contract price for the erection of the hotel, the sum of $101,555, leaving a balance of $23,845. According to the terms of the contract, if the building had been completed in accordance with the plans and specifications, there would have been due to the contractors on the 21st day of February, 1924, the sum of $11,295, and upon the expiration of thirty-five days thereafter the further sum of $12,550.

As against the claim of the plaintiffs, the defendant alleged that the building was not completed according to the plans and specifications, and that he necessarily had to expend the sum of $7,284.80 in completing the same, according to the plans and specifications called for in the contract. Of this sum for the completion of the building the court allowed the owner $3,386.50.

On or about the 17th day of March, 1924, certain subcontractors and materialmen filed liens for materials furnished and labor performed and work done upon the hotel building, aggregating the sum of a trifle over $33,000. On the 4th day of August, 1924, the plaintiffs began this action to recover the alleged balance due on the contract, and damages for various alleged causes in the sum of between $37,000 and $38,000. Damages were allowed by the court in the sum of $3,323.64.

The trial court found that, notwithstanding the failure of the contractors to complete the building according to the plans and specifications as called for by the contract, the building had nevertheless been substantially completed, and the failure of the contractors to comply with the terms and conditions of the plans and specifications was adjudged to be true.

The first question presented for our serious consideration is the allowance of interest on the two unpaid installments; one allowance of interest dating from February 21, 1924, and the second from a date thirty-five days thereafter. The interest was allowed upon the full sum of both installments, respectively, from the dates mentioned, notwithstanding the plaintiffs were not entitled to recover the amount of the first installment on the 21st day of February, 1924, and that, prior to the expiration of the thirty-five days thereafter, mechanics' liens had been filed in the sum of over $33,000.

[1] The record shows that, after the beginning of the action, and by stipulation of the parties through their respective counsel, the owner and the insurance company, respectively, paid $9,183.32 to the lien claimants whose claims were uncontested. Notwithstanding this payment which under the law constituted, pro tanto, a part payment of whatever might be due the contractors, the court allowed interest just as though no payment had been made. This appears to us to be erroneous. There can be no gainsaying the fact that a payment on the principal of a promissory note stops the running of interest upon the amount of the payment. Likewise, here, when the owner paid the sum of over $9,000, we do not very well see how he could be charged with interest thereafter on a sum which was no longer due the contractors.

[2] Again, the court allowed interest on the full contract price, irrespective of the fact that it found that the plaintiffs were not entitled to recover that sum. The plaintiffs in this action were only entitled, under the finding of the court, to payment of such sum as might be due upon the contract price, less whatever was reasonably required to be expended by the owner in completing the building according to the plans and specifications.

The rule is thus stated in 9 C. J. 739: "The hardship of the rule requiring strict performance in order to permit recovery on a contract generally, when applied to a builder who has undesignedly violated his contract, and the inequitable advantage that it gives to an owner who receives and retains the benefit of the builder's labor and materials have led to its qualification; and it is generally held that, where the compensation is due only on the performance of the contract, a literal and strict performance is not required, and if the builder, acting in good faith and intending and attempting to perform his contract, does so, he may recover the contract price, notwithstanding slight and trivial defects or deviations in performance, for which compensation may be made, in all its material and substantial particulars, by an allowance to the owner, but the owner is entitled to an allowance for the damages he may suffer by reason of the failure to perform strictly, such as the cost or expense of putting the structure or work in the condition called for by the contract." And further, as to what constitutes a substantial compliance: "There is a substantial performance where a variance from the specifications of the contract

is inadvertent or unintentional and unimportant, and is one by which the building or structure as a whole is not impaired; where the building or structure is actually used after it is erected for its intended purpose; where the defects can be remedied by the owner without any great expenditure, and without material damage to other parts of the structure, and may without injustice be compensated for by deductions from the contract price; and it is apparent that the builder endeavored in good faith to fulfil his contract."

[3] It thus appears that the contractors were not, on the 21st day of February, 1924, or at a period thirty-five days thereafter, or in fact at any time preceding the entry of judgment, entitled to recover the full contract price. The court in this instance gave judgment for the full contract price and interest thereon, and then offset the amount found due the owner by reason of the sums necessarily expended by him in finishing the building. This, of course, gave the contractors interest on a sum which they never were entitled to recover, and, if they were not entitled to recover, it follows as a necessary conclusion that they were not entitled to interest on money that was not due them. Not being entitled to payment for work that was never done, for materials that were never furnished, and for labor that was not performed, they are certainly not entitled to interest on the sum of money that they should have expended, and the work they should have done, and the materials they ought to have furnished.

The court found that, after the payment by the insurance company and by the owner, of the sum of $18,366.64 on undisputed liens, there was still due to lien claimants the aggregate sum of $14,578.16, from which it follows that there was but little due the contractors, as section 1193 of the Code of Civil Procedure provides: "Any contractor shall be entitled to recover * * * only such amount as may be due him according to the terms of his contract, after deducting all claims of other parties for work done and materials furnished." Under this section evidence of the contract price, and work done and omitted therefrom, is properly received to determine the amount remaining in the owner's hands, which is applicable to the payment of lienholders.

It is earnestly contended by the appellant that no interest whatever should be allowed to the contractors; that whatever was due them was an unliquidated demand by reason of their failure to complete the building according to the plans and specifications and the subsequent necessity of the owner to expend a considerable sum in so doing, and that this sum remained to be adjudged by the court. However, the weight of authority seems to be to the contrary; it being held in most cases that the contractor is entitled to interest on whatever is due upon the contract price, less the amount found due the owner by reason of the failure of the contractors. Thus, in the case of Pearson v. Ryan, 42 R. I. 83, 105 A 513, 3 A. L. R. 805, the majority rule is thus stated: "A payment called for by a construction contract upon completion of the building is liquidated from time of demand, within the rule that interest is allowed as damages for failure to pay a liquidated demand when it is due, although the court allows a rebate from the amount claimed because of unsatisfactory workmanship and materials." The difference in the case at bar from the facts in the case which we have just cited is that here a considerable portion of the work was left unperformed. The case which we have cited further illustrates the rule as follows: "Undoubtedly there is a clear distinction between a claim for damages entirely unliquidated, as for example, claims for damages arising from assault and battery, * * * or from slander and libel, which are wholly at large, and a liquidated claim, where there is an express contract to pay a sum certain at a fixed time. In the former cases, the amount of damages is unknown until determined, after the presentation of evidence, by a decision, award, or verdict. In the contract case, both parties know what the claim is, and when it is due and payable. It is in dealing with cases lying between these extremes, where the distinction is less clear and obvious, that courts have so differed in their interpretation and application of the rule as to interest that their decisions are far from harmonious as to when interest may be allowed."

The action in the case at bar is not based upon quantum meruit, or strictly for work and labor performed, but is based upon the contract for what the court found to be a substantially completed building. Thus in the case of Healy v. Fallon, 69 Conn. 228, 37 A. 495, cited in the Pearson Case, we find the following: "The defendants claimed that the house was not finished as called for in the contract, upon which claim some deduction was made by the trial court from the contract price. On pages 235 et seq. of 69 Conn. [37 A. 495], the court says: 'We are also of opinion that the court did not err in allowing interest to the date of judgment upon the sum found to be due after deducting the damages caused by the deviations from the contract. * * * It is difficult on principle to see why he should not recover, as compensation for that detention, damages measured by the legal rate of interest upon the sum so detained for that time. It is said, however, that the amount due was unliquidated up to the time of the judgment, and that interest is never allowed upon unliquidated amounts. It may be conceded

that the amount due the plaintiff was in a certain sense unliquidated up to the time of the judgment, inasmuch as the amount due him under the contract, which was a liquidated amount, was to be lessened by the as yet unascertained damages caused by his deviations from the contract; but it is not true that damages measured by the rate of interest are never allowed for the nonpayment of money, where the claim is an unliquidated one.' " It was then held that interest should be allowed upon the amount due the contractor from the date of the completion of the building, which amount was the contract price, less the allowance made to the owner for finishing the building.

Beginning on page 809 of 3 A. L. R., there has been appended to the case of Pearson v. Ryan, supra, a large number of authorities and extended quotations showing the rule generally followed which we have set forth herein. The only California case where the precise question has come before the court is that of McCowen v. Pew, 18 Cal. App. 482, 123 P. 354, 357, where the rule which we have stated was followed.

A number of California cases have been cited by counsel where the actions have been based upon quantum meruit, or for work and labor performed and materials furnished, and not upon contract. In all these cases interest has been denied prior to entry of judgment. It would serve no useful purpose to review them by reason of the facts being different from those here presented, which we think brings this cause within the rule announced in Pearson v. Ryan, supra, and the cases found in the annotations as just stated.

The court allowed the plaintiffs, as damages for delay, the sum of $3,323.64. Of this sum the defendant seriously contends that the following items should be stricken therefrom, to wit, the sum of $1,000 alleged to have been damages caused by delay of the architect in furnishing plans; the sum of $500 for failure to furnish details for painting; the sum of $50 for failure to select a color for painting; the sum of $500 for failure to select the hardware; the sum of $100 for failure to let heating contract; and the sum of $200 for failure of elevator subcontractors.

The terms of the contract entered into between the parties contains, among other things, the following: "The contractors covenant and agree to commence the construction of the work undertaken by them within ten days after the signing of this contract, and to prosecute the same diligently and with a sufficient force of men, equipment and material so as to fully complete this contract not later than October 1, 1923; provided, however, that the time during which the contractors may be delayed by the acts or neglect of the owner, or his employees, or those under him by contract or otherwise, or by the act of God, which the contractors could not have reasonably foreseen and provided for, or by stormy and inclement weather which delays the work, or by strikes or like trouble among mechanics or laborers which delays said work and which are not caused thereby, or the continuance of which is not due to any unreasonable acts or conduct on the part of the contractors, shall be added to the time of completion, as aforesaid."

The contract then further contains a provision that payments of installments shall be made at certain times, and that the owner shall be liable to the contractors for any damages occasioned them by delay in making payments.

It appears that a contract in the precise form came before the court for consideration in the case of Seebach v. Kuhn, 9 Cal. App. 485, 99 P. 723, in which it was held that, as the parties had agreed that extension of time for the completion of the building should result from any of the acts specified above, damages could not be predicated thereon. This holding appears to be supported by the case of Goss v. Northern Pacific Hospital, 50 Wash. 236, 96 P. 1078; Haydnville v. Art Institute (C. C.) 39 F. 484; Richard v. Clark, 43 Misc. 622, 88 N. Y. S. 242; Cornell v. Schuylkill County (C. C. A.) 222 F. 876.

In addition to the cases cited, we may call attention to 9 C. J. 790, § 132, relative to the liability of owners where the law as stated in the text is as set forth in the foregoing cases, that, where the parties have stipulated in the contract that delays shall operate as an extension of time for the performance of the contract, no other penalties follow, and that damages cannot be allowed for such delays, unless something else appears in the case.

The court made no finding of any fraudulent acts on the part of the architect, nor on the part of the owner. In addition to this, it appears from the record that, wherever there was a delay, the contractor immediately claimed an extension of time, and did obtain an extension of time for various reasons, from October 1, 1923, until February 21, 1924.

Notwithstanding the fact that the law appears to be that, under contracts containing a clause such as the one involved in this action, there can be no claim for damages on account of delays caused by any of the persons mentioned in the paragraph of the contract under consideration, we will nevertheless give some attention to the different items which the court did allow as damages for delays.

[4, 5] The first of these items is an allowance of $1,000 to the contractors for and on account of the alleged failure of the architect to furnish detailed plans and specifications.

The record shows that the contract was

awarded on or about the 23d day of May, 1923, and that work was begun by the contractors on the following day; that thereafter, and during the first week in June, 1923, the contractors wrote a letter addressed to the architect in San Francisco, but by some mistake or other failed to send the letter to the correct address. Seven days thereafter another letter was forwarded by the contractors, to wit, on the 13th day of June, correctly addressed to the architect at his office in San Francisco. On the following day the detailed plans and specifications called for by the contractors were received by them from the architect. It thus appears that for the eight days' delay, as claimed by the contractors, seven days of the delay were due to the mistake of the contractors themselves.

Our attention has not been called to any testimony showing that the work of the contractors was actually delayed for any time by reason of not receiving the plans and specifications earlier than the 14th of June. It can scarcely be claimed that the failure of the architect to furnish the plans, based upon a notification to him which was misdirected, constitutes a basis for penalizing the owner, especially in view of the paragraph of the contract to which we have referred. While not directed to any testimony showing any delay in the work, we have found the following in the transcript of the testimony:

"Q. Now, there was not any finishing work going on in the building at that time? A. There was other work going on that depended on the measurements.

"Q. Did it cost you any more in actual money, other than this so called delay by reason of failure to get the plans on the 13th or 14th, rather, the 13th? A. Well, there is one item again that would be hard to say just for one day.

"Q. Can you say, or give me one dollar that you lost by reason, as a result of the so-called loss between the 13th and the 14th? A. No, I could not give that to you.

"Q. Now, let me ask you, you didn't lay off any man between the 13th and 14th, did you? A. Between 13th and 14th, no, I cannot say that we did."

The testimony further shows that the men continued work.

"Q. Now, where did you get this figure of $125.66 a day that is mentioned in your bill of particulars; just where did you get that? A. I get that item from taking the amount that we had estimated that we would earn on the job, the time it took to do the job from the 1st of June, way until the 15th or 16th of February. I took all the expenses, or part of it, or part of the overhead it would take for this extra time, and items such as that, and computed them together and divided it by the number of days."

In view of the fact that there is no showing that any work was discontinued, it is evident that the testimony does not uphold this assessment of damages against the owner, irrespective of the contract provisions.

[6] The next item called to our attention by the appellants, allowed as damages, is the sum of $500 for an alleged failure to furnish details for painting. Just how this item of damages got into the allowance does not very satisfactorily appear. The claim of the contractors apparently is based upon an alleged failure to select color schemes for painting the lobby. Without discussing the testimony as to the merits of this contention, it is sufficient to state that the record shows that the contractor never painted the lobby, and that the work was done by the owner at an expense to him of over $400.

The next item of any importance is the alleged damage allowed in the sum of $500 for failure of the owner to select hardware. The record shows that the owner or architect was by the contract allowed to select the hardware, which was to be paid for by the contractors. It further appears that the owner made a selection of the hardware, and that it was ordered by the contractors. Following this, the record discloses that the house from which the hardware was ordered declined to ship the hardware on the credit of the contractors, claiming that their credit was not such as to warrant the shipment unless payment was guaranteed by the owner. This caused considerable delay in the shipment of the hardware, and finally resulted in the owner and contractors going to San Francisco, and, by stipulation, arranging for the payment of the hardware, and the acceptance of it in San Francisco. It does appear that the owner at first declined to finally accept the hardware until it was installed in the building, but this does not appear to be the basic cause of the delay, nor does the testimony show for what time any delay was due to this act of the owner.

[7] Again, it is not pretended that there was any fraudulent act on the part of the owner in any particular in relation to the hardware, and the time of the delay, which was reasonably chargeable to the fact that the commercial house with which they were dealing declined to ship the invoice of hardware on the credit of the contractors, is certainly not chargeable against the owner. Not having segregated the time of delay due to the lack of financial responsibility of the contractors from alleged acts of the owner, it follows that this allowance of damages has no support in the testimony.

Again, an allowance of $50 was made on account of the alleged failure of the owner in selecting colors for certain painting, but the testimony does not show that work was stopped on the building on this account.

[8] An item of $100 appears in the allowance of damages on account of failure to let heating contract, and also $200 for delay of the subcontractors in installing an elevator. These provisions are likewise squarely covered by the paragraph of the contract set out in this opinion.

An examination of the testimony shows that the contract for the heating plant was let on the 25th day of June, 1923. On the next day the measurements were sent by the contractor who had contracted to put in the heating plant, to a Sacramento firm, to be filled. We have scanned the record in vain to find any testimony showing that the progress of the work on the building was delayed by the failure of the owner to let the contract for the heating plant at an earlier date. The testimony does show, however, that portions of the building were not ready for the installation of the heating plant until after the heating plant was roughed in. It appears that the contractors did not know just when the heating plant was finally roughed in, nor do we find any specific testimony showing that the contractors were delayed, to their damage in the sum of $500.

In relation to the damages claimed in connection with the painting, we may quote the following testimony showing the lack of any basis for a judgment of damages (testimony of contractor Hansen): "Q. How did you arrive at $1200.00?" (Amount of damages claimed). "A. That is another item I cannot give you."

As to the delay respecting the selection of the hardware and the testimony showing damages, and the uncertainty of any basis therefor, we may quote the following testimony of contractor Hansen: "Q. Now, what effect did that delay in the hardware have on the progress of the work? A. We had our doors ready to hang; they stood for five weeks before we had hardware to hang them with; they warped and that cost us considerable more to handle the doors."

We need not specify further the items of damages claimed on account of delays, for the testimony shows that the damages in relation to each item were fixed according to the testimony hereinbefore set forth, which does not furnish any basis therefor.

In addition to what we have stated as to items that should be stricken from the allowance by the court, it appears from the record that there should have been allowed the owner a credit for electrical fixtures in the sum of $460, credit on plumbing for sidewalk elevator in the sum of $46, and credit on mail chute in the sum of $452, aggregating the sum of $958. These items were agreed to by the contractors, and will be accepted as correct, even though a somewhat larger sum is claimed by the appellant on account of the omission of the mail chute. The subtracting of the aggregate amount of these items from the amount found due the contractors appears to have been overlooked by the trial court.

[9] The record shows that during the course of the construction of the building the contractors discontinued the use of their own elevator for hoisting building materials, and began using the passenger elevator installed in the building, to the use of which the owner objected to the contractor who installed the passenger elevator, and thereupon the contractor having charge of the installation of the passenger elevator notified the plaintiffs in this action to discontinue use of the same. By reason of this transaction the plaintiffs claimed damage in the sum of $465, of which sum the court allowed $250. The contract signed by the plaintiffs in this action contained the following: "The obligation of the contractors includes the furnishing of the necessary labor, materials and mechanical workmanship, including tools, implements and appliances required, and all other things necessary for the doing of work shown on said plans and specifications, except as hereinafter noted." The elevator shaft in the building provided for two passenger elevators, and were not intended for use as freight elevators. Upon being questioned as to the extent of the damages mentioned in this item, the plaintiff Hansen testified as follows:

"Q. What is the basis of the $465? A. That I could not say.

"Q. You cannot point to a single dollar, can you, that was lost by reason thereof? A. No, I cannot."

Further: "Q. So when you signed the contract did you rely at all on the possibility of using the owner's elevator to hoist materials? A. No, sir, we did not."

In view of this testimony and the covenant in the contract, and in view of the further fact that the plaintiffs had their own elevator for hoisting building material, and discontinued the use thereof and began using an elevator which was not intended for the uses to which it was put, and that the use of that elevator was not contemplated when the contract was signed by the plaintiffs, it is evident that the $250 allowed as damages in this particular must be stricken from the judgment.

[10] In concluding our discussion of the testimony showing that the items allowed as damages are not supported, we may again refer to the contract in this case, which specifies that in such cases the time for completion is to be extended, and the parties adopted that as the remedy in lieu of monetary compensation, to which the following quotation from the case of Richard v. Clark, 43 Misc. 622, 88 N. Y. S. 242, is applicable, to wit: "Where a contract under which plaintiff was to construct a model of defendant's residence, according to plans furnished by defendant's architect, provided that, if plaintiff should be delayed in the completion of his work by the

delay or default of the owner or architect, the time fixed by the contract for the completion of the work should be extended for a period equivalent to the time lost, the time clause affected plaintiff's liability alone, and absolved him from liability for delay to the extent and in the manner provided thereby, but did not authorize a recovery in damages by him for delay of the architect in furnishing plans."

[11] This brings us to a consideration of the expenses incurred by the owner in completing the contract according to the plans and specifications. The claim of the owner in this particular is that he necessarily expended the sum of $7,284.80, of which the court allowed only $3,386.52. In fixing this sum, the court apparently overlooked the item of $797.34, being expenses for labor and material in properly installing fire-shutters. Our attention has not been called to any testimony contradicting such expenditure. Not being properly installed, the full cost should have been allowed. The court allowed the full sum of $2,824.02 for installing bathtubs; $200 was allowed for correcting the defective columns in front of the building, the undisputed testimony showing, however, that the cost thereof was the sum of $250, respondents' contention being only that no sum should have been allowed. For plastering bathrooms the testimony shows that the owner expended for labor and materials the sum of $327.35, for which the court awarded only $200. A general account specified in the bill of particulars covering labor, materials furnished, etc., in the sum of $1,524.50, was either overlooked or disregarded in the findings. The items to which we are referring were supported by testimony showing bills submitted by the parties who did the work upon the building, and by checks showing that the owner had paid therefor. Our attention has not been called to any testimony showing that the work was not done, or showing that the work was unnecessary in order that the building might be finally brought up to the standard contemplated by the plans and specifications, and necessary to be done in order that the building should be rendered fit and proper for the uses and purposes for which it was intended.

While the record shows that the court found the building substantially completed on the 21st day of February, 1924, there is no disputing the fact that the hotel was not then finished as contemplated by the plans and specifications, nor could it then be used for hotel purposes.

[12] From the allowance to the owner for the expenses incurred in labor and materials, and especially for the allowance of the $2,824.02 for installing bathtubs and work on bathrooms, the plaintiffs appeal, basing their contention on the theory that the bathtubs were properly installed in the first instance, even though they did not comply with the plans and specifications. The bathtubs were simply set upon the wooden joists or wooden bearings, without any concrete base underneath them. A reading of the specifications shows that they called for the entire surface of every bathroom being covered with concrete, and then tile over the concrete, etc., just in accordance with the law relative to the construction of bathrooms, etc.

The record shows that the attention of the contractor was called to the manner in which concrete and tile floors should be laid in the bathrooms, prior to the installation of the tubs. Some of the witnesses called by the plaintiffs testified that the plans and specifications called for the installation of the tubs upon concrete base, and further testified that they would not follow the plans and specifications, but would install the tubs as was done by the contractors in the first instance in this case. We do not very well perceive how the testimony of any witness, that he would not follow the plans and specifications, can be held to relieve the contractors from so doing. An examination of the record, as we have said, shows the manner in which the bathtubs were to be installed. It shows, further, that, in order to make the installation of the bathtubs conform to the plans and specifications and the building laws, it was necessary to take up all the bathtubs and re-lay a portion of the floors in every bathroom, of which there were forty in number, from which it follows that the appeal of the plaintiffs touching this item is without merit.

[13] In view of the fact that the court allowed the appellant the sum of $3,386.52, to which there must be added a considerable sum, as hereinbefore indicated, the finding of the court that the delay of the owner in making the installment payment immediately after February 21, 1924, brought about the filing of the liens against the hotel building, does not appear to be supported. The total amount of the installment is the sum of $11,295, against which there was a sum due the owner for expenses which we have considered in actually completing the building, diminishing the installment payment more than one-half.

It does not logically follow that, because a payment of four or five thousand dollars was withheld, that liens aggregating something over the sum of $33,000 were filed as a consequence. Section 1193, Code of Civil Procedure, provides that contractors shall protect buildings from liens. The record does not show that they had any financial responsibility. What there is in the record is to the effect that they were without credit. Therefore the conclusion that the withholding of the sum above mentioned prevented the contractors from paying off liens aggregating some six times the amount of the money ac-

tually owing to the contractors does not appear to be sustained.

The only answer of the respondent to the general item of $1,524.55, compensation claimed for work and labor performed and materials furnished, for which a bill of particulars was furnished, and which the testimony, so far as we have been able to discover, shows to have been work and labor performed upon the building and materials furnished to make the building conform to the plans and specifications, is that the court found that the building had been substantially completed, and specifies some of the defects called "trivial defects" in one of its findings. It is now argued, as we have just stated, that, by reason of substantial performance, the owner should not be compensated for the work just mentioned. The cases which we have cited show that a finding of substantial performance does not estop the owner from recouping the expenses necessarily incurred in bringing the building up to the standard contemplated by the plans and specifications. We may here again refer to 9 C. J. 739, where the law is stated in relation to why the courts have adopted the rule of substantial performance. Connected with that same rule of construction of contracts is a further construction that the owner is entitled to be reimbursed for work and labor performed, notwithstanding the finding of substantial performance. As said in Long Beach, etc., District v. Dodge, 135 Cal. 401, 67 P. 499, the contractors had full knowledge of all and singular the requirements of the plans and specifications and of the work necessary to be done, notwithstanding the substantial performance claimed by them.

Our attention not having been called to any testimony controverting what we have hereinbefore stated, it follows that the owner was entitled to be fully reimbursed for all the sums shown by the testimony to have been expended by him in perfecting the building as called for by the plans and specifications.

No damages were allowed the plaintiffs for and on account of the withholding of payments for the limited periods mentioned in the complaint, other than the sum of $186.99 as interest, from which it follows that it is illogical to conclude that the withholding of payments for the short periods mentioned induced the filing of liens in a sum slightly in excess of $33,000. The consolidation of cases mentioned in the beginning of this opinion included the Globe Indemnity Company as cross-defendant, and also actions begun by the Stockton Supply Company, J. R. Bickel, and J. M. Adams, based upon mechanics' liens filed against the hotel building. The questions involved as to these parties relate to the judgment charging the owner with interest on the liens, charging his property with the amount of the liens, including interest, irrespective of the sums due the contractor on account of the building contract, and also failing to allow the owner recourse against the bonding company.

Did the court err in providing that the owner should not have recourse against the bonding company for any excess that he would be required to pay in order to clear his property from any mechanics' liens thereon in excess of the amount due the contractors?

The court made no finding that the Globe Indemnity Company had been in any particular disadvantaged or that that its liability upon its bond had been increased by any act of the owner. The only item of damages which we have found under the law and the testimony charged to the owner is the sum of $186.99 allowed as interest on deferred payments. This burden, however, is cast upon the owner and not upon the bonding company. The instrument by which the bonding company insured the completion of the building expressly refers to the contract, and, under the contract, as we have seen, the contractors were entitled to an extension of time if any delay in the progress of the work was caused by the owner. This extension of time was claimed, and, while the contractors claimed that they were damaged, no tenable testimony was introduced upon which any finding of damages could be supported. The estimate was too vague and uncertain.

This, taken in connection with what we have heretofore stated, we think shows conclusively that the liability of the bonding company has in nowise been increased by any act of the owner. While the court found that the building was substantially completed, the fact remains that the owner was compelled to pay out the sum of $7,284.80 to bring the building up to the plans and specifications, and to make it fit for its intended use.

[14, 15] Appellant strongly contends that the court is in error in finding substantial compliance, and in holding that only trivial defects remained to be remedied. There is much merit in this contention, but courts of equity have adopted a rule giving a very liberal construction to such contracts in order that the contractor may be paid for the work actually performed, and the owner reimbursed or entitled to an offset on the contract in the full amount of the money necessary to be expended by him to complete the building according to the plans and specifications. The applying of this principle was largely within the discretion of the trial court, and, by reason of what is hereinafter said, we do not feel that the circumstances demand a reversal of the judgment on account of such holding.

[16] The Globe Indemnity Company was a surety for compensation, and therefore does not stand before the court as a "favorite of the law," as is the case with a voluntary surety, and the strict rule ordinarily applied

to private voluntary sureties does not apply to this case. Royal Indemnity Co. of New York v. Northern Granite & Stone Co., 100 Ohio St. 373, 126 N. E. 405, 12 A. L. R. 378, and the annotations found in A. L. R. In the annotations on page 389 it is said: "While an individual surety's contract must be construed strictly in his favor, that of a surety company given for the faithful performance of a building contract, will not be construed so as to release it because of a variance in the performance of the contract, unless it is shown that the variance substantially increased the chances of loss insured against"—citing a long list of cases.

The same rule is enunciated in the consolidated cases of Montpelier v. National Surety Co. and City of Montpelier v. National Surety Co., 97 Vt. 111, 122 A. 484, 488, 33 A. L. R. 489. We find the following relative to the liability of compensated sureties thus stated: "The rule is well settled that a compensated surety is relieved from its obligations for a departure from the contract only when the departure is shown to be material and prejudicial." Supporting this statement, the court cites on page 496 of 33 A. L. R., supra, a large number of cases, and then says: "This doctrine is sometimes referred to as a modern rule, but it is merely the application of old principles to the new situation in suretyship matters, due to the advent of bonding or surety companies, whose business, while in form that of suretyship, is essentially that of insurance. Their contracts are regarded as contracts of indemnity, and as such, are governed by the rules of construction applicable to contracts of insurance." See, also Maryland Casualty Co. v. E. W. Fowler et al. (C. C. A.) 31 F.(2d) 881, 63 A. L. R. 1375.

[17] In line with these decisions and the principles applicable to surety companies who insure only for compensation, it must be held that that portion of the judgment denying recourse of the owner against the Globe Indemnity Company must be stricken therefrom and a provision inserted therein giving the owner a right to recover for any excess over the contract price which he may be compelled to pay.

While under the provisions of the fourth paragraph of section 1183, Code of Civil Procedure, the court did not limit the right of recovery of the lienholders to the amount that might be found due upon the contract from the owner to the contractor, yet, reading that section with section 1193, Code of Civil Procedure, the owner is really chargeable only with the amount of the unpaid construction price as we have determined the same herein, being the balance due the contractors, less the sum necessarily expended by the owner to complete the building, and, if the owner is compelled to pay any sum in excess thereof, recourse is given him against the contractors, or, in this case, the contractors' sureties.

[18] In its findings and judgment the court allowed interest to the respective lien claimants from the time of the filing of their liens until the date of judgment. This was error. The record shows that the three lien claimants held unliquidated demands, and that they were not entitled to the sums claimed by them, and that the amount could only be determined by the judgment of the court. Lien claimant Adams claimed the sum of $347.60, and was allowed $298.26. The Stockton Plumbing Company claimed the sum of $7,750, and was allowed only the sum of $4,855.48, and lien claimant Bickel asked $6,334.50, and was allowed $5,818.50.

[19] Dealing with a similar question the court, in Burnett v. Glas, 154 Cal. 249, 97 P. 423, 427, used the following language: "We are of the opinion that the claim of appellants that claimants Dyer and Watkins & Thurman were not entitled to interest prior to judgment is well founded. As to each of these claims, the amount due was unliquidated and not capable of being made certain by calculation until fixed by the judgment. The rule applied to such claims in Macomber v. Bigelow, 126 Cal. 9, 58 P. 312, namely, that interest prior to judgment cannot be allowed, was applicable. See, also, Stimson v. Dunham, etc., 146 Cal. 285, 79 P. 968. The judgment must be modified in this respect." We have found no rule contrary to the rule just set forth. From which it follows that the allowance of interest to the lien claimants as against the owner must be stricken from the judgment. At the same time it is due all parties to state that the judgment of the trial court awarded the lien claimants the interest just referred to, as against the Globe Indemnity Company, and as the Globe Indemnity Company has taken no appeal from the judgment, the judgment will not be modified so as to prevent the lien claimants from collecting such interest from the Globe Indemnity Company.

[20] Appellant further cites the cases of Stone v. Siermian, 198 Cal. 520, 246 P. 45, Roberts v. Security T. & S. Bank, 196 Cal. 557, 238 P. 673, and Bowman v. Maryland Casualty Co., 88 Cal. App. 481, 263 P. 826, to the effect that it is the duty of the contractors to protect the property from lien claimants, to defend such suits, if any, and that, if the owner is compelled to defend such suits, he is entitled to recover costs of suits and attorney's fees paid in making such defense. While the law is plain, as contended for by the appellant, the record in this case shows that the owner was compelled to litigate, as against the contractors, practically all of the issues involved in the lien cases, and there is nothing in the record which

would enable this court to apportion the costs, nor is there any basis upon which we could fix that portion of counsel fees that might properly be chargeable to the different claims set up by the holders of liens, and by reason of these facts we cannot say that this case presents a situation where the attorney's fees were really enhanced to any considerable extent by reason of the lien cases which were consolidated with the main case.

While the appellant claims damages for delay on the ground that the plaintiffs did not complete the building according to the plans and specifications, we have found nothing in the record upon which we could base any finding or judgment thereon as to the extent of the delay, and reversal should not be had for such reasons.

[21] Was the defendant entitled to costs in the court below?

The following figures have been computed according to our conclusions as hereinbefore set forth, which answer this question in the negative, to wit: At the date of the entry of judgment, there was due as principal on the contract the sum of $7,423.18; as interest, $4,438.86; allowance for extras including the $186.99 interest on deferred payments aggregate the total sum due the contractors of $12,570.68; due lien claimants at the date of the entry of judgment, chargeable against the owner, or which the owner might have paid, offsetting the plaintiff's claims, the sum of $10,972.24; leaving a balance due the contractors of $1,598.44, which entitle the contractors to their costs.

As this action has involved an immense amount of labor and a great deal of expense, instead of ordering a new trial, we will, in pursuance of section 956a, Code of Civil Procedure, and the constitutional provision relating thereto (Const. art. 6, § 4¾), direct only a modification of the judgment.

It is therefore ordered that the sum of $22,794.15 adjudged to be due the plaintiffs from the defendant Covell be stricken from the judgment, and the figures $12,570.68 be inserted in lieu thereof.

It is further ordered that the allowance of interest to lien claimants as against the owner, from the date of the filing of the liens until the entry of judgment, be stricken therefrom.

It is further ordered that, wherever the language of the judgment provides that whenever the owner pays any lien or liens in excess of the sum found to be due the contractors, the owner shall not be subrogated to the rights of the lien or lienholders as against the Globe Indemnity Company, be stricken therefrom, and the following inserted: "Provided, that if the owner pays any lien or liens, in excess of the sum found due from the owner to the contractors, then and in that case the owner shall be, and he is hereby subrogated to the rights of such lien or lienholders against the Globe Indemnity Company."

It is further ordered that that portion of the judgment providing that, if the Globe Indemnity Company shall pay or satisfy any judgment in favor of the Stockton Supply Company, J. R. Bickel, or J. M. Adams, or any thereof, then the Globe Indemnity Company shall be subrogated forthwith to all the rights of such judgment creditors so paid and discharged by it, be modified by adding thereto the following: "Provided that such recourse against the owner shall not extend to any sum in excess of the amount heretofore found due the plaintiffs as contractors."

It is further ordered that the allowance of costs for the Globe Indemnity Company be stricken from the judgment.

It is further ordered that the judgment in favor of Covell, in so far as it relates to the costs and expenses of reinstalling bathtubs, and from which the plaintiffs have appealed, be affirmed.

It is further ordered that the judgment in favor of the plaintiffs and in favor of the lienholders stand affirmed as modified herein.

The appellant Covell is awarded his costs on appeal.

We concur: PRESTON, P. J.: R. L. THOMPSON, J.

126 Cal.App. 575

GREAT NORTHERN RY. CO. v. SUPERIOR COURT IN AND FOR MODOC COUNTY et al.

Civ. 4676.

District Court of Appeal, Third District, California.

Oct. 4, 1932.

1. Eminent domain ⇐169.

Logging company's mere lack of title to easement for track across railroad right of way does not exempt it from regulation by railroad commission (Const. art. 1, § 14).

2. Eminent domain ⇐169.

Allegations of logging company's complaint, in suit to condemn easement for track across railroad right of way, *held* sufficient to establish plaintiff's status as common carrier, subject to regulation by railroad commission (Const. art. 1, § 14).

The complaint alleged defendant railway company's incorporation and owner-

ership and operation of railroad and necessary equipment for transportation of passengers and freight in state, route of its tracks through county, and plaintiff's incorporation, engagement in logging and lumber business in state, right of way for railway tracks in county, and desire to acquire easement therefor across defendant's right of way at described point in county.

3. Eminent domain ⇐169.

Procurement of railroad commission's order, determining location and conditions incident to crossing of railroad right of way by logging company's tracks, *held* prerequisite to proceeding to condemn easement therefor (Const. art. 1, § 14; Code Civ. Proc. § 1238; St. 1915, p. 137, § 43, subd. b, as amended by St. 1927, p. 1215).

4. Eminent domain ⇐169.

Railroad commission has jurisdiction to hear logging company's application to condemn easement for tracks across railroad right of way, where taking of private individual's property is not involved (Const. art. 12, § 23a; St. 1915, p. 137, § 43, subds. b, c, as amended by St. 1927, p. 1215).

Application by the Great Northern Railway Company for a writ of prohibition to the Superior Court of the State of California in and for the County of Modoc and F. M. Jamison, Judge thereof.

Writ granted, and court directed to dismiss action.

Earl & Hall and Chaffee E. Hall, all of San Francisco, for petitioner.

W. C. Van Emon, of Klamath Falls, Or., and A. K. Wylie, of Alturas, for respondents.

Mr. Presiding Justice PRESTON delivered the opinion of the court.

The petitioner seeks to prohibit the Superior Court of Modoc County from proceeding to try an action in eminent domain which was instituted by the Tionesta Logging Railway Company to condemn an easement to be used for a crossing of the track of the Great Northern Railway Company. It is asserted the court lacks jurisdiction to try the condemnation suit for the reason that the order of the railroad commission was not first procured determining the location and conditions incident to the crossing as required by section 43 subdivision (b) of the Public Utilities Act of California (as amended by St. 1927, p. 1215). A motion to dismiss the action on that ground was denied.

The complaint in the condemnation suit alleges the incorporation of the Great Northern Railway Company and that it owns and operates a railroad and necessary equipment for the transportation of passengers and freight in California. The route of this railroad track through Modoc county is described. It is also alleged the Tionesta Logging Railway Company is incorporated and is engaged in a logging and lumber business in the state of California and possesses a right of way for its railway track in Modoc county; that it is desirous of acquiring an easement for its railroad track to cross the right of way of the Great Northern Railway Company in Modoc county at a point which is particularly described to be used in common with the last-mentioned company. The complaint recites the necessary elements of an ordinary condemnation suit, except that it is not alleged that the order of the railroad commission was first procured consenting to the crossing or determining its location or the conditions incident thereto. The defendant's motion to dismiss the condemnation suit for lack of jurisdiction was denied. This petition for a writ of prohibition was then instituted.

The only question which is involved in this proceeding is whether the Superior Court is without jurisdiction to try the condemnation suit until the railroad commission first determines the location and conditions incident to the proposed crossing and authorizes the same, as provided by subdivision (b) of section 43 of the Public Utilities Act of California.

Section 1238 of the Code of Civil Procedure provides that: "The right of eminent domain may be exercised in behalf of the following public uses: * * * 11. Railroads, roads and flumes for quarrying, logging or lumbering purposes."

[1-3] The Tionesta Logging Railway Company contends it is entitled under the provisions of article 1, § 14, of the Constitution of California, to maintain an action in eminent domain in the Superior Court of the county where the land is located, to condemn an easement for its railroad to cross the petitioner's track, and have the damages incident thereto assessed by the court or a jury, subject to a subsequent authorization therefor and order of the railroad commission determining the location and conditions attending the proposed crossing pursuant to subdivision (b) of section 43 of the Public Utilities Act of California.

The logging company further asserts that it does not become a common carrier subject to the regulation of the railroad commission until it has acquired the property for its right of way and a decree of condemnation therefor has been duly made and entered. This claim is based upon the last paragraph of section 14 of article 1 of the Constitution, which provides: "The taking of private property for a railroad * * * for logging or lumbering purposes shall be deemed a taking

for a public use, and any person, firm, company or corporation taking private property under the law of eminent domain for such purposes shall thereupon and thereby become a common carrier."

It will be observed, however, that the taking of private property in eminent domain for a railroad right of way is not involved in this proceeding. We must assume the logging company is possessed of a right of way and that it is an incorporated logging railway company. All that is involved in this proceeding is the privilege of procuring an easement for one railroad track to cross the right of way of another railroad. We are of the opinion that the desired easement for a railroad crossing is a mere incident to the property rights of the logging railway company, and that the mere lack of title to this easement does not exempt the logging company from regulation by the railroad commission. The allegations of the complaint in the condemnation suit, and of the petition in this proceeding, are sufficient to constitute it a common carrier. It is only necessary that it should be equipped so as to be able to transport passengers or property, to be deemed to be a common carrier. Conceding, for the sake of argument, that the courts still retain concurrent jurisdiction of eminent domain proceedings to condemn an easement for one railroad to cross the track of another railroad, where merely public utility property is taken as distinguished from property of a private individual, still we are of the opinion that the procuring of an order of the railroad commission pursuant to subdivision (b), section 43, of the Public Utilities Act, determining the location and conditions incident to the proposed crossing, is a prerequisite to the right to maintain such eminent domain proceeding.

Certainly orderly procedure and justice would seem to demand that the order of the railroad commission consenting to the crossing determining the exact location and fixing the terms and conditions incident to the grant should become a prerequisite to the maintaining of an action in the state courts to condemn the easement for railroad crossing purposes. For instance, it is apparent that since the commission has the exclusive power to locate the point of crossing and determine the manner, terms, and conditions incident to the crossing, it might become unjust and idle to first condemn a particular strip of land as a crossing or attempt to fix the compensation therefor. It is entirely possible the commission in the exercise of wise discretion may subsequently determine, in the interest of justice, that an entirely different location of the proposed crossing from that which was condemned, is least detrimental to the owner and best adapted to the interest of both parties. The commission may, in the exercise of justice, determine that the best interest of the public and of the parties involved demand an overhead or an under track crossing. Other reasonable terms and conditions may be imposed by the commission which were not contemplated in the awarding of compensation at the trial. Such contrary action on the part of the commission would result in nullifying the decree of condemnation. The expense and time of trial would become useless.

[4] Moreover, under the provisions of article 12, § 23a, of the Constitution, and subdivisions (b) and (c) of section 43 of the Public Utilities Act (as amended by St. 1927, p. 1215), the railroad commission has jurisdiction to authorize one railroad to cross the tracks of another railroad, to determine the location of such crossing and the terms and conditions incident thereto, and to assess the compensation to be paid for the taking of any property of a public utility for such purpose, and to make the final order of condemnation therefor.

Article 12, § 23a, of the Constitution provides: "The railroad commission shall have and exercise such power and jurisdiction as shall be conferred upon it by the legislature to fix the just compensation to be paid for the taking of any property of a public utility in eminent domain proceedings by the state or any county, city and county, incorporated city or town, municipal water district, irrigation district or other public corporation or district, and the right of the legislature to confer such powers upon the railroad commission is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

Pursuant to this authorization of the Constitution, subdivision (b) of section 43 of the Public Utilities Act was enacted, which reads in part: "The commission shall have the exclusive power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection of each crossing of one railroad by another railroad * * * and to require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the construction, alteration, relocation or abolition of such crossings or the separation of such grades shall be divided."

Subdivision (c) of the same section of the Public Utilities Act provides: "The commission shall have power in accordance with the procedure provided in this subsection to fix the just compensation to be paid for property or any interest in or to property to be taken or damaged in the separation of grades at any crossing specified in subsection (b) hereof, or for property or any interest in or to property to be taken or damaged in the

construction, alteration or relocation, under the order or with the approval of the commission, * * * and upon the payment of the just compensation so fixed to make a final order of condemnation as hereinafter provided."

From the foregoing enactments of law it seems clear that where the mere acquiring of an easement for one railroad track to cross the right of way of another railroad is involved, which amounts to the taking of an interest only in the property of a public utility as distinguished from the property of a private individual, the railroad commission has jurisdiction to hear the proceeding for condemnation, and grant or deny the application, determine the location and fix the terms and conditions incident to the proposed crossing, award the compensation to be paid for the taking of the property of a public utility, and make and enter the final order of condemnation therefor.

Chase Lumber Company v. Railroad Commission, 212 Cal. 691, 706, 300 P. 12, 18, upon which the respondent relies, does hold that: "The Railroad Commission has no power to make or direct the execution of any order under * * * sections 22, 23, and 23a of article 12 of the state Constitution or of section 43, subd. a, of the Public Utilities Act, which shall either by its terms provide for, or by the execution thereof, effectuate the taking or damage *of the private property of private persons* otherwise than under the provisions of section 14 of article 1 of the state Constitution, or which shall provide for or effectuate the taking or damage of such private property without compensation."

In the Chase Lumber Company Case, which was decided by a divided court, the property of private individuals was directly affected by the proposed crossing of a city street by a railroad track. In granting the petition for a writ of prohibition which was instituted by private owners of private property adjacent to the proposed crossing, the court appears to have carefully limited the jurisdiction of the court in such eminent domain proceedings to the taking or damaging of "private property of private persons." Upon the contrary, it will be observed that section 23a of article 12 of the Constitution confers jurisdiction upon the railroad commission to award compensation "for the taking of any property of a public utility." This provision is declared to be plenary and unlimited by any other provision of the Constitution. If the language of the Chase Lumber Company Case is enlarged to apply to the taking of all property of public utilities as well as the property of private persons, then the last-mentioned section of the Constitution is meaningless and ineffectual for any purpose.

Regardless of whether the railroad commission is possessed of jurisdiction to condemn an easement for one railroad track to cross the right of way of another railroad and award the compensation therefor, it still remains true that the commission has the exclusive power to determine the location and fix the terms and conditions of the proposed crossing. We are of the opinion this action on the part of the commission should become a prerequisite to the maintenance of an action in a state court to condemn an easement for one railroad track to cross the right of way of another railroad.

The impossibility of appraising damages prior to the determination of the location, terms, and conditions upon which a railroad was authorized to cross a public street was recognized in Re West 134th Street, 204 N. Y. 465, 97 N. E. 862, 864, where it was said: "It is important that the commissioners of estimate and assessment should be advised in advance of the nature and character of the interests of the railroad company to be taken in order to determine the damages that should be awarded to it. If the street is to cross under or above the railroad tracks, a very different question may be presented from that where the street is to cross the tracks at grade. If they cross at grade, the easement of the railroad company in the operation of its trains may be more seriously affected than by an under or over crossing. The power to determine this question was then vested in the board of railroad commissioners, now in the public service commission, and in our view the statute contemplated the determination of that question by that commission before the city should proceed to appraise the property interests of the railroad corporation and acquire title for the crossing."

The foregoing language seems very appropriate to the situation in the present proceeding, provided the court retains any jurisdiction of the condemnation suit whatever under the circumstances which are here presented.

Under a Missouri statute similar to the Public Utilities Act of California, in the case of City of Kirksville v. Hines, 285 Mo. 233, 225 S. W. 950, 951, it was determined that a city could not condemn land for a street to cross a railroad track until the public service commission had first determined the location of the crossing and the terms and conditions thereof. The court there said: "The petition does not allege that such parcel of land is the locus of the particular point of crossing of the crossing of defendants' railroad by the proposed street extension as determined by the Public Service Commission. If a municipality has no authority to determine the place of the crossing of a railroad by a street that it proposes to open or extend, obviously it cannot appropriate land for such a crossing unless and until the situs is determined by the tribunal invested with the power so to do. Such prior determination is therefore a con-

dition precedent to the right to condemn. As it nowhere appears from the petition that the land therein described and which is sought to be condemned is at a place that has been determined upon and fixed by the Public Service Commission as the point of crossing of the railroad by the proposed street extension, the petition does not state a cause of action."

The complaint in eminent domain which is involved in the present proceeding failed to state that the railroad commission had authorized the proposed crossing or designated its location. The complaint therefore failed to state a cause of action. The Superior Court is without jurisdiction to try the eminent domain cause.

The writ of prohibition is granted as prayed for. The court is directed to dismiss the action.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

126 Cal.App. 367

SCHROEDER v. WHEELER.

Civ. 7819.

District Court of Appeal, First District, Division 1, California.

Sept. 27, 1932.

Rehearing Denied Oct. 27, 1932. Hearing Denied by Supreme Court Nov. 25, 1932.

1. Action ⇐6.

Complaint by patent attorney upon contract to prosecute client's patent applications and protect client against infringements by employing counsel when necessary stated cause of action for declaratory relief (Code Civ. Proc. §§ 1060–1062a).

Such complaint stated a cause of action for declaratory relief under the provisions of Code Civ. Proc. §§ 1060–1062a, and was not subject to the objection that, although in form it was an action for declaratory relief, it was an attempt to seek specific performance of a contract for professional services under the guise of an action for declaratory relief.

2. Contracts ⇐143.

Contract must be interpreted in entirety.

3. Contracts ⇐153.

Where possible, contract should be interpreted to sustain its validity (Civ. Code, § 3541).

4. Attorney and client ⇐11.

Patent attorney's contract to protect client's interest by employing counsel when necessary and prosecuting infringement suit *held* not illegal as agreement to "practice law," where patent attorney was not an attorney at law.

The term "practice of law" is generally understood as the performing services in a court of justice in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure; but in a larger sense it includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court.

[Ed. Note.—For other definitions of "Practice of Law," see Words and Phrases.]

5. Attorney and client ⇐11.

In patent attorney's action on contract to prosecute patent applications and defend client's interest against infringements, evidence *held* to show client knew patent attorney was not attorney at law.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Harry C. Schroeder against Maude Agnes Mingus Wheeler, doing business under the fictitious name and style of the Lavalon Laboratories. From the judgment for defendant, plaintiff appeals.

Reversed, with directions.

John H. Miller, A. W. Boyken, and N. D. Thomas, all of San Francisco, for appellant.

Norman J. Ronald, Walter M. Gleason, and George W. Hickman, all of Oakland, for respondent.

LANDIS, Justice pro tem.

The following are the facts as stated in appellant's brief and appear to substantially cover the controlling facts, to wit:

The defendant, Maude Agnes Mingus Wheeler, was the inventor and manufacturer of a composition hair rinse known as Lavalon Rinsing Powder. Desiring to obtain protection for her invention and for the name "Lavalon," she filed in the United States Patent Office two applications, one for a patent on the hair rinse and the other for a trade-mark on the aforesaid name, which trade-mark later became involved in an opposition proceeding. Both of these applications were filed through the plaintiff, Harry C. Schroeder, a registered patent attorney, who has been engaged in that profession in Oakland, Cal., approximately twenty years. During all of the time Schroeder had dealings with defendant, he had associated with him, as an employee, Adelbert Schapp, an attorney at law, admitted to practice in all the courts of California, who was a registered patent attorney as well.

It became necessary for defendant to file additional applications in the Patent Office to protect her interests adequately and to enable her to take legal proceedings if her rights should be invaded by infringers. She was not financially able to compensate Schroeder for his services as a patent attorney. A contract was therefore made in writing between plaintiff and defendant, by the terms of which plaintiff agreed to file and prosecute all patent and trade-mark applications for defendant and protect defendant against infringement and unfair competition "by employing counsel when necessary." In consideration of these covenants the defendant agreed to compensate plaintiff in an amount equal to 5 per cent. of the gross income from her "Lavalon" business. This contract was entered into on May 21, 1926, and was to continue in force for a period of ten years.

On August 5, 1927, the defendant ceased to make payments under the contract and on October 10, 1927, wrote a letter to plaintiff purporting to terminate and cancel the same. Thereupon plaintiff filed his complaint, alleging that he was ready, competent, willing, and able to perform the services required of him under the contract; that defendant had failed and refused to pay him the compensation reserved in the agreement, except the sum of $555.28; and, in an amended complaint, alleged that there was due him a sum in excess of $2,500. He prayed for an adjudication of the rights of the parties under the contract and for an accounting.

In the answer, defendant, after a denial of paragraphs IV and V of the complaint, set up as a separate defense that the contract called for the services of an attorney at law, and that performance on his part was therefore impossible. As a further separate defense, the answer alleged default on the part of plaintiff in protecting defendant against the infringement of S. Hikell & Co., of Omaha, Neb., thereby giving defendant the right to terminate the contract.

Upon the original trial of the action, the court directed findings in favor of the plaintiff, subsequently reopened the case for further trial, and after the further trial of the case made its findings and caused judgment to be entered for defendant, and this appeal is by plaintiff from said judgment.

Appellant contends that the following six findings are contrary to the evidence, and that they thus constitute the issues of this appeal, to wit: The finding "that under and by virtue of the terms and promises of said written contract, plaintiff also promised and agreed to and in fact did perform certain services of an attorney-at-law"; the finding "that at the time of entering into said contract defendant did not know that plaintiff was not an attorney-at-law"; the finding "that it is not true that plaintiff has at all times or at any time, or at all, been ready and/or competent and/or willing and/or able to perform each and/or every, and/or all and/or singular the services and/or any part or portion of the services specified and/or required of him under the terms of the said agreement and that it is not true that plaintiff has performed all and/or any services thereunder required and/or requested by defendant"; the finding "that plaintiff failed, refused and neglected to perform for defendant any of the services so agreed by him to be performed except that plaintiff did procure for defendant not to exceed six patents, and in this respect the court finds that defendant paid to plaintiff therefor the sum of Five Hundred and Fifty-five and 28/100 ($555.28) Dollars, and that plaintiff has been fully compensated therefor"; the finding "that it is not true there is now and/or that there was at any time, or at all, due to plaintiff from defendant, a sum in excess of Twenty-five Hundred Dollars, or any sum or sums whatever"; the finding "that defendant performed each and every all and singular the promises, covenants and agreements in said contract by her agreed to be performed."

For the purpose of simplifying the discussion, appellant groups said findings into the following questions: (1) Did plaintiff agree to perform and did he in fact perform the services of an attorney at law? (2) Did defendant know plaintiff was not an attorney at law? (3) Did plaintiff or defendant violate the terms of the contract? (4) Was plaintiff fully compensated for the services performed by him under the contract?

Defendant does not appear to seriously urge that plaintiff acted in the capacity of a lawyer, whereas he was only a patent attorney, but appears to take the position that the contract itself provides for the services of a lawyer, and that plaintiff could not fill that requirement, and contends that plaintiff agreed to perform for defendant certain personal services which fall into two distinct classes, to wit, (a) Services usually and customarily performed by registered patent attorneys, and (b) services usually and customarily performed exclusively by attorneys at law; and that the real question involved herein is whether or not a patent attorney, who is not an attorney at law, may enforce a contract under which he undertakes and agrees to prosecute and defend, or causes to be prosecuted and defended, such actions at law for infringement of patents and unfair competition as in his belief and judgment shall be beneficial to his client, and that the action is one wherein the plaintiff, as a registered patent attorney who is not an attorney at law, seeks to have adjudicated his rights with reference to a written contract of employment; and, although in form it is an action for declaratory relief under the provisions of sections 1060 to 1062a of the Code

of Civil Procedure, it is an attempt by plaintiff to seek specific performance of a contract for professional services under the guise of an action for declaratory relief, and that the complaint does not state a cause of action.

[1] With respect to the contention that the complaint fails to state a cause of action, we need but cite the case of Blakeslee v. Wilson, 190 Cal. 479, 213 P. 495, the decision of which is applicable to and determinative of the question here presented, and clearly shows that this contention is not well taken. See, also, Lane Mortgage Co. v. Crenshaw, 93 Cal. App. 411, 269 P. 672; Oldham v. Moodie, 94 Cal. App. 88, 270 P. 688; 8 Cal. Law Review, 133; 9 Cal. Law Review, 359; and 10 Cal. Law Review, 158.

Defendant further contends that the contract is illegal and void, and in support thereof urges the following points: (a) Plaintiff is not an attorney at law; (b) definition of the term "practicing law"; (c) by the terms of the contract plaintiff undertook to practice law; (d) one who is not an attorney at law cannot practice law; (e) one who is not an attorney at law cannot recover compensation for legal services; and (f) the contract is entire and not severable. Plaintiff admits points (a), (d), (e), and (f), leaving only points (b) and (c) to be considered.

Constituting the material parts of the contract necessary for a consideration of the issues to be determined by the court, and after in effect reciting that defendant is in the business of manufacturing a hair rinse which is being sold on the market under the name Lavalon Rinsing Powder; that she has an application pending in the United States Patent Office for letters patent on the composition of said rinse powder and contemplates filing further applications for letters patent on changes and improvements she may make from time to time; that she has adopted and is using the word "Lavalon" as a trade-mark and has filed application in said United States Patent Office for registration of said trade-mark; that she is building up a substantial trade on said rinse powder, with a limited capital; that she is selling said powder in distinctive packages and with distinctive literature which have become well known to the trade; that an attempt is being made by S. Hikell & Co., of Omaha, Neb., to place a similar powder on the market in substantially the same package for the purpose of deceiving the purchasing public; that it is likely that other firms may adopt similar measures in the future, and that it will be necessary for defendant to take measures continually for the protection of her patent rights, trade-marks, and the identity of her goods; that plaintiff is a registered patent attorney and is now prosecuting defendant's patent application and trade-mark application and certain opposition in connection therewith, and will file further patent applications as the same may become necessary, and is ready to protect the legal interests of defendant wherever the same may be invaded, by employing counsel when necessary for commencing and prosecuting infringement suit or suits for unfair competition; that defendant is not financially able at the present time to properly compensate plaintiff for services to be performed—the contract recites that defendant hereby retains said plaintiff as attorney for the purpose of filing and prosecuting patent and trade-mark applications and for protecting defendant against infringement and unfair competition for the period of ten years, the employment to be continued thereafter at the option of either party, and defendant agrees to pay plaintiff, as consideration for such services, a retainer equal to 5 per cent. of the gross income of said business, to be paid on the 15th day of each month for the gross receipts of the preceding month; that plaintiff hereby accepts the employment as attorney for defendant and agrees to protect the interests of defendant against infringement and unfair competition with all reasonable care and to the best of his ability, to prepare and prosecute applications for patent and trade-mark protection wherever in the judgment of plaintiff the filing of such applications will advance the interests of defendant and where the expense involved is not out of proportion to the retainer received, and he further agrees to defend defendant or cause her to be defended when any suit or action is brought against her for infringement of any patent rights or trade-marks or for unfair competition; that, if either party should neglect to perform the obligations assumed in this contract, the other may terminate by giving notice, etc., provided that the alleged default shall consist of the refusal of plaintiff to bring suit on the instructions of defendant against an alleged infringer or unfair competitor; the question of whether such suit falls within the limits of this contract shall be decided by arbitration; and further provides that the agreement has reference only to the present business of defendant as set forth above and to allied subject within the natural expansion thereof, and that the duties of said plaintiff shall be confined to matters arising out of patent and trade-mark matters and unfair competition.

The parties appear to rely on the plain and ordinary signification of the language of the contract; and in fact the evidence shown by the record, in addition to the contract, is but little, if any help to the court in its determination of the real question to be determined.

With respect to what constitutes "practice of law," in the 1932 supplement of California Jurisprudence, section 6, on page 16 of the article on "The Practice of Law," it is said: "The meaning of the phrase 'practice

of law' is too broad to be brought within the limits of a single all-inclusive definition. The courts have adopted many definitions, some of which are only broad enough to cover the specific facts before them in the particular cases, and legislatures have also attempted to define the phrase in the enactment of statutes regulating the practice of law as a whole or prohibiting certain persons from engaging therein. One definition, frequently approved by the California courts, is thus phrased: 'As the term is generally understood the "practice of the law" is the doing or performing services in a court of justice in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court.'"

Defendant contends that the plain intent and meaning of the contract is found in the provisions thereof which for convenience in discussing the same will be divided into three paragraphs numbered and hereinafter referred to as paragraphs 1, 2, and 3.

[2, 3] Needless to say, the contract must be interpreted in its entirety and from a consideration of every word, sentence, and phrase, and, if possible, should always be interpreted so as to sustain its validity. In 6 California Jurisprudence, 268, § 168, it is stated as follows: "As between two permissible constructions, that which establishes a valid contract is preferred to that which does not, since it is reasonable to suppose that the parties meant something by their agreement, and were not engaged in an attempt to do a vain and meaningless thing. Pacific Wharf, etc., Co. v. Dredging Co., 184 Cal. 21 [192 P. 847]; McVicker v. McKenzie, 136 Cal. 656 [69 P. 495]; Jackson v. Puget Sound Lumber Co., 123 Cal. 97 [55 P. 788]; Herzog v. Purdy, 119 Cal. 99 [51 P. 27], and others. The parties are deemed to have intended a lawful, rather than an unlawful, act, and their agreement is to be construed, if possible, as intending something for which they had the power to contract. (Smith v. Luning Co., 111 Cal. 308 [43 P. 967].)"

The following is also quoted from 6 California Jurisprudence, 269, § 168, in support of which some fifteen or twenty cases are cited: "All intendments being against fraud and in favor of fair dealing, it will not be presumed against a writing that it contemplated a violation of the law, unless that conclusion becomes irresistible from the very reading of the instrument. (Estate of Wood, 137 Cal. 129 [69 P. 900]). * * * And section 3541, Civil Code, provides that, 'an interpretation which gives effect is preferred to one which makes void.'"

[4] With respect to paragraph 1, which reads as follows: "Agrees to protect the interests of the said Maude Agnes Mingus Wheeler against infringement and unfair competition with all reasonable care and to the best of his ability"—although standing alone it could not mean or import more than an agreement by a patent attorney to use all reasonable care and to the best of his ability protect the interests of defendant against infringement and unfair competition, read and considered in connection with this paragraph found in the contract, to wit, plaintiff "is ready to protect the legal interests of the said Maud Agnes Mingus Wheeler wherever the same may be invaded, by employing counsel when necessary for commencing and prosecuting infringement suit or suits for unfair competition," clearly it cannot be held that under said paragraph 1 plaintiff agreed to practice law. At most, he agreed to employ counsel, when necessary, to perform the services that are required to be performed by an attorney at law. Who, it might be asked, would be better qualified to render the services required than a registered patent attorney admitted to practice before the Patent Office of the United States with all the rights and privileges appertaining thereto, recognized by that office as a specially qualified expert in the field of patents and trade-marks, and endowed with the technical and legal qualifications necessary to render valuable services to clients in that field?

[5] At this point it may be stated that it is obvious that the finding that "defendant did not know that plaintiff was not an attorney at law" is contrary to the irresistible conclusion that must be reached from a consideration of the entire contract and contrary to the evidence.

With respect to paragraph 2, which reads as follows: "To bring suit against infringers and unfair competitors where such suits in the best judgment of the said Harry C. Schroeder will be beneficial to the interests of the said Maud Agnes Mingus Wheeler"—the most that can be said of this paragraph, standing alone, is that plaintiff agreed to bring suits against infringement and unfair competitors where such suits in the best judgment of plaintiff will be beneficial to the best interests of defendant. Defendant in effect contends that under this provision she is deprived of the benefit of counsel and advice of a duly licensed attorney-at-law with respect to the nature and extent of her legal rights, duties, and obligations. A question similar in purport to the question propounded with respect to the provisions of paragraph 1 might be applied here; that is, Who would be better qualified to decide whether or not the bringing of such suits would be beneficial to the interests of defendant than a specially qualified expert in the field of patents and trade-marks? Also it may be

noted that the contract in effect provides that, in the event plaintiff shall refuse to bring suit on the instructions of defendant against an alleged infringer or unfair competitor, the question of whether such suit falls reasonably within the limits of this contract shall be decided by a board of arbitration, and in detail provides the manner of bringing about such arbitration. The compliance with this requirement is neither alleged nor proved.

With respect to paragraph 3, which reads as follows: "And he further agrees to defend the said Maud Agnes Mingus Wheeler or cause her to be defended where any suit or action is brought against her for infringement of any Patent rights or Trade Marks or for unfair competition"—it will be seen that plaintiff agrees to defend or cause defendant to be defended where any action or suit is brought against her for infringement or unfair competition. Reading and considering this paragraph in connection with all other paragraphs of the contract forces the conclusion that plaintiff will, if necessary, employ counsel to defend such suit or action.

A consideration of the entire contract forces the irresistible conclusion that, as contended by plaintiff, the intention of the parties was that plaintiff should perform the necessary services as a patent attorney and act as defendant's agent and counselor in looking after her patent and trade-mark matters generally, employing counsel if and when necessary.

The question thus arises as to the legality and the enforceability of such a contract; that is, Can a person who is not an attorney at law enforce a contract under which he agreed to if necessary employ the services of an attorney at law to assist in the performance of services, a portion of which services is to be and may be performed by such person?

As hereinbefore stated, it is conceded by both parties that one who is not an attorney at law not only cannot practice law, but cannot recover compensation for legal services by him performed, but there is no law prohibiting persons other than attorneys from recovering the reasonable value of their services when performed at the request of another. Miller v. Ballerino, 135 Cal. 566, 67 P. 1046, 68 P. 600. In 6 Corpus Juris, page 721, it is stated as follows: "An unlicensed person may recover for services not performed in a court of record, and of a character the performance of which would not constitute the practice of law." See cases therein cited.

Where, as here shown, by solemn contract in writing admitted to have been entered into by and between parties, under the terms of which plaintiff agreed to perform certain services which he was capable of performing and further agreed to furnish the services of an attorney at law if said services should be beneficial and necessary and for and in consideration of which defendant agreed to pay plaintiff on a contingent basis, it cannot be held that the contract is illegal and void; neither is it unenforceable nor impossible of performance. With respect to the contention of defendant that plaintiff failed to perform, particularly urging that plaintiff failed to take steps to protect defendant against the infringement of S. Hikell & Co., in addition to the testimony of defendant admitting *her* failure and refusal to perform by refusing to make any further payments required under the contract, as hereinbefore stated, it need but be said that it was neither alleged nor proved that the question was submitted to arbitration as required by the plain provisions of the contract.

It is clear that plaintiff is entitled to a judgment decreeing that the contract is a legal contract and is entitled to an accounting.

For the reasons herein given, the judgment appealed from is reversed, with directions to the trial court to proceed in accordance with the views herein expressed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

126 Cal.App. 661

MACHADO v. WESTON et al. (two cases).

Civ. 7975.

District Court of Appeal, First District, Division 1, California.

Oct. 7, 1932.

Rehearing Denied Nov. 5, 1932. Hearing Denied by Supreme Court Dec. 5, 1932.

1. Judgment ⇐199(1).

Failure to make motion for directed verdict during trial precludes rendition of judgment notwithstanding verdict (Code Civ. Proc. § 629).

2. Judgment ⇐199(1).

Defendant's proposal of instruction directing verdict in her favor *held* not equivalent to presenting motion for directed verdict so as to authorize judgment notwithstanding verdict (Code Civ. Proc. §§ 607a, 629).

3. Judgment ⇐199(1).

Judgment notwithstanding verdict, rendered where no motion for directed verdict was made, and long after judgment was entered in accordance with jury's verdict, *held* not sustainable (Code Civ. Proc. § 629).

Appeals from Superior Court, Santa Clara County; F. B. Brown, Judge.

Actions by Robert Machado, a minor, by Joe Machado, his guardian ad litem, and by

Mildred Machado, a minor, by Joe Machado, her guardian ad litem, against Maude I. Weston and another. From orders setting aside judgments and re-entering judgments notwithstanding the verdict, plaintiffs appeal.

Reversed, with directions.

John H. Machado and A. Andreuccetti, both of San Jose, and William L. Southwell, of San Francisco, for appellants.

Charles W. Haswell, of San Francisco, and Bohnett, Hill & Campbell, of San Jose, for respondent.

KNIGHT, J.

At the trial of these consolidated actions to recover damages for personal injuries sustained by plaintiffs in an automobile accident, verdicts were rendered against the defendants for the total sum of $3,500, and judgments in conformity therewith were entered by the clerk on the same day. Nine days afterwards Maude I. Weston, one of the defendants, served and filed in each action notice of motion to set aside the judgment and to re-enter the same in her favor, non obstante veredicto; and approximately a month later the trial court granted the motions. From the orders made in that behalf, plaintiffs prosecute these appeals.

[1] Section 629 of the Code of Civil Procedure, from which the trial court derives its authority to hear and determine motions of the kind here granted, provides that "*when a motion for a directed verdict, which should have been granted, has been denied* and a verdict rendered against the moving party, the court, at any time *before* the entry of judgment, either of its own motion or on motion of the aggrieved party, shall render judgment in favor of the aggrieved party notwithstanding the verdict * * *" (italics ours), and by recent cases it has been definitely settled that failure to make a motion for a directed verdict during the trial of the action precludes the exercise of the authority granted by said Code section. Cushman v. Cliff House, 79 Cal. App. 572, 250 P. 575; Estate of Yale (Cal. Sup.) 4 P.(2d) 153; Estate of Easton (Cal. App.) 5 P.(2d) 635. In the present cases no motions for directed verdicts were ever made; and it follows, therefore, that the trial court's action in setting aside the judgments against respondent and re-entering the same in her favor non obstante veredicto cannot be sustained.

[2] Respondent points out that prior to the submission of the cases to the jury she proposed an instruction directing a verdict in her favor, and that the trial court refused to give the same, which she contends was the equivalent of presenting a motion for a directed verdict and a denial thereof. The same contention, based on similar facts, was made in the Estate of Easton, supra, decided several months subsequent to the rulings of the trial court in the present actions, and was held to be without merit. The decision in that case was afterwards taken before the Supreme Court on petition for hearing before that court, and the petition was denied.

In the Estate of Easton, also, as here, the record failed to show that the appellant was cognizant of the fact that an instruction for a directed verdict had been proposed; and in this connection respondent calls attention to certain language used in Ramos v. Service Brothers (Cal. App.) 5 P.(2d) 623, decided about the same time the decision in the Estate of Easton was rendered, to the effect that it will be presumed that all instructions proposed by the respective parties were served on each other in conformity with the requirements of section 607a of the Code of Civil Procedure. But whether or not such knowledge be imparted would seem to make little difference, because, as shown, under the ruling of the cases above cited the making of a motion during trial for a directed verdict is a necessary prerequisite to the exercise of the authority granted to the trial court by said section 629.

[3] Moreover, as will be observed, the provisions of said section declare that the authority to enter judgment non obstante veredicto may be exercised at any time *before* the entry of judgment on the verdict; and here no steps were taken by respondent to invoke the provisions of said section, nor were the motions presented or granted until long after the judgments were entered in accordance with the verdicts; and, to make the rulings effective, it was first necessary to set said judgments aside. Therefore, in any event, the proceedings initiated by respondent's motions were not had within the period of time allowed therefor by said code section.

As claimed by respondent, however, her motions for judgment non obstante veredicto were made in the alternative, as permitted by said Code section, so as to reserve the right to apply for a new trial in the event the motions were denied, and that simultaneously therewith she filed motions for new trial. Therefore the orders appealed from are reversed, with directions to the trial court to re-enter the judgments in favor of plaintiffs in accordance with the verdicts, and thereupon to hear and determine respondent's motions for new trial.

We concur: TYLER, P. J.; CASHIN, J.

In re DOYLE'S ESTATE.

CHRISTMAN v. VOYCE et al.

Civ. 8599.

District Court of Appeal, First District, Division 1, California.

Sept. 28, 1932.

Rehearing Denied Oct. 28, 1932. Hearing Denied by Supreme Court Nov. 25, 1932.

1. Descent and distribution ⇐71(7).

Rule that, where any evidence or reasonable inference therefrom sustains trial court's findings, they cannot be disturbed, *held* applicable to determination of heirships.

2. Descent and distribution ⇐71(6).

In contest of will by testator's second cousin, evidence *held* sufficient to sustain finding that proponents were testator's first cousins, and next of kin.

3. Appeal and error ⇐231(4).

Irregularity in admitting depositions over general objections of hearsay, immateriality, and incompetency, without giving opposite party sufficient opportunity to object, did not justify reversal, where objectionable portions were not specified (Code Civ. Proc. § 657, subd. 1, and § 2022).

4. Depositions ⇐104.

Law requires that full and fair opportunity be afforded for objections before reception of depositions (Code Civ. Proc. § 2022).

5. Depositions ⇐110.

Generally, for objection to deposition to be effective, even as to its competency or relevancy, it should be specific and addressed to objectionable parts (Code Civ. Proc. § 657, subd. 1, and § 2022).

6. Appeal and error ⇐1052(8).

Admission of evidence, exclusion of which would not have affected finding, did not constitute reversible error.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding by M. Christman as administratrix with the will annexed of the estate of Leonard J. Meehan, deceased, to contest the will of Thomas Patrick Doyle, deceased, opposed by Alfred Voyce, executor of the estate of Patrick Doyle, deceased, and others. From the decree directing final distribution of testator's estate, contestant appeals.

Affirmed.

Rothchild & Golden and I. F. Chapman, all of San Francisco (Joseph A. Pritchard, of San Francisco, of counsel), for appellant.

John Carfraie Birnie, of San Francisco, for respondents Patrick Doyle and others.

ATTERIDGE, Justice pro tem.

The present appeal is from the final decree of distribution entered in the estate of one Thomas Patrick Doyle, deceased. In the said decree the trial court found and adjudged that the respondents were either directly, or in due course of legal representation, first cousins of the deceased, and as such his next of kin and legal heirs. It also further found that appellant's testator, Leonard J. Meehan, was a second cousin of said Thomas Patrick Doyle, but was not his next of kin nor, under our laws of succession, his next immediate legal heir. Leonard Meehan died shortly after the death of Thomas Patrick Doyle, and his estate is represented here through the appealing administratrix with the will annexed of his estate.

Appellant's main contention on the appeal is that the evidence is insufficient to sustain the trial court's finding that respondents were first cousins of Thomas Patrick Doyle, while she is at the same time conceding the correctness of its finding as to the degree of relationship her own testator sustained to the deceased.

[1] Although a resident of San Francisco for a great many years prior to his death on November 3, 1928, Thomas Patrick Doyle appears to have led a secluded and isolated life. He had never married, and during the period of his residence in San Francisco lived with his mother, Mary Ann Meehan Doyle-Edwards, who predeceased him by about three years. Doyle was about seventy-one years of age at the date of his death, and the great majority of the witnesses, giving testimony as to his family pedigree, were persons of greatly advanced years, whose opportunities of acquiring accurate information concerning and memory of the subject matter of their testimony varied widely. As a consequence thereof, the trial court was required to, and we must assume that it did, weigh and balance the testimony of these witnesses in the light of its own inherent strength or infirmities and with due consideration of their bias in favor or prejudices against the interests of the respective claimants to Doyle's estate. Its finding as to the ultimate fact of heirship comes to us fortified by those favorable presumptions in which an appellate court must invariably indulge in favor of the integrity and correctness of the lower court's determination of all matters of fact, and which in fine require that: "If there is any evidence in the record, or any reasonable inference to be drawn from such evidence, to sustain the findings of the trial court they cannot be disturbed here." Kienlen v. Holt, 106 Cal. App. 135–140, 288 P. 866, 868. This fundamental rule of appellate practice applies with equal force to determinations of heirship. Estate of Walden, 166 Cal. 446, 137 P. 35.

From our review of the record, we find that there was evidence before the trial court from which it could and did infer the following matters and circumstances entering into its final determination of ultimate fact:

Thomas Patrick Doyle was the only child of Patrick *Henry* Doyle and Mary Ann Doyle-Edwards, née Mary Ann Meehan. He was born in New York July 12, 1857. Respondents offered evidence tending to prove that they are the children of the deceased sisters and brother of the father of Thomas Patrick Doyle, and therefore the first cousins of the latter. It will be noted that their claim of heirship is upon the paternal side of Thomas Patrick Doyle's ancestry. Appellant, on the other hand, traces her testator's heirship on the maternal side of said Doyle's ancestry, in that he was the grandson of Patrick Meehan, who was the brother of Mary Ann Meehan Doyle, mother of Thomas Patrick Doyle. He was therefore a second cousin of the instant decedent and one degree further removed from him in kinship than are the respondents.

The evidence tending to establish the relationships described in the preceding paragraph came from sources of approximately equal dignity, and as such was entitled to equal consideration at the hands of the trial court, whose exclusive duty it was to reconcile any and all conflicts and discrepancies that might exist therein. It is, however, the claim and theory of appellant, strenuously urged at the trial, and on this appeal, that Patrick Henry Doyle, the father of Thomas Patrick Doyle, was an only child, and consequently as such would not have had any brothers and sisters through whom respondents could establish or maintain their asserted relationship to the deceased. This claim and theory, however, is based almost entirely upon certain alleged declarations, alleged to have been independently made some years prior to their respective deaths, by the said Thomas Patrick Doyle and his said mother, Mary Doyle-Edwards, which are of the tenor and to the effect that their father and husband, respectively, said Patrick Henry Doyle, had been an "only child," and that Thomas Patrick Doyle "had no living relations on his father's side." Opposed to the testimony of the alleged declarations of those deceased persons were the depositions of a number of witnesses residing in Ireland, who definitely testified that Patrick (Henry) Doyle had one brother and three sisters, and that the present respondents are the surviving children of his said brother and sisters. It should be noted in passing that Patrick Henry Doyle was concededly born in Ireland, while his wife Mary Ann Meehan (mother of Thomas Patrick Doyle) was born in England, and that both emigrated to America at least as early as 1854, for they intermarried in New York City in that year. The trial court might well believe and conclude that these witnesses in Ireland were in at least as good, if not a superior, position to know the facts of Thomas Patrick Doyle's ancestry on his father's side as were any of the witnesses produced on behalf of appellant. Moreover, these witnesses displayed a knowledge of the facts relating to the matter of birth, family history, marriage to Mary Ann Meehan, emigration to America, subsequent movements in this country, and of the eventual death of the said Patrick (Henry) Doyle, to a degree so sufficiently intimate as to at once insure that the identity of the Patrick Doyle to whom their testimony related was one with the self-same Patrick *Henry* Doyle, who appellant herself concedes and claims was the father of Thomas Patrick Doyle. If the actual fact as to this identity of person were to be found otherwise than in accordance with the testimony of these witnesses (resident in Ireland), the only possible basis for so finding would have to be upon the assumption that they acquired the information of which they thus testified at a time subsequent to Thomas Patrick Doyle's death, and then detailed it in evidence for the base purpose of establishing heirship in favor of strangers to his blood. But the correctness of their narratives with respect to the events and details of which these witnesses testify, their apparent good standing in their respective communities, and their ability to withstand cross-examination were, among other things, potent factors tending to wholly disprove so maleficient an assumption. Irrespective of these considerations, the trial court impliedly found in favor of the probity of these witnesses, and, under the familiar elementary rule earlier herein enunciated, we could not, were we so disposed, displace its favorable finding with any adverse views of our own.

Appellant in attacking said finding also stresses upon the circumstances that the witnesses in Ireland invariably referred to the father of Thomas Patrick Doyle as Patrick Doyle, whereas in some of the exhibits and by some of her own witnesses the said parent is usually identified by the more extensive name of Patrick *Henry* Doyle, and she thereby seeks to enforce the implication that the two groups of witnesses could not have been referring to the same individual. This circumstance was by no means of controlling importance upon the question of identity. Many persons are known by one of their given and legal names almost to the exclusion of the other.

A similar claim of misidentity, urged by appellant, arises out of the fact that one of her evidentiary exhibits refers to the maiden name of Thomas Patrick Doyle's paternal grandmother as "Ann Goss," whereas the data having its origin in Ireland merely refers to her as "Bridget Doyle." Aside from the fact that the exhibit in question merely

records the answer of the declarant to an inquiry of a bank employee, and was therefore likely to be only as complete or accurate as was the information or belief possessed by the declarant on the subject, this recital in this exhibit was by no means conclusive. The "Ann Goss" referred to in the American exhibits might well have been known in Ireland as "Bridget Ann Goss" or "Bridget Goss" to the complete ignorance of the American declarant of said fact.

[2] These and all other conflicting circumstances to which appellant directs our attention were purely matters of initial reconciliation and determination by the trial court, and the fact that they did exist does not sufficiently militate against the force of the finding as to warrant out setting it aside on this appeal. We therefore hold that the finding in question finds sufficient support in the evidence.

[3] Appellant also contends that the trial court committed alleged errors of law in connection with its admission of certain evidence over her objections thereto. We have carefully examined these assignments of error, and, while it would appear that the action of the trial court in receiving certain depositions in evidence without affording appellant sufficient opportunity to object thereto in the manner hereinafter indicated was irregular, it is evident, for the reasons hereinafter stated, that such irregularity does not justify a reversal.

In support of their respective claims, all parties litigant relied in great part upon testimony of foreign or absent witnesses which was presented to the court in the form of depositions. Shortly after the trial was under way, the following proceedings transpired:

"Mr. Birnie: I will introduce the depositions and consider them read, your Honor, if it is pleasing to your Honor.

"Mr. Pritchard: *We would rather have the depositions read*, because we think there is so much objectionable matter in them that I would like to call the Court's attention to *them*.

"The Court: They are not going to be read in open court. I will read them.

"Mr. Pritchard: We want to make the objection that *they* are based on hearsay, and are incompetent, irrelevant and immaterial." (Italics ours.)

Mr. Birnie thereupon offered his depositions and the following took place:

"Mr. Pritchard: If your Honor please, for the purposes of the record, we wish to object to the *depositions* on the ground that *they* are hearsay." (Italics ours.)

At a later point in the record of the progress of the trial is the following passage:

"Mr. Pritchard: Now, if your Honor please, we would like to introduce * * * the depositions which were taken on behalf of our client. * * *

"The Court: I thought they were all in.

"Mr. Pritchard: We have not introduced them formally.

"The Court: Didn't you have any depositions at all?

"Mr. Pritchard: We have them but they were not introduced * * *"—whereupon appellant placed in evidence eight depositions *in precisely the same manner as that in which those offered by respondents had been previously received over her objection.*

[4] Doubtless there are occasions when the heavy demands upon the time of a busy trial court render it inexpedient and impracticable to permit on all occasions of the reading in extenso of depositions in open forum in all cases where the court is sitting without a jury. Nevertheless, in the absence of express or *implied* agreement thereto by counsel, the reception of depositions by the trial court in the manner above outlined constitutes a departure from the correct procedure and practice governing the reception in evidence of oral or written testimony, which requires and always implies that there shall be a full and fair opportunity afforded for the interposition of any and all grounds of legal objection to evidence of any character before its reception for the consideration of the trier of ultimate fact. An examination of our reports will disclose that, in the absence of some agreement to the pursuance of a contrary course, the unvaried practice has been to *read* depositions into the record as evidence, as indeed the only statute on the subject (§ 2022, Code Civ. Proc.) directly indicates is the proper course to pursue.

In pointing out the pernicious effects upon the minds of jurors likely to have been occasioned through the refusal of a trial court to make timely rulings upon objections to certain questions and answers appearing in depositions *in advance of the reading of the same to a jury*, our Supreme Court said: "No one familiar with the practice of our law need be informed of the vast amount of irrelevant, immaterial, and incompetent matter which finds its way as evidence into such depositions. They are not taken before an officer who may rule out such objectionable matter, and there is no check therefore upon its admission. * * * Moreover * * * it will often happen in the taking of depositions, even upon settled interrogatories, as it occurs in court when a witness is testifying viva voce, that the answer to a pertinent question will itself be impertinent."

The quotation is from the Estate of Martin, 170 Cal. 657, at page 665, 151 P. 138, 141, where, in summarizing the effect of the practice as thus condemned, the court further

declared: "The result was that a mass of incompetent matter was thus read, heard, and considered by the jury."

Although it is obviously less probable that a trial judge will be unfairly influenced by the presence of illegal evidence before him to the same degree as would a jury under similar circumstances, all contention to that effect can be obviated by ruling at appropriate times upon the admissibility of the evidence.

However, before this court is authorized to review and act upon irregularities as such, it is a required condition precedent that the appellant shall have first proceeded as provided in the Code of Civil Procedure, under subdivision 1 of section 657, and in the manner set forth in section 658 thereof. See in this connection Wagner v. Meinzer, 182 Cal. 608, 189 P. 435; Gay v. Torrance, 145 Cal. 144, 78 P. 540. Instead of so proceeding, as thus required, appellant has elected to bring to our attention the irregular act complained of *merely* as an asserted *error* of law, but in so doing he must of necessity fail in the establishment of his claim of reversible error for the reasons next herein set forth:

[5] From the previously quoted excerpts of the record it will be observed that appellant's objections were of a most general character, and were directed exclusively to the *depositions*, and that in no instance was objection taken to any given question or answer or to any specified portions of the depositions. The rule in general is that, "in order that an objection, even to the competency or relevancy of a deposition, should be effective, it should be specific, and addressed to those parts which are objectionable. A mere general objection to the deposition does not reach the defects, as it may be good in part and bad in part; and the objection should be limited to the part which is objectionable." Jones on Evidence (3d Ed.) § 676. To similar effect is the holding of our Supreme Court in Gassen v. Hendrick, 74 Cal. 444, 16 P. 242. Only the most fragmentary portions of the depositions against which appellant thus leveled his general objection would have been possibly subject to the urged ground of objection had the same been sufficiently specific; and, as was said of a somewhat similar situation: "If it be conceded that certain portions of it were hearsay and improper, the appellant did not specifically object to any particular parts of his evidence. Its motion to exclude was general, and, as the testimony was competent and some portions at least were relevant to the issue, appellants' objection cannot avail." St. Louis, I. M. & S. R. Co. v. Taylor, 87 Ark. 331, 112 S. W. 745, 747.

It is therefore held that admission of these depositions in evidence over appellant's general objection did not constitute reversible error.

[6] Appellant makes the further claim that certain of respondents' exhibits in the nature of copies of baptismal and other records were so wanting in sufficient authentication as to warrant their exclusion from the evidence. But as part of his own case in chief he placed in evidence exhibits which were exactly similar in the method and degree of their authentication. Irrespective of the principle that evidence of a like kind (when not inherently illegal) is admissible to rebut that offered by the opposite party, the evidence in question cannot be regarded of such sufficient importance that its exclusion would have affected the finding of the court one way or the other, and the admission thereof in evidence, therefore, did not constitute reversible error.

For the reasons hereinbefore stated, the judgment and decree is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

126 Cal.App. 583

ZUMWALT v. E. H. TRYON, Inc., et al.

Civ. 4687.

District Court of Appeal, Third District, California.

Oct. 4, 1932.

Rehearing Denied Nov. 3, 1932.

Hearing Denied by Supreme Court Dec. 1, 1932.

1. Automobiles ⇐216.

Sheep herder endeavoring to chase lamb from highway into field when struck by automobile *held* not "pedestrian" within statute requiring pedestrian to walk close to left-hand edge of highway (St. 1923, p. 517, § 150½, as added by St. 1929, p. 546, § 66).

This was so, since the duties of the sheep herder required him to be in the highway, and his status under the circumstances could not be determined by the rule under St. 1923, p. 517, § 150½, as added by St. 1929, p. 546, §§ 66, which governs the pedestrians.

[Ed. Note.—For other definitions of "Pedestrian," see Words and Phrases.]

2. Trial ⇐260(8).

Refusing defendant's comparative negligence instruction sufficiently covered by contributory negligence instruction *held* not error.

3. Damages ⇐132(3).

$12,500 damages to sheep herder for fracture of bone of leg below knee, injury to back resulting in spinal arthritis, and permanent injury to ankle and instep, *held* not excessive.

Circumstances disclosed that sheep herder was bedfast from injuries for 47 days, and that at end of that period, when

able to be out of bed, had to use a crutch to get about, that he was 48 years of age at time of accident, earning $90 per month, and was then in good health, and there was substantial evidence that by reason of injuries the sheep herder would be unable to continue his occupation or engage in any other kind of hard labor during the remainder of his life.

4. Appeal and error ⇐1004(3).

Jury's award sustained by trial court will not be disturbed, unless so grossly disproportionate to compensation reasonably warranted as to create presumption of passion, prejudice, or corruption.

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Action by Ernest L. Zumwalt against E. H. Tryon, Inc., and James A. McNamee. Defendant McNamee having died prior to trial, the case proceeded against defendant E. H. Tryon, Inc., alone. Judgment for plaintiff, and the defendant appeals.

Affirmed.

Fred C. Pugh, of Red Bluff, and W. M. Roll, for appellant.

J. Oscar Goldstein, of Chico, for respondent.

JAMISON, Justice pro tem., delivered the opinion of the court.

This was an action for damages for injuries sustained by plaintiff, when struck by an automobile operated by defendant's employee, McNamee. The said McNamee having died prior to the trial, the case proceeded against defendant E. H. Tryon, Inc., alone. The case was tried by a jury, which returned a verdict for plaintiff for $12,500; thereupon said defendant moved for a new trial; the same being denied, judgment was rendered for plaintiff and against said defendant for said sum. From this judgment said defendant appeals.

This accident occurred on the 21st of April, 1930, on the afternoon of a clear day, at a point on the Pacific Highway, and, according to the testimony of respondent's witnesses, about 150 feet south of a county road which enters said highway from the west known as the Bowman road. It appears that respondent and a boy named Davis were in charge of a band of sheep as herders, and had driven them through a gate and into a field some 50 feet south of where the said Bowman road enters said highway; that, in doing this, one of the lambs escaped from the band and remained on said highway.

These two herders, aided by their dog, were endeavoring to chase the lamb from said highway into the field at the time of the accident. While respondent was so engaged, McNamee, in company with another employee of appellant, was traveling south on said highway in an automobile operated by McNamee.

According to evidence of respondent and several witnesses of the accident, when the said automobile approached the said intersection it was traveling at a speed of from 45 to 50 miles per hour, and was on the left-hand or easterly side of said highway, and continued on that side until it struck respondent. Davis, who was near the said intersection, waved at the occupants to stop, but they paid no attention to him, and continued on down the highway at the same speed.

Respondent, following the said lamb, looked back and saw Davis wave at the said occupants, and he took off his hat and waved at them to stop. At this time respondent was on the left-hand side of said highway and about 4 or 5 feet from its easterly edge, the paved part of said highway being 20 feet wide. After waving at the occupants to stop, respondent continued on down the highway after the lamb, and, while passing down said highway on the left side thereof, and 4 or 5 feet from its easterly edge, he was struck in the back by the said automobile and knocked to the pavement and rendered unconscious.

There is ample testimony to substantiate these facts.

At the time of the accident W. J. Walton was in charge of some 3,000 sheep. They were being held on the said county road, at the point where it entered said highway. He was holding said sheep back from entering said highway until respondent turned said lamb into the field. He was seated on a mule, and had a clear and unobstructed view of the accident. W. P. Hayland just previous to the accident had driven his automobile up to the point where said county road entered the highway, and stopped there waiting for Walton to drive his sheep from said county road. He also saw the accident. Both of these witnesses and Davis testified to the facts hereinbefore set forth. Appellant produced one witness, George, the companion of McNamee in the automobile, whose testimony conflicted with that of respondent and his witnesses.

Appellant contends that the court erred in refusing to give certain instructions requested by it.

Instruction IX refused by the court is as follows:

"You are hereby instructed that section 150½ of the California Vehicle Act (added by St. 1929, p. 546, § 66) provides as follows:

" 'It shall be unlawful for any pedestrian to walk along and upon any highway outside of a business or residence district otherwise than close to his left-hand edge of the highway.'

"I further instruct you that if you should

find that the plaintiff immediately prior to and at the time of the accident, was walking in a southerly direction upon the paved portion of the highway, it became and was his duty to comply with the provisions of the section of the California Vehicle Act, which I have just read, and to walk close to his left hand edge of said highway, provided you should also find that the place of the accident was outside of a business or residence district."

The court gave the first part of this instruction; that is to say, the portion containing the provisions of said section 150½, but refused the remainder.

We are not inclined to take the view that respondent was a pedestrian on said highway, at the time of the accident, within the meaning of said section 150½.

[1] Respondent was not a traveler upon the highway, but was there as a herder in the performance of his duties as such. Laborers, whose duties require that they work in the streets, are not considered in the same light as pedestrians. Ceola v. 44 Cigar Co., 253 Pa. 623, 98 A. 775. In the case of such persons the degree of care is different from that of a traveler, whose whole attention is directed to protecting his own safety. Huddy, Automobile Law, vols. 5–6, 180; Peters v. Schroeder, 290 Pa. 217, 138 A. 755; State Compensation Ins. Fund v. Scamell, 73 Cal. App. 285, 238 P. 780, 782.

In the case of King v. Green, 7 Cal. App. 473, 94 P. 777, 778, the court said: "Had a pedestrian with no occupation requiring his presence in that part of the street devoted to the use of vehicles, been struck by a passing vehicle while he was backing along the roadway without looking to see where he was going, it is clear that he would have been guilty of contributory negligence. * * * But the rights of a laborer whose duties require him to be in the roadway cannot be determined by the same rule."

In the case now before us the duties of respondent, as said herder, required him to be in the roadway, and his status, under these conditions, cannot be determined by the rule which governs the pedestrian.

In State, etc., Ins. Fund v. Scamell, supra, the court used the following language: "It here appears that plaintiff, at the time of the injury complained of, was where he had a legal right to be. He was attending to his work, and was under no legal compulsion to keep constantly looking behind to ascertain if he was likely to be run down. No warning or signal was given, or at least he heard none, nor did certain other witnesses, of the approach of the car. The testimony also shows that he was working near the curb adjacent to the space reserved for the parking of cars, and there was more than ample room for the driver to have passed him without danger of collision. These were facts for the trial court to consider in determining the question of negligence, and its finding cannot here be disturbed."

In the instant case no warning or signal was given, according to the testimony of respondent and his witnesses, and for quite a distance before the car struck respondent it was traveling on the left-hand side of the highway, and continued on the left-hand side until it struck respondent. No other cars were on the highway at the time of the accident, and there was nothing to prevent the driver of said automobile from having a clear view of respondent. There was ample room for the driver to have passed respondent, had he traveled on the right-hand side of the highway, as was his duty to do.

We are of the opinion that the court committed no error in refusing appellant's instruction XI, herein set forth; nor in refusing appellant's instruction No. X, which is to the same effect.

[2] Nor was error committed in refusing appellant's instruction No. VII, relating to comparative negligence.

The court fully and fairly instructed the jury upon the question of contributory negligence. This refused instruction was sufficiently covered by those given by the court.

[3] Appellant claims that the damages awarded by the jury are excessive. We are of the opinion that this claim is also without merit. Respondent was struck in the back, knocked down, and rendered unconscious. Immediately after receiving the injury, he was taken to the Sisters Hospital, where X-rays were taken, which disclosed a fracture of one of the bones of the leg below the knee. He was also found to be suffering from ruptures of the ligaments and muscles of the ankle and instep, and from injuries to his back. His leg from above the knee to a point below the instep was incased in a plaster cast. He remained at the hospital about four days, and, being without means to defray his expenses there, was removed to his home, where his wife acted as his nurse.

He was bedfast from said injuries for 47 days, and at the end of that period, when able to be out of bed, had to use a crutch to get about and continued to use the crutch until October 1, 1930.

During all of that time he suffered great pain from said injuries. Spinal arthritis developed from the injury to the back, causing extreme pain and loss of sleep. Injuries to his ankle and instep have rendered him unable to run or walk over rough ground, and these injuries are permanent. The injuries to his back will necessitate a specially fitted aluminum belt. There was testimony of physicians that this disease of spinal arthritis

is of a permanent nature, and, while the pain caused by it may be lessened, it is incurable.

Respondent was 48 years of age at the time of the accident, was earning $90 per month, and was then in good health, and, according to the mortality tables, his expectancy of life was 23 years.

There was also substantial evidence that, by reason of said injuries, he will be unable to continue his occupation of herding sheep or engaging in any other kind of hard labor during the remainder of his life.

[4] The law is so well settled that the award of damages made by the jury and sustained by the trial court will not be disturbed, unless they are so grossly disproportionate to any compensation reasonably warranted by the facts as to shock the sense of justice and create the presumption that the verdict was the result of passion, prejudice, or corruption rather than an honest and sober judgment, that citations of authorities are unnecessary.

Lastly, appellant contends that the trial court erred in denying its motion for a new trial. This motion was submitted on affidavits produced by appellant and counter affidavits submitted by respondent.

We do not find that the trial court abused its discretion in denying said motion.

It is admitted that McNamee was an employee of appellant, and the evidence that he was engaged in the performance of his duties as such employee at the time of the accident is uncontradicted.

The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

126 Cal.App. 522

BEHR v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 4714.

District Court of Appeal, Third District, California.

Sept. 29, 1932.

Rehearing Denied Oct. 29, 1932.

1. Master and servant ⇐367.

Woman cutting apricots at piece rate, under grower's direct supervision and control, *held* "employee," not "independent contractor."

[Ed. Note.—For other definitions of "Employee" and "Independent Contractor," see Words and Phrases.]

2. Master and servant ⇐375(2).

Injury fruit cutter returning from luncheon sustained while carrying water for employees, in falling on employer's premises, "arose in course of and out of employment."

[Ed. Note.—For other definitions of "Arising Out of Employment" and "Course of Employment," see Words and Phrases.]

Proceeding under the Workmen's Compensation Act by Mrs. N. C. Benning, claimant, opposed by Mrs. Emma Behr, employer. To review an award rendered by the Industrial Accident Commission in favor of claimant, the employer brings certiorari.

Award affirmed.

Burt W. Busch, of Lakeport, and Arthur M. Dean, of Redding, for petitioner.

A. I. Townsend, of San Francisco, and W. H. Hazell, of Lakeport, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is a petition to review an award of damages which was rendered on account of injuries which were sustained by the respondent Nancy C. Benning in the course of her employment in preparing fruit for a process of curing.

The petitioner owns a 95-acre fruit ranch in Lake county. In the month of June, 1930, she employed the claimant to assist her in cutting apricots for the purpose of drying them. She was paid for this service at the rate of 30 cents a box. There was no agreement to cut a specified amount of fruit. The cutting of fruit was performed in a shed which was situated on the petitioner's premises, 250 yards distant from her dwelling house. A well-defined pathway leads from the house to the shed.

There is a conflict of evidence, but the following statement of facts is adequately supported by the record: The claimant resided in Sonoma. She was temporarily visiting with her sister who lived on the property adjoining the petitioner's farm. These three ladies were engaged in cutting apricots at the petitioner's shed prior to the occurrence of the accident which is involved in this proceeding. The cutting of fruit was done under the direct supervision of the petitioner. In going to and returning from their work, the claimant and her sister were accustomed to pass the petitioner's dwelling house along the pathway mentioned. They carried with them their luncheons. With the consent or at the request of the petitioner, they ate their luncheons with her at the table in her home.

On the second day of their employment, these ladies went from the shed to the petitioner's home on the same premises for lunch. After completing the meal, the claimant told the petitioner they required at the shed

some drinking water and a pail in which to wash their hands when they became smeared with fruit. The petitioner directed the claimant to take a canteen of water which hung from a nail on the porch, and a bucket which stood nearby and carry them to the shed. Both the canteen of water and the pail were intended for the general use of the employees at the shed. Mrs. Benning thereupon picked up the pail, and, taking the canteen of water, proceeded to carry them toward the shed. She had walked along the pathway but a short distance when she stepped upon an olive pit or some small rolling object and fell, breaking her ankle. She was seriously injured. A physician was called to set her ankle. He rendered medical aid.

In due time a claim for compensation was made. The Industrial Accident Commission found that the claimant was employed by the petitioner to prepare fruit for drying, and that she sustained a broken ankle from an accident which occurred in the course of her employment. An award of damages was rendered in her favor and against the petitioner. The cause was brought to this court by means of a petition for a writ of certiorari.

The petitioner contends that the award should be annulled for the reason that the claimant was engaged at the time of the accident in cutting fruit as an independent contractor and not as an employee; that she was not injured in the course of her employment, but upon the contrary that she sustained the broken ankle at the noontime when she was not engaged in her employment, and that the petitioner is relieved of responsibility by virtue of the application of the established rule of "going and coming" from work.

[1] Under the circumstances of this case, it appears that the claimant was an employee in the cutting of the fruit and not an independent contractor. She worked under the direct supervision of her employer and subject to her control. Hillen v. Ind. Acc. Comm., 199 Cal. 577, 250 P. 570, 571. In this cited case, wherein the employee was engaged in shingling a house in consideration of a specified sum for each thousand shingles laid, it is said: "A workman who is paid wages by the piece or quantity comes within the provisions of the Workmen's Compensation Act the same as one who is paid by the day. Wages may be measured by time, by the piece, or by any other standard. McKinstry v. Guy Coal Co., 116 Kan. 192, 225 P. 743, and note in 38 A. L. R. 839. One of the best tests to determine whether the relation is that of an independent contractor or that of employer and employee is the right of control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent."

In the same case it is further said: "Whether or not the relation of employer and employee existed in this case, under the oral contract entered into, is a question of mixed law and fact, to be proved like any other question. The finding of the commission, in effect, that the relation [of employer and employee] existed between Hillen and Downing, is binding on this court. Pacific Gas & Elec. Co. v. Industrial Accident Com., 180 Cal. 497, 499, 181 P. 788."

In support of the finding of the commission to the effect that the employer in the present case had the absolute right to direct and control the manner of the performance of the work of the claimant in cutting the apricots, she testified: "Q. Did Mrs. Behr, all the time you were employed there have direction and supervision of the work that was going on? A. She certainly did, nobody else there." Regarding the same subject, Laura Taylor, the sister of the claimant, also testified: "Q. Mrs. Behr would direct you every day what was to be done, whether picking or cutting or both? A. Yes."

[2] We are also satisfied that the record amply supports the findings of the commission to the effect that the claimant was injured "in the course of and arising out of her employment." At the time of the accident she was returning to her place of employment along the pathway she and other employees were accustomed to walk on their way to the shed. She was engaged in carrying a canteen of water and a pail for the general use of the employees at the shed. She claims to have been carrying it at the request of the petitioner. There is no controversy regarding the fact that she was actually on the premises of the employer. The Supreme Court in the case of Makins v. Ind. Acc. Comm., 198 Cal. 698, 247 P. 202, 203, 49 A. L. R. 411, has said: "The rule is well settled that an employee, in going to work, comes under the protection of the act when he enters the employer's premises or upon the means provided for access thereto, though the premises and such means of access are not wholly under the employer's control or management." Globe Indemnity Co. v. Ind. Acc. Comm., 208 Cal. 715, 284 P. 661, State Comp. Ins. Fund v. Ind. Acc. Comm., 89 Cal. App. 197, 264 P. 514; Cromwell v. Los Angeles Ry. Co., 102 Cal. App. 499, 283 P. 375, 376.

In the case last cited, the late Mr. Justice Finch quoted with approval the following principle: " 'It is not necessary, in order to entitle the employee to compensation, that at the time of accident he have reached the place of employment and have actually be-

gun there to render service. It is sufficient if he has come to the employer's premises and is seeking entrance thereto by a means of access provided by the employer or reasonably used by the employee.' "

It frequently becomes a question of fact to be determined from the circumstances of a particular case as to whether an employee is engaged in the labor for which he was hired, or whether his activities at the time of the accident are incident to such services so as to bring his conduct within the course of or arising out of the employment. Under the circumstances of the present case, we are persuaded that the claimant was injured in the course of and arising out of her employment.

The award is affirmed.

I concur: PLUMMER, J.

126 Cal.App. 548

KALLEN et al. v. SERRETTO et al.

Civ. 8487.

District Court of Appeal, First District, Division 2, California.

Sept. 30, 1932.

Rehearing Denied Oct. 29, 1932. Hearing Denied by Supreme Court Nov. 28, 1932.

1. Venue ⇐72.

Amended complaint and attorney's affidavit, filed after named defendants' appearance and demand for change of venue, cannot be considered in hearing motion.

2. Venue ⇐21.

Defendants named in complaint when they demurred and demanded change of venue *held* entitled to change thereof to county of their residence.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Ethel Kallen and others against Ed Serretto and wife. From an order denying defendants' motion for a change of venue, they appeal.

Reversed.

Ross & Ross, of Redwood City, for appellants.

Walter McGovern, of San Francisco, for respondents.

NOURSE, P. J.

Plaintiffs sued in the city and county of San Francisco for damages arising out of an automobile collision which occurred in San Mateo county. The defendants Ed Serretto and wife moved for a change of venue to San Mateo county on the ground that they were both residents of that county. Their motion was denied and they have appealed on typewritten transcripts.

Two fictitious defendants were joined as "First Doe" and "Second Doe." As to them the complaint alleged that they had "some right, title, or interest in and to defendants' motor vehicle hereinafter mentioned." The collision was alleged to have been caused by the fact that "the defendants drove and operated a certain motor vehicle * * * in a careless, negligent, and unskillful manner." After the demurrer and demand for change of place of trial were filed by the two Serrettos, the plaintiffs were permitted to file an amended complaint in which it was alleged that "the defendants, acting through said defendant Ed Serretto, drove and operated their motor vehicle," etc. In the affidavit of plaintiffs' attorney filed in opposition to the motion for change of place of trial, it is averred that "First Doe" is one Irani, a resident of San Francisco. But it does not appear that he was named or substituted as a defendant, and no process was served upon him.

[1, 2] Upon this record appellants insist that they were entitled to a change of the place of trial for several reasons, of which it will be sufficient to consider but two: (1) The right of the moving party to a change depends upon the conditions existing at the time the demand is made. McClung v. Watt, 190 Cal. 155, 159, 211 P. 17, 19. Hence, the parties defendant "as revealed by the pleadings existing at the time" (McClung v. Watt) the demand was made and the demurrer was filed are the only parties to be considered on the motion for a change of the place of trial. (2) Fictitious defendants who have not been brought into court are not to be regarded in consideration of the motion for a change of venue. South v. County of San Benito, 40 Cal. App. 13, 19, 180 P. 354; Yuba County v. North America, etc., Co., 12 Cal. App. 223, 107 P. 139. When the appellants filed their demurrer and demand for a change of venue, they were the only real parties defendant named in the pleadings. In fact, the same condition existed at the time the motion was heard because no other defendant had been brought into court by substitution, appearance, or service of process. The amended complaint and the affidavit of plaintiffs' attorney, both of which were filed after appellants' appearance and demand, and from which it might be inferred that some other defendant might be brought in, could not be considered in the hearing of the motion to change. Appellants' residence in San Mateo county being conceded, they were entitled to a change of the place of trial to that county.

The order is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

126 Cal.App. 617

Ex parte CROW.

Cr. 1692.

District Court of Appeal, First District, Division 2, California.

Oct. 6, 1932.

1. Witnesses ⇐297.

In prosecution of physician for attempting to procure miscarriage by witness, witness *held* privileged to refuse to answer questions regarding witness' visiting doctor's office, on ground that answers would tend to incriminate her (Code Civ. Proc. § 2065; Pen. Code, § 275; Const. art. 1, § 13).

In such prosecution under Pen. Code, § 274, witness was privileged under the provisions of Code Civ. Proc. § 2065, and Const. art. 1, § 13, relating to witness' privilege to refuse to answer questions where answers would tend to incriminate witness, to refuse to answer questions as to who was with her when she visited the doctor's office, and what was the date of such visit, since any direct answer showing witness was present at the time and place of the alleged offense would have a tendency to subject witness to punishment under Pen. Code, § 275, providing in effect that any woman submitting to an illegal operation is guilty of a felony.

2. Witnesses ⇐308.

Witness may not arbitrarily refuse to answer question on ground that answer might incriminate him when court can determine no direct answer could incriminate him (Code Civ. Proc. § 2065; Const. art. 1, § 13).

Application by Alice Crow for writ of habeas corpus against the Sheriff of Santa Cruz County, to secure petitioner's release from confinement.

Petitioner discharged.

See, also, 14 P.(2d) 920.

Harry I. Stafford and Dean Cunha, both of San Francisco, for petitioner.

Simon M. Collins, Deputy Dist. Atty., of Santa Cruz, for respondent.

SPENCE, J.

Petitioner seeks her release on habeas corpus from confinement for an alleged contempt based upon her failure to answer certain questions as a witness in the trial of G. E. Grosse.

Said G. E. Grosse was charged by indictment under section 274 of the Penal Code with using instruments upon petitioner in the month of July, 1932, with the intent thereby to procure a miscarriage. Petitioner and her husband were called as witnesses upon the trial. The district attorney, after certain preliminary questions, asked petitioner: "Now coming down to the month of July, 1932, did you have occasion during that month to visit the office of Dr. Grosse?" She answered: "I refuse to testify on the ground that I may incriminate myself." A discussion followed between court and counsel in which the court recognized that the witness had a "constitutional right," but declared that there was nothing on the face of the question "which shows it would have any tendency to incriminate her." Counsel for defendant Grosse finally said, "We have no objection to the witness answering as to whether she went to Dr. Grosse's office," and the witness, after being directed to answer by the court, replied to the question in the affirmative. She was then asked, "Who was with you on that occasion?" to which she replied, "I still refuse to answer on the ground I might incriminate myself." The court was of the opinion that "the question at this stage would develop nothing that would tend to incriminate the witness" and instructed her to answer. The question was re-read and the witness again refused to answer it, restating the same ground for her refusal. She was further asked, "What was the date, to the best of your recollection, of your visit to Dr. Grosse's office?" She stated, "I still refuse to answer." The trial court found the witness guilty of contempt and ordered her into custody.

[1] Petitioner urges several grounds for her release, but we need consider only one of them. It is petitioner's contention that it was her right and privilege to decline to answer the above-mentioned questions under article 1, section 13, of the Constitution, and section 2065 of the Code of Civil Procedure. In our opinion this contention must be sustained. Said constitutional provision has been construed in Re Tahbel, 46 Cal. App. 755, 189 P. 804. Said section 2065, relating to witnesses, reads in part: "* * * But he need not give an answer which will have a tendency to subject him to punishment for a felony." Section 275 of the Penal Code provides in effect that any woman who submits to an illegal operation is guilty of a felony.

[2] The authorities on the general subject under discussion are quite exhaustively considered in Ex parte Berman, 105 Cal. App. 37, 287 P. 125. The object of such constitutional and statutory provisions as our own is stated on page 46 of 105 Cal. App., 287 P. 125, 129, as follows: "The object of the law is to afford to a party, called upon to give evidence in a proceeding inter alios, protection against being brought by means

of his own evidence within the penalties of the law." It is clear, however, as indicated in the opinion, that a witness may not arbitrarily refuse to answer a question on the ground that his answer might incriminate him when the court can determine as a matter of law that "no direct answer which the witness may make can tend to criminate him." But here any direct answer showing that petitioner was present at the time and place that the offense was alleged to have been committed upon her by the defendant doctor would certainly "have a tendency" to subject her to punishment under section 275 of the Penal Code.

The questions propounded here were not as contended by the district attorney merely "preliminary questions," the answer to which could have no tendency to incriminate the petitioner. It is quite possible that the prosecution had sufficient evidence without the testimony of petitioner and her husband to establish all the necessary facts except the identity of the party upon whom the operation was performed, and that the identity could not be established without their testimony. It is further possible that the only questions which the prosecution desired to ask of the witnesses were those which would establish the fact that petitioner and her husband were the persons who came to the leged for the purpose of requesting that the office of the defendant doctor at the time al- operation be performed and having petitioner submit thereto at the hands of the defendant. Under such circumstances the answers to the questions propounded might be the only link required to complete the chain of evidence necessary to convict the defendant doctor under said section 274 as charged and also to convict the petitioner in a separate prosecution under said section 275.

The position taken by the district attorney is somewhat similar to that taken by the prosecuting attorney in the federal case (U. S. v. Burr, Fed. Cas. No. 14,692e) quoted on page 45 of the opinion in 105 Cal. App., 287 P. 125, 128 in Re Berman, supra, where it is said: " 'According to their statement a witness can never refuse to answer any question unless that answer, unconnected with other testimony, would be sufficient to convict him of a crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description.' "

We are therefore of the opinion that the trial court erred when it determined as a matter of law that petitioner's answers to the questions propounded could have no tendency to incriminate her. They clearly might have such tendency, and it was petitioner's right and privilege to decline to answer any of the above-mentioned questions upon the ground stated. We fully realize the difficulty encountered in the prosecution of cases under section 274 of the Penal Code when those present and capable of establishing the facts are unwilling to testify because of fear of subjecting themselves to prosecution. But the constitutional and statutory guaranties accorded to petitioner cannot be swept aside merely because they may result in making difficult, or even impossible, the conviction of the accused.

In re Rogers, 129 Cal. 468, 62 P. 47, is cited in support of the action of the trial court, but we find nothing in the opinion in that case contrary to the views herein expressed. There the grand jury was considering a charge against a third person, and there was nothing in the question itself nor in the surrounding circumstances to indicate that it could have any tendency whatever to incriminate the witness. Under the facts, the court held that the witness was required to answer unless he made it appear that his answer "might at least have that tendency." Here the obvious purpose of the questions was to show that petitioner was present at the time and place when the offense was alleged to have been committed upon her person, and it was unnecessary for petitioner to make it appear that answers favorable to the prosecution would have a tendency to incriminate her as this was apparent under the circumstances.

The petitioner is discharged.

I concur: NOURSE, P. J.

126 Cal.App. 621

Ex parte CROW.

Cr. 1693.

District Court of Appeal, First District, Division 2, California.

Oct. 6, 1932.

Witnesses ⇐297.

In prosecution of physician for attempting to procure miscarriage by witness' wife, witness *held* privileged to refuse to answer questions regarding whether he visited doctor's office on certain date, on ground that answers might incriminate him.

Witness could properly refuse to answer questions whether on or about a specified date he had occasion to visit the doctor's office, and if on or about such date he went with some other person to the doctor's office, without further showing to make it appear that his answers would tend to incriminate him, since it was apparent that his answers might have a tendency to subject him to punishment as an accomplice.

Application by Jasper Crow for writ of habeas corpus against the Sheriff of Santa Cruz County to secure petitioner's release from confinement.

Petitioner discharged.

Harry I. Stafford and Dean Cunha, both of San Francisco, for petitioner.

Simon M. Collins, Deputy District Attorney, of Santa Cruz, for respondent.

SPENCE, J.

Petitioner seeks his release on habeas corpus from confinement for an alleged contempt for failure to answer certain questions as a witness in the trial of one G. E. Grosse.

This is a companion case to Ex parte Alice Crow (Cal. App.) 14 P.(2d) 918, the opinion in which has been this day filed. Petitioner is the husband of said Alice Crow. After being sworn and asked the usual preliminary questions, he was asked: "Now I will ask you if on or about the 11th day of July, 1932, you had occasion to go to the office of Dr. Grosse?" He replied: "I refuse to testify on the ground that I might incriminate myself." The trial court directed petitioner to answer, saying: "There is nothing that appears by the question that could have any possible tendency to incriminate or degrade you." The witness still refused to answer. He was then asked: "Did you with any other person on or about the 11th day of July, 1932, go to the office of Dr. Grosse?" The petitioner again refused to answer upon the same ground. The trial court directed petitioner to answer this question, but he again refused. He was adjudged guilty of contempt and ordered into custody.

Considering the nature of the indictment, charging an offense by the defendant doctor committed on the person of the wife of petitioner, together with the nature of the questions propounded, we are of the opinion that petitioner could properly refuse to answer on the ground that his answers might incriminate him without any further showing to "make it appear" that his answers would have such tendency. This is true because it was apparent that his answers might have a tendency to subject him to punishment as an accomplice. The trial court could not say that they would not, and petitioner should not have been directed to reply. It may be pointed out that petitioner was not in the position of a witness having no connection with any person named in the indictment. He was the husband of the person upon whom the violation of section 274, Pen. Code, was alleged to have been committed, and the obvious purpose of the questions was to place him on the scene at the time.

For the reasons stated, together with those set forth in the opinion of Ex parte Alice Crow, supra, the petitioner is discharged.

I concur: NOURSE, P. J.

126 Cal.App. 646

In re DOYLE'S ESTATE.

BRIDGE v. DOYLE.

Civ. 8434.

District Court of Appeal, Second District, Division 1, California.

Oct. 6, 1932.

Insane persons ⇐75.

Services rendered by attorney in attempt to restore incompetent to capacity *held* "necessaries" for which incompetent's estate is liable upon implied contract (Civ. Code, § 38).

[Ed. Note.—For other definitions of "Necessaries," see Words and Phrases.]

CONREY, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Collamer A. Bridge filed a claim against the estate of Charles A. Doyle, deceased, opposed by Alice E. S. Doyle, administratrix with the will annexed of the estate. The court appointed a referee, and the referee recommended that the claim be disallowed.

From an order denying the objections filed to the referee's report, claimant appeals.

Reversed.

Karl L. Ratzer, of Los Angeles, for appellant.

Goudge, Robinson & Hughes and Francis W. Read, all of Los Angeles, for respondent.

YORK, J.

Charles A. Doyle, decedent herein, was adjudged incompetent by the superior court of Los Angeles county, and Alice E. S. Doyle, the respondent herein, was appointed guardian of his estate, and continued to act as the duly qualified guardian of decedent at all times thereafter until the date of his death. After the adjudication of incompetency, decedent conferred with appellant, an attorney at law, and requested him to institute the necessary proceedings to restore him (the said decedent) to competency. The incompetent died before these proceedings were instituted, and respondent was appointed administratrix of his estate. Appellant thereupon presented his claim for legal services rendered to decedent. An agreement for reference of the claim was entered into between these parties, and the court in due time made its order appointing a referee to try the controversy over the said creditor's claim of $50. The referee reported as her conclusion of law that appellant had no valid claim against decedent's estate, and recommended that the claim be disallowed. Appellant filed objections to the report of the referee, the matter was submitted to the court on briefs, and in due time the court made its order confirming the report of said referee, and denied the objections filed thereto. From such order this appeal is taken.

The referee apparently based her recommendation for disallowance of the claim upon section 40 of the Civil Code, the following recitation being incorporated in said report: "Sec. 40 of the Civil Code definitely defines the powers of persons whose incapacity has been adjudged, i. e., the incompetent has no right to contract."

Appellant contends that, despite section 40 of the Civil Code, legal services rendered to an incompetent are in the nature of necessaries, and that a contract to pay their reasonable value will be implied by law. In support of this theory, appellant cites several cases decided in foreign jurisdictions.

So far as the record in the instant case shows, no express contract was ever entered into by the appellant and decedent, and therefore sections 39 and 40 of the Civil Code, which refer to express contracts, are not applicable. Under the circumstances here presented, section 38 of the Civil Code, "A person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary for his support or the support of his family," may be invoked, in order to bind the estate of the incompetent upon a contract implied in law for the payment of necessaries, because we are inclined to the belief that services rendered by an attorney in an attempt to restore an incompetent to capacity should be classed as necessaries of life. Circumstances may well be imagined, where a guardian as well as members of the family of the incompetent turn a deaf ear to his urgent request that he be restored, and it would seem unjust to deny reasonable compensation to the attorney, who is instrumental in bringing such a situation to the attention of the court, in order that the status of the incompetent be determined.

The distinction between the two classes of cases—true contract and those implied in law—is aptly illustrated by two cases reported in volume 111, California Appellate Reports. The first of these, Nielsen v. Witter, 111 Cal. App. 742, 296 P. 121, was an action on a common count for money had and received, brought by an incompetent, through his guardian, to recover $1,500 paid by him to an attorney for legal services. Prior to commencement of the action, a notice of rescission was served upon the attorney by the guardian. It was held by the court that plaintiff had no mental capacity when he executed the contracts and that he was not bound by them. On the trial of the case, plaintiff by his guardian "offered to do equity, and include in his account such amount as would compensate defendant attorney for such services as might be deemed beneficial to defendant."

The second case, Estate of Nielsen, 111 Cal. App. 744, 296 P. 122, involves the same facts, and is an application for allowance of attorney's fees due for services rendered the incompetent. On the theory of contract implied in law, the court made an order fixing the sum of $1,250 as the reasonable value of the attorney's services rendered to the incompetent.

The order appealed from is reversed.

I concur: TAPPAAN, Justice pro tem.

CONREY, P. J.

I dissent. Hellman, etc., Bank v. Alden, 206 Cal. 592, 604, 275 P. 794.

126 Cal.App. 419

PHELPS v. DAVIES.

Civ. 1014.

District Court of Appeal, Fourth District, California.

Sept. 27, 1932.

1. Husband and wife ⇐249.

In determining whether property is community or separate, source of funds with which it was purchased and then intention of parties are material.

2. Husband and wife ⇐249.

That mortgages are assumed or given as part of purchase price by community is not conclusive that mortgage credit is community credit.

3. Trusts ⇐81(2).

Where wife's separate funds were used to purchase realty, husband, who was without property or credit, held title as trustee for wife, though both signed one mortgage and assumed another, no part of which was paid by husband.

4. Husband and wife ⇐249.

Whether property is separate or community depends on facts at time of purchase.

5. Bankruptcy ⇐143(6).

Trustee of estate of bankrupt husband has no better title to allegedly community realty than husband himself had (Bankr. Act § 70 [11 USCA § 110]).

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by A. F. Phelps, as trustee in bankruptcy, against Cecelia Davies. From judgment rendered, defendant appeals.

Reversed.

F. L. Richardson, of San Diego, for appellant.

Shreve, Abbey & Shreve, of San Diego, for respondent.

BARNARD, P. J.

This is an action by a trustee in bankruptcy against the wife of the bankrupt, in which it is sought to quiet title to certain real property upon the theory that the property in question is the community property of the bankrupt and his wife. The wife defended upon the claim that the property in question is her separate property.

After finding that Stephen Davies and Cecelia Davies were married on November 23, 1912, and ever since have been and now are husband and wife, that they have lived upon the property in question continuously since November 7, 1919, and that Stephen Davies was adjudged a bankrupt on March 4, 1930, the court found:

"That the defendants Cecelia Davies and Stephen Davies, on or about the 7th day of November, 1919, purchased eighty-five (85) acres of land in the county of San Diego and state of California, a part of which land so purchased is described in plaintiff's complaint, and that the total purchase price was the sum of twenty thousand dollars ($20,000.00), and that the defendant Cecelia Davies paid cash upon said purchase price in the sum of five thousand dollars ($5,000.00) which sum was her own separate property, having been the proceeds of property inherited by her from her grandfather's estate prior to her marriage with said Stephen Davies, and that she and her husband Stephen Davies executed a mortgage upon said real estate in the sum of eight thousand dollars ($8,000.00) as part of the purchase price thereof, and assumed the payment of a mortgage upon said premises of seven thousand dollars ($7,000) and that the title to said real estate so purchased by said Cecelia Davies was taken in the name of Stephen Davies, her husband, and during all times mentioned herein was managed and controlled by Stephen Davies.

"That subsequent thereto said Cecelia Davies and Stephen Davies sold forty-three (43) acres of said land for the sum of twenty thousand dollars ($20,000.00) and used part of the proceeds of said sale for the purpose of paying off said mortgage given upon said real estate by herself and husband as part of the purchase price thereof, but that said Stephen Davies never invested any sum whatsoever in said real estate, and that the purchase price thereof, which was paid, was wholly paid out of the separate funds of said defendant Cecelia Davies."

The court then found that on January 3, 1929, Stephen Davies conveyed the property to Cecelia Davies; that on the same day Cecelia Davies filed a declaration of homestead upon the property; that on February 27, 1929, these two, with others, joined in a conveyance of the property to a title company for the purpose of correcting an error in the description thereof; that, when the property was so conveyed to the title company, the grantee was instructed to reconvey the same to Cecelia Davies; that subsequently the title company reconveyed the property to Stephen Davies without the knowledge or consent of Cecelia Davies; that on April 15, 1930, Stephen Davies executed and delivered to Cecelia Davies a quitclaim deed covering all his right, title, and interest in the property; and that the property is now incumbered by a mortgage for $7,900, "which sum represents a part of the purchase price of said real estate." As conclusions of law, the court found that Cecelia Davies is the owner of an undivided separate interest in said real property

to the amount of $5,000, subject to existing mortgages, and that, subject to said separate interest and subject to the mortgage of record, the plaintiff is the owner of an interest in said property equal to the claims filed and allowed in the bankrupt estate, plus the ordinary cost of the proceeding, and that the plaintiff is entitled to have its title to that portion of the property quieted. A decree was entered in accordance with these conclusions, from which judgment the defendant has appealed.

In addition to the facts set forth in the findings, the uncontradicted evidence shows that, at the time of his marriage to appellant and at the time this property was purchased, Stephen Davies had neither money nor property; that shortly after their marriage the appellant received over $13,000 in cash from her grandfather's estate; that shortly thereafter she bought a place in Los Angeles, paying for it with $8,000 of her inheritance; that in 1919 she bought the property here in question for $20,000, paying $5,000 in cash which came from her inheritance, assuming a mortgage upon the property in the sum of $7,000, and executing a mortgage upon the real property, in which her husband joined, securing the balance of $8,000; that about two years later she sold the Los Angeles property and put all of the proceeds into the property here in question; that in allowing the property to stand in her husband's name, she had no intention of giving it to him; and that at all times she has claimed to be the owner of the property.

It is the contention of the appellant that the conclusions of law drawn by the court and the judgment entered are erroneous and that under the facts found judgment should have been entered in her favor. The respondent contends that the appellant acquired a separate interest in said property only to the extent of the $5,000 originally paid by her from her separate funds, and that all interest in the property above that specific sum became the community property of the parties. The only argument made by respondent is to the effect that, while money borrowed upon a wife's separate property and used as a part of the consideration for the purchase of other property is to be considered as her separate property, any mortgage assumed upon property being purchased, or placed therein by both husband and wife as a part of the purchase price, must be considered, as a matter of law, as money borrowed for the credit of the community, with a corresponding community interest in the property itself. In other words, it is contended that mortgages given or assumed as a part of the purchase price of property represent a proportionate community interest in the property so purchased, unless such mortgages are also secured by other property theretofore separately owned by one of the spouses.

[1, 2] In determining whether property is the separate property of one of the spouses, the source of the funds used in purchasing the property and the intention of the parties at the time are both important considerations. The mere fact that existing mortgages are assumed, or the fact that mortgages are given by husband and wife as a part of the purchase price is not, in itself, conclusive that the credit represented by these mortgages is the credit of the community. In Oldershaw v. Matteson & Williamson Mfg. Co., 19 Cal. App. 179, 125 P. 263, 265, the court said: "Neither the fact that the husband contributed all his time and skill in the conduct of the business, or that he joined his wife in the execution of notes given for money wherewith to make the purchase (assuming that he did), in the absence of any agreement to that effect, gave him any interest in the property."

In Heney v. Pesoli, 109 Cal. 53, 41 P. 819, 821, it was said: "Assuming, then, that the property was purchased by the plaintiff as and for her separate property, and that her husband paid no part of the purchase price, we do not find in the mere fact that her husband joined with her in the note and mortgage to secure a part of the purchase price, but paid nothing on account thereof, anything to rebut the deduction that it was and is the separate property of the plaintiff."

In that case the wife purchased the property, making a cash payment from her separate funds, assuming an existing mortgage, and agreeing to pay the balance of the purchase price about a year later. Her husband joined her in executing a mortgage upon this and other property owned by her. In its opinion the court further said:

"In the present case, the extrinsic evidence tended to show the intent to purchase the property by plaintiff as her separate estate, which intent was acquiesced in by her husband. That being so, the money borrowed and secured by a mortgage upon her separate property became also her separate property, and when it went to pay the residue of the purchase price of the land the whole estate vested in the plaintiff as her separate property.

"It is rational to conclude that money borrowed upon the security of the separate real estate of one of the spouses will, in the absence of any showing to the contrary, be treated as the separate property of the party owning such real estate."

In Murphy v. Clayton, 113 Cal. 153, 45 P. 267, 268, a case where land was purchased by husband and wife jointly, each paying one-half of the purchase price, and title being taken in the husband alone, the court said: "The consideration for the land having, at the time of the purchase, been paid (half of it by appellant's intestate, and half of it by the respondent), and the title taken by the former, a resulting trust arose in the land in favor of

respondent for the undivided one-half thereof, that proportion being an aliquot part of the consideration."

In that case the court further said:

"The reasoning of the court in Breeze v. Brooks, 71 Cal. 169, 9 P. 670, and 11 P. 885, more nearly applies to this case than that of any other case I have found. The decree of the court below adjudged that a deed made by John Brooks to his brother and co-defendant, Patrick Brooks, was fraudulent and void; and that Patrick took the legal title thereunder in trust for John and his successors in interest; and that he holds the same in trust for the plaintiffs, who were creditors of John and purchasers at a sheriff's sale of the land conveyed, under a judgment in their favor against John. The court said: 'From the findings, it plainly appears that John had nothing except a naked legal title. Patrick had paid all the money for the land, and John, therefore, held it in trust for him. * * * John never, so far as Patrick knew, asserted any title adverse to Patrick's; and Patrick's right to assert his claim thereto was not barred, and John only conveyed to Patrick that which belonged to him.

" 'The findings negative the idea that the plaintiffs, in giving credit to John, relied on any statement of Patrick that John owned the land; nor is it there intimated that they examined the records of deeds * * * to find out what they disclosed in reference to John's title, or relied on them in any way to induce the credit which they extended to John. They seem to have relied on the facts that John lived on the land, claimed it in his conversations with them as his, and that he was insolvent, and Patrick knew it. * * *

" 'Therefore, it does not appear that the deed from John to Patrick was made to hinder, delay, or defraud creditors. It was simply made to reinvest Patrick with the legal title to his own land.' Held, that the purchaser at execution sale got no title, 'as a purchaser at such sale can get no title save that of the judgment debtor,' and that the findings, therefore, did not justify the decree. See the same case, upon a second appeal, reported in 97 Cal. 72, 31 P. 742 [22 L. R. A. 257].

"There is nothing illegal or against public policy in the mere fact that a party equitably entitled to real property permits the legal title to remain in another. Resulting trusts are fully recognized by our law, and every one is presumed to know the law."

[3, 4] In the case before us, not only did the husband pay no part of the consideration for the land, but he had nothing with which to have paid it, and no facts appear that would justify the inference or conclusion that his wife gave him or intended to give him any interest in the land, or that his credit was relied upon in any way in making the purchase. The entire capital which enabled the purchase to be made was furnished by the wife from her separate funds, and the facts that the deed was taken in his name, that he lived with her upon the property, and that he signed the mortgage covering a part of the purchase price, are not controlling. In Dyment v. Nelson, 166 Cal. 38, 134 P. 988, 989, in which a wife borrowed funds upon her own credit, although her husband signed the note, the court said: "Nor was the possession of the property by the husband and the registry of the yacht in his name sufficient to change its status. The fact that it was not community property being once established, the management of it by the husband raised no presumption except that he was holding it in trust for her."

While the court found that "the defendants Cecelia Davies and Stephen Davies" purchased the land here in controversy, it also found that "the title to said real estate so purchased by said Cecelia Davies was taken in the name of Stephen Davies." The other findings show exactly what was done, and there is no evidence that Stephen Davies had anything to do with the purchase of the land other than that the deed was taken in his name, that he lived with his wife upon the property, and that he managed the place. Under such circumstances, we think it must be held that he took and held the title in trust for his wife. The character of property, whether separate or community, is determined by the situation existing at the time it was purchased. The findings and the uncontradicted evidence show that this property was purchased by the wife with her separate funds, that a large amount of money from her separate estate was later put into the property, and that the only payment made upon the incumbrance came from a sale of a portion of the property itself. As was said in a somewhat similar case where, however, the property was taken in the name of both husband and wife, "The utmost that can here be claimed for Mr. Shaw in this regard is that he held the dry legal title to an undivided one-half of the property, as trustee for his wife, who was the sole beneficial owner thereof and entitled to have the same conveyed to her." Shaw v. Bernal, 163 Cal. 262, 124 P. 1012, 1015.

[5] We find nothing in the facts found or shown in the evidence that would have justified a judgment in favor of this husband had he brought an action against his wife for the purpose of establishing an interest in the property. The trustee of his bankrupt estate is in no better position, being vested by operation of law only with such title as the bankrupt had as of the date he was adjudged a bankrupt. National Bankruptcy Act § 70 (section 110, USCA, title 11).

Whether or not the last deed given by Stephen Davies to his wife was void, Davies at no time, so far as appears from the evidence, had any more than the dry legal title to the property. This he held as trustee for his wife, who was at all times entitled to a conveyance thereof.

For the reasons given, the judgment is reversed.

We concur: MARKS, J.; JENNINGS, J.

126 Cal.App. 652

CAMPBELL v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 8714.

District Court of Appeal, Second District, Division 2, California.

Oct. 6, 1932.

Prohibition ⇐13.

Contestee's petition for prohibition against court's proceeding with recount and contest presented moot issue, where recount determined contestee was rightly declared nominee.

Proceeding for writ of prohibition by William D. Campbell, prayed to be directed to the Superior Court in and for Los Angeles County to restrain respondent from proceeding with the recounting of certain ballots.

Alternative writ vacated and proceeding dismissed.

O'Melveny, Tuller & Myers, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondent.

STEPHENS, Justice pro tem.

George W. Rochester, a candidate at the recent primary election for the Republican Party nomination for congressman, is seeking to have the Superior Court decree that he and not William D. Campbell, petitioner herein, has been nominated. The board of supervisors has canvassed the votes and declared Campbell nominated. Rochester bases his claim for a recount of the ballots upon an information and belief affidavit that there has been malconduct on the part of election officers in many definitely referred to precincts. Such malconduct, according to the affidavit, consisted of election officials dividing their forces and counting the ballots in several groups and not by a full quota of the election board, as well as the tallying and counting of Rochester votes in the Democratic column which should have gone in the Republican column. Rochester also sought the Democratic nomination.

In the midst of the counting the contestee petitioned this court to issue the writ of prohibition to prohibit the Superior Court from proceeding with the contest, on the ground that the allegations of fact in the affidavit were not of sufficient definiteness to justify the court in making a recount or to give it jurisdiction to make a recount of the ballots, and that if sufficient otherwise the affidavit could not be considered at all for the reason that it was based solely upon information and belief. This court issued its alternative writ prohibiting the Superior Court from making or entering any decision or judgment in such contest until further ordered. The Superior Court continued and concluded the counting, but has not announced a decision or caused any judgment to be entered.

Upon the argument here both parties agreed that there was no substantial issue, since the recount actually determined that Campbell, the contestee, had been rightly declared the nominee. It is contended, however, that the petition should not be dismissed, but that because of the great importance of the principle involved we should proceed to consider the matter and either issue or deny the peremptory writ. We have been sympathetic with this desire and have devoted considerable time to the problem presented. We have, however, arrived at the conclusion that the very reason urged for our continuing to take cognizance of the petition is a good reason why we should not do so. We think the points raised should have the fullest possible consideration, and the time at our disposal does not permit of this.

We think the question is moot, but whether or not it is now technically moot, it is so in fact. As was said in Foster v. Smith, 115 Cal. 611, 47 P. 591, 592: "Any opinion that we might give upon the merits of the plaintiffs' application to the superior court would not, therefore, be followed by any action on the part of that court, and would not have any binding authority, or constitute an adjudication of the rights of the parties. People v. Common Council of Troy, 82 N. Y. 575; Matter of Manning, 139 N. Y. 446, 34 N. E. 931. It was said in the case last cited, upon a similar question: 'The demands of actual, practical litigation are too pressing to permit the examination or discussion of academic questions such as this case in its present situation presents.'" See, also, Bradley v. Voorsanger, 143 Cal. 214, 76 P. 1031. In the instant case it may with propriety also

be added that the make-up of the ballots must go to press very shortly, and we should not inject an inconvenience where no real issue impends. The Superior Court should be allowed to proceed to make its decision and to enter its judgment without delay.

We are cognizant of the fact that if petitioner is right in his position a recount of ballots would be very difficult to secure. On the other hand, if loose and indefinite allegations, supported only by information and belief affidavits, are all that is needed to start a recount, very undesirable results may follow. We think the subject fertile field for legislative consideration.

The alternative writ is vacated and the proceeding dismissed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

126 Cal.App. 465

CITY OF LOS ANGELES v. CLAY et al. (three cases).

Civ. 7193–7195.

District Court of Appeal, Second District, Division 2, California.

Sept. 28, 1932.

Rehearing Denied Oct. 27, 1932. Hearing Denied by Supreme Court Nov. 25, 1932.

1. Eminent domain ⇐265(5).

Where plaintiff dismissed condemnation proceedings after trial, fees of landowners' expert witnesses not appointed by court *held* not taxable against plaintiff as "costs" (Code Civ. Proc. § 1255a, 1871).

Fees of expert witnesses who had been called by landowners to testify as to the value of the land, but who had not been appointed by court, were not taxable as "costs" against the plaintiff under Code Civ. Proc. § 1255a, since section 1871, empowering trial court in any proceeding, civil or criminal, to appoint and fix the compensation of expert witnesses, applied and was intended to provide means for a fair and complete ascertainment of facts involved, and entirely safeguards a defendant in condemnation proceeding from loss in case of abandonment by the plaintiff.

[Ed. Note.—For other definitions of "Costs," see Words and Phrases.]

2. Eminent domain ⇐265(5).

That attorneys' fees allowed against plaintiff dismissing condemnation proceedings after trial exceeded amount at which defendants' property was appraised *held* not to show trial court abused discretion in allowing such fees.

STEPHENS, Justice pro tem., dissenting.

Appeals from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Three separate suits by the City of Los Angeles against W. H. Clay and others. From orders denying motions to tax costs, following the dismissal of the suits the plaintiff appeals. The cases were consolidated on appeal.

Orders modified, and, as so modified, affirmed.

Erwin P. Werner, City Atty., and C. N. Perkins, Deputy City Atty., both of Los Angeles, for appellant.

Hill, Morgan & Bledsoe, Tanner, Odell & Taft, and Evans, Pearce & Campbell, all of Los Angeles, for respondents.

CRAIG, Acting P. J.

Three cases were consolidated upon appeal by the City of Los Angeles from orders denying motions to tax costs in eminent domain proceedings, following the dismissal thereof after trial.

[1] The principal question presented necessitates an interpretation of section 1255a of the Code of Civil Procedure relating to witness' fees. It is therein provided: "Upon such abandonment, express or implied, on motion of defendant, a judgment shall be entered dismissing the proceeding and awarding the defendant his costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees." The appellant excepted to the allowance of fees to expert witnesses who had appraised the designated properties and who were called by the respondents to testify as to values. It is contended that these are not proper taxable items, for the reason that said witnesses were not appointed by the court, but were employed by the defendants.

It has been determined that the fees of expert witnesses in condemnation proceedings are not authorized under sections 1022, 1025, and 1255 of the Code of Civil Procedure which relate to "costs." City of Los Angeles v. Vickers, 81 Cal. App. 737, 254 P. 687. As there said, adopting the language of another court: "'The word "costs," when used in relation to the expenses of legal proceedings, means the sum prescribed by law as charges for the services enumerated in the fee-bill.'" It contemplates only such costs as are authorized by statute. Said section 1255a of the Code of Civil Procedure provides that, upon abandonment of proceedings in eminent domain be-

fore the expiration of thirty days after final judgment, the defendant may have his necessary expenses incurred in preparing for trial. Section 1871, embraced in title 1, part 4, of the same Code, wherein the Legislature established "general principles of evidence" empowers the trial court in any proceeding, civil or criminal, to appoint and fix the compensation of expert witnesses whenever it shall be made to appear that their evidence is or will be required by the court or any party to the action. Said section further plainly states, however, that: "Nothing contained in this section shall be deemed or construed so as to prevent any party to any action or proceeding from producing other expert evidence as to such matter or matters, but where other expert witnesses are called by a party to an action or proceeding they shall be entitled to the ordinary witness fees only and such witness fees shall be taxed and allowed in like manner as other witness fees." The respondents seek to bring the case within the rule heretofore announced that such a proceeding as the instant one "is so differentiated from the ordinary actions or proceedings in a court of justice * * * as to bring it within the settled test justifying the assignment of the proceeding to a particular class for the purposes of reasonable provisions not applicable to other classes of actions." City of Los Angeles v. Cline, 40 Cal. App. 487, 181 P. 78, 79.

The decisions so cited relate only to attorneys' fees, which are expressly made allowable in proper cases by section 1255a of the Code of Civil Procedure. We are cited to no authority which can be said to justify the conclusion that section 1871 is not applicable here, or that a party has the power which is elsewhere vested in the court to determine what expert evidence may be required, and thus to include the cost thereof as a necessary expense in preparing for trial. We have no doubt that this section does apply to condemnation proceedings, and that it was intended by the Legislature to provide means for a fair and complete ascertainment of facts involved, in this as well as any other proceeding wherein its provisions are used. We conclude that the charge made for expert witnesses other than as ordinary witnesses should be disallowed the more readily because as to such expenses section 1871 entirely safeguards a defendant in condemnation proceedings from loss in case of abandonment by the plaintiff. Under its provisions it is only necessary that a party who desires to use experts should satisfy the court of this necessity and secure an order appointing one or more such witnesses and allowing reasonable and proper compensation for their services. It cannot be assumed, contrary to the admissions of all parties to the present appeals, that the witnesses in question were not such as were entitled "to the ordinary witness fees only." It is conceded by the respondents that their experts were called by them, and, their category having been defined by legislative enactment, it does not permit of another characterization by judicial interpretation.

[2] It is contended that an item of attorneys' fees, being more than the amount at which the defendant's property was appraised, was excessive, and that the trial court abused its discretion in allowing the same. It is not contended, however, that such fees were unreasonable for whatever services the trial court found to have been rendered, nor is any authority cited tending to make the ground assigned a basis for denying or reducing the compensation adjudged as reasonable.

It is ordered that the judgment for witnesses' fees be modified as indicated herein, and, as so modified, the judgment is affirmed.

I concur: IRA F. THOMPSON, J.

STEPHENS, Justice pro tem.

I dissent.

I do not think the citation of cases on the general question of costs is helpful in this case. Section 1255a of the Code of Civil Procedure is unmistakably a statute applying alone to cases in which the extraordinary power of eminent domain is sought to be exercised. It recognizes the limited meaning of "costs and disbursements," and specifically adds to the ordinary cost bill disbursements "which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees." The Legislature evidently did not consider that the usual allowance of "costs and disbursements" to the winning party properly covered the situation described in 1255a, supra, so it proceeded to provide specifically therefor. There is sound reason for this legislation. Too often ambitious municipalities have pushed condemnation proceedings to judgment only to abandon them before paying out the money when the values exceeded the engineering estimates. That the ordinary cost bill fell far short of making the property owner whole is obvious.

I think the evident purpose of section 1255a of the Code of Civil Procedure is disregarded in the main opinion, for it holds that section 1871 of the Code of Civil Procedure in a large measure supersedes section 1255a. If this is a proper interpretation, it cuts the very heart out of the latter section. It is my opinion that the purposes of these two Code sections are entirely different.

Section 1871 is a permissive statute. Either one or all parties may or may not act

under it. If a party acts under it, the court selects and appoints the experts, and the fee is taxed as costs. If a party does not act under it, he selects his own experts, and pays them except for the small witness fee. A party has a perfect right to take either course according to his own judgment, and it is entirely beyond my comprehension how this choice can or does affect the "necessary expenses in preparing for trial." Respondents here chose to select their own experts. Under 1255a, if the experts were "necessary," their reasonable fee must be repaid by the plaintiff if it abandons its case. Bear in mind that section 1871 is a general statute applying to all cases within its scope except cases specially covered by other statutes. Section 1255a is a special statute enacted to right occurring wrongs in condemnation proceedings. Sections 84, 85, and 86, California Jurisprudence, volume 23, treating, respectively, "Presumption against Repeal by Implication," "Identity of Subject and Object," and "Inconsistency and Repugnancy," may be read in this connection with profit.

Expert testimony is constantly being criticized by the courts, but, where technical knowledge is required, it seems there is no better way to get it than from men learned in the particular line of information needed. Despite the abuses, I know of no better way to arrive at the truth than through the sworn testimony of men who have prepared the details of a case in which they are called to testify and to submit themselves to cross-examination. That a man's property should be taken from him for a compensation estimated by a witness chosen for him and with whom he has no right to confer, and by a witness whose extent of examination of the property and the elements that affect its value he has no right to know until the witness reaches the witness stand, is monstrous. It is entirely foreign to our system of jurisprudence. And yet this is the logic of every scheme for judicial selection of experts. No party should ever be required to have his case affected by judge-chosen witnesses. Section 1871 according to the main opinion, effectually says to every property owner, in an eminent domain case, "Let the judge appoint your experts or you cannot have their fees repaid you in case the plaintiff abandons the case." I cannot agree with this conclusion, and I have a suspicion of its constitutionality if this conclusion is a correct one. The trial judge should have decided whether or not the expert witnesses employed by respondents were necessary, and, if they or any of them were necessary, he should have fixed a reasonable compensation for them and included the same in the costs allowed.

125 Cal.App. 296

GILL et al. v. JOHNSON, State Treasurer.
Civ. 468 (4).

Supreme Court of California.
Oct. 3, 1932.

In Bank.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

On hearing in Supreme Court.

For opinion of District Court of Appeal, see 13 P.(2d) 857.

See, also, 110 Cal. App. 442, 294 P. 405.

U. S. Webb, Atty. Gen., and L. G. Campbell, and James S. Howie, Deputy Attys. Gen., for appellant.

Barker & Keithly and Barker, Smiley & Keithly, all of Los Angeles, for respondents.

PER CURIAM.

The petition for hearing in the Supreme Court is denied.

Our denial of the petition for transfer in this cause is based upon the ground that enough appears on the face of the proceedings to show that Austin is primarily liable for the loss suffered by respondents and that the Torrens Title fund (St. 1915, p. 1932) may not be resorted to until an execution against Austin shall have been returned unsatisfied. It was the duty of the court to require the presence of Austin. St. 1915, pp. 1932, 1949, § 105; Code Civ. Proc. § 389; O'Connor v. Irvine, 74 Cal. 442, 16 P. 236; Mitau v. Roddan, 149 Cal. 1, 8, 84 P. 145, 6 L. R. A. (N. S.) 275; Lake v. Dowd, 207 Cal. 293, 277 P. 1047.

We withhold our approval from that portion of the opinion which holds that the demurrer was sufficient in form.

216 Cal. 528

WITHERS v. KERR, Registrar of Voters.
S. F. 14790.

Supreme Court of California.
Oct. 18, 1932.

Elections ⊂⊃143.

Independent candidate for office of congressional Representative *held* properly nominated by nomination papers signed by over 5 per cent. of electors who voted at preceding general election in territory comprised in congressional district created after such election (Pol. Code, § 1188, as amended by St. 1931, p. 2281; Pol. Code, § 117, subd. 18, as amended by St. 1931, p. 297).

Such candidate was properly nominated for purpose of placing his name on next general election ballot as independent candidate, in view of Pol. Code, § 1188, as amended by St. 1931, p. 2281, which provides that signatures attached to independent nomination papers thereunder must be at least 5 per cent. in number of entire vote cast at last preceding general election "in the state, district, or political subdivision for which the nomination is to be made," since term "district" may be considered as equivalent of "area" or "territory," and, if statute is thus construed, literal compliance therewith was accomplished, and even without such construction proceedings to nominate such candidate were in substantial compliance with statute.

In Bank.

Proceeding on a petition for a writ of mandate by Parker J. Withers against William M. Kerr, as Registrar of Voters of and for Los Angeles County.

Peremptory writ denied.

O'Melveny, Tuller & Myers, of Los Angeles, for petitioner.

Everett W. Mattoon, County Counsel, J. H. O'Connor, Deputy County Counsel, and Fred M. Cross, Deputy County Counsel, all of Los Angeles, for respondent.

PER CURIAM.

Mandate to compel the respondent, as registrar of voters of Los Angeles county, to omit from the ballot to be used at the ensuing general election the name of William E. Hinshaw as a candidate for Representative in Congress for the Eighteenth congressional district in California.

William E. Hinshaw was not a candidate for any office at the primary election of August 30, 1932. On September 29, 1932, he filed in the office of the respondent registrar nomination papers for the purpose of placing his name upon the general election ballot as an independent candidate for said office in the manner and form provided by section 1188 of the Political Code, as amended by St. 1931, p. 2281. These papers, upon examination by the registrar, were found to contain signatures of electors qualified to sign the same in excess of 5 per cent. of the entire vote cast at the last preceding general election in the territory comprising the Eighteenth congressional district. The registrar so certified to the secretary of state, and in turn received from the secretary of state a list of names, including the name of William E. Hinshaw for said office, to be placed on the general election ballot in said district.

The Eighteenth congressional district was established by the Legislature at its session in 1931, and comprises the sixty-ninth, sev-

entieth, and seventy-first assembly districts. St. 1931, p. 297, section 117, Pol. Code, subd. 18. This district was carved out of a portion of the old ninth congressional district without any change in precinct lines. It was therefore a comparatively easy matter for the registrar to check the nomination papers and determine whether the signatures attached thereto were of qualified electors sufficient in number in the territory or area comprising the present Eighteenth congressional district.

Section 1188 of the Political Code, as amended by St. 1931, p. 2281 provides that the signatures to be attached to independent nomination papers thereunder must be at least 5 per cent. in number of the entire vote cast at the last preceding general election "in the state, district or political subdivision for which the nomination is to be made." It is the petitioner's position that, since the old ninth congressional district was wiped out by the 1931 reapportionment measure, no independent nominations for said office may be made in the new district because the latter was not in existence at the last general election. In order to uphold this contention, it would be necessary to conclude that it was the intention of the Legislature to abolish the right to independent nominations in new congressional districts, at the same time continuing the right in the district or districts whose boundaries had not been changed. This conclusion would not be justified, unless compelled by some expression of legislative will to that effect, and we find none. For the purposes of this proceeding, it is enough to say that the term "district" may be considered as the equivalent of "area" or "territory." Without such construction, it is fair to say that the proceedings to nominate Mr. Hinshaw were in substantial compliance with the statute. And with that construction a literal compliance would seem to have been accomplished.

The peremptory writ is denied.

126 Cal.App. 749

PEOPLE v. SCHNEIDER. *

Cr. No. 2256.

District Court of Appeal, Second District, Division 1, California.

Oct. 11, 1932.

Rehearing Denied Oct. 25, 1932.

Hearing Denied by Supreme Court Nov. 10, 1932.

Criminal law ⚖371(3), 1169(12).

In prosecution for issuing check without sufficient funds, defense being that check was mistakenly drawn on wrong bank, admitting evidence that, subsequently, defendant drew checks on his bank, but that three days thereafter account was closed, *held* prejudicial error (Pen. Code, § 476a).

It was error to admit such evidence since, at time of utterance of such subsequent checks, there was sufficient money in bank to cover them, and their issuance did, therefore, not constitute violation of Pen. Code, § 476a; and court could not say that admission of such evidence was not prejudicial, since defendant's story as to excusable mistake in issuing check directly involved in prosecution seemed probable, and corroborating circumstances appeared to lend substantial support thereto.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

A. E. Schneider was convicted of issuing a check without sufficient funds, and he appeals.

Reversed.

A. E. Schneider, in pro. per.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and William R. McKay, Deputy Dist. Atty., both of Los Angeles, for the People.

HOUSER, J.

Under the provisions of section 476a of the Penal Code, defendant was charged with the commission of the criminal offense of "issuing check without sufficient funds." From a judgment of conviction and from an order by which his motion for a new trial was denied, defendant has appealed to this court.

On the trial of the action defendant admitted the issuance by him of the check in question; also the fact that in the bank on which the check was drawn he had no funds. In substance, his defense consisted in the claim that the check was issued by reason of an excusable mistake on his part; and in that regard the story told by defendant seemed probable, and the corroborating circumstances appeared to lend substantial support thereto. In effect, it was that, although defendant had no banking account with the bank on which the check in question was drawn, he did have an account in another bank; and that in issuing the check on which he was prosecuted, the reason why he had used a check on a bank in which he had no funds was that his employment required him to carry blank checks on many different banks for the use and convenience of persons with whom he transacted business, and that on the occasion in question, in his haste and confusion, he inadvertently used a check on a bank in which he had no account, instead of a

⚖For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Rehearing denied 15 P.(2d) 540.

check on the bank in which he had funds deposited sufficient in amount to satisfy and pay the check for the issuance of which he was on trial.

The principal complaint registered by appellant is that, regarding so-called "similar offenses" said to have been committed by defendant, evidence was erroneously admitted against him. The facts with relation thereto appear to be that approximately sixteen days after the date of the issuance of the check in question, defendant issued two other checks on the bank in which he kept his account; that at the time of such issuance defendant had funds in said bank sufficient to pay each of said checks; but that three days after the latter of such checks was issued, the account of defendant in his bank was "closed"; and that thereafter, when the said two checks were presented by the holder thereof to the bank for payment, the bank refused to pay the same.

An examination of the pertinent provisions of section 476a of the Penal Code, for the alleged violation of which defendant was prosecuted, discloses the situation that, in effect, it denounces the utterance of "any check * * * upon any bank * * * for the payment of money, knowing at the time of such * * * uttering * * * that the maker * * * has not sufficient funds in, or credit with said bank * * * for the payment of such check * * * in full upon its presentation."

From a consideration of the facts which related to the utterance of the two checks to which attention hereinbefore has been directed, it is clear that as to the issuance of neither of such checks did defendant place himself within the situation defined by the statute. Regarding the status of the banking account of defendant "at the time of utterance," in substance the evidence was that "on the day that these checks were written, there was sufficient money in the bank to cover them"; from which it follows that had the checks been seasonably presented for payment, as far as defendant was concerned, each of them would have been paid "in full upon its presentation." It results that in the utterance of the two checks in question, at least no "similar offense" was committed by defendant.

With reference to the general rule in cases of the character of that here under consideration, in 8 Ruling Case Law 202, the rule is thus stated: "* * * Where a felonious intent is an essential ingredient of the crime charged, and the act is claimed to have been innocently or accidentally done, or by mistake, when the result is claimed to have followed the act lawfully done for a legitimate purpose, or where there is room for such an inference, it is proper to characterize the act by proof of other like acts producing the same result, as tending to show guilty knowledge, and the intent and purpose with which the particular act was done, and to rebut the presumption that might otherwise obtain. But the evidence of the other acts relied upon must show them to be identical with the act in question, otherwise they have no probative value so far as this question of mistake or accident is concerned." Citing State v. Hyde, 234 Mo. 200, 136 S. W. 316, Ann. Cas. 1912D, 191.

In view of the circumstances which surrounded defendant at the time when he drew the check for the utterance of which he was placed on trial, it cannot be said that he was not prejudicially affected by the admission of the evidence which related to the two checks which were assumed to constitute "similar offenses." No other error specified by appellant requires consideration by this court.

The judgment and the order by which defendant's motion for a new trial was denied are reversed.

We concur: CONREY, P. J.; YORK, J.

126 Cal.App. 590

Application of MERCEREAU et al.

WHITESELL et al. v. LA BERGE.

Civ. 980.

District Court of Appeal, Fourth District, California.

Oct. 4, 1932.

Rehearing Denied Nov. 1, 1932.

Hearing Denied by Supreme Court Dec. 1, 1932.

1. Judgment ⇐135.

Statute providing for setting aside of judgment where summons is not personally served on defendant should be so applied as to dispose of cases upon substantial merits (Code Civ. Proc. § 473).

2. Judgment ⇐153(6).

Court rendering default judgment quieting title could within year thereafter vacate such judgment and permit trial on merits where no personal service was had on defendant (St. 1915, p. 1932; Code Civ. Proc. § 473).

3. Judgment ⇐145(2).

As condition to setting aside of default judgment to permit defense on merits, defendant must have good defense on merits (Code Civ. Proc. § 473).

4. Records ⇐9(11).

In proceeding to register title to land, claimant having her right to land extinguished by default decree quieting title could

apply as adversary for relief from such decree, though not named as defendant and not legal representative of named defendant (St. 1915, p. 1932, and p. 1936, § 16; Code Civ. Proc. § 473).

5. Records ⇐9(11).

In proceeding to register title to land, vacating default judgment quieting title and permitting adverse claimant whose predecessor in interest was not personally served to answer to merits *held* not error, though good-faith purchasers acquired title subsequent to such judgment (St. 1915, p. 1932; Code Civ. Proc. § 473).

6. Records ⇐9(11).

In proceeding to register title to land, defaulting adverse claimant not personally served and without knowledge of quiet title action *held* entitled within year after judgment to plead merits of action as matter of right, it being immaterial that claimant failed to record deed on which she relied until 19 months after its execution (St. 1915, p. 1932; Code Civ. Proc. § 473).

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

In the matter of the application of Job Frank Mercereau and others. Petition by Walter Leo Whitesell and another against Ora E. La Berge under the Land Title Law. From an order vacating a default judgment, Walter Leo Whitesell and another appeal.

Affirmed.

Jas. W. Bell, of Los Angeles, for appellants.

Chauncey E. Snow and Victor H. Kendrick, both of Los Angeles, for respondent.

JENNINGS, J.

This is an appeal from an order of the superior court setting aside and vacating a default judgment obtained after publication of summons.

The proceedings herein were instituted by petitioners Walter Leo Whitesell and Carol Georgia Whitesell under the provisions of the Land Title Law adopted by the initiative method at the general election of November 3, 1914 (St. 1915, p. 1932). The petition was filed on December 20, 1928. In it petitioners alleged that they were owners in fee simple, as joint tenants of certain described land, and that William C. La Berge, whose address was unknown to them, claimed some right, title, or interest in the premises adversely to petitioners which said claim was alleged to be without right. The prayer of the petition was for a decree quieting the title of petitioners to the property. Thereupon, the court ordered that notice of the filing of the petition be given as provided in the act and that it be published for the required time. In compliance with the court's order, notice of the filing of the petition was published and a copy of the notice was mailed to said William C. La Berge, in an envelope addressed to him, in care of the county clerk of Los Angeles county for the reason that his address could not, with reasonable diligence, be ascertained. Due proof of the publication and mailing of said notice was made, and the court thereafter, on April 25, 1929, rendered its decree adjudging that said William C. La Berge had no right, title, or interest to the land described in the petition and quieting the title of petitioners to the said land. At some time prior to April 11, 1930, Ora E. La Berge gave notice that on said April 11, 1930, she would move the court to vacate and set aside the said decree. The motion was made on the ground that summons in the proceeding was not personally served on defendant William C. La Berge and was supported by an affidavit of Ora E. La Berge. This affidavit set forth that affiant and her former husband, William C. La Berge, purchased the property and acquired title thereto by deed dated July 18, 1922; that on June 1, 1925, affiant conveyed her interest in the property to William C. La Berge; that on May 11, 1928, William C. La Berge conveyed to affiant all his right, title, and interest in said property; that neither affiant nor William C. La Berge were personally served with summons in the proceeding; and that neither had notice of the filing of the petition until January 20, 1930. Accompanying the affidavit a proposed answer was filed by said Ora E. La Berge alleging the conveyance made to her by William C. La Berge on May 11, 1928, and setting up her right to contest the petition. In opposition to the motion thus made petitioners filed affidavits in which it is set out that, at the time the petition was filed and when the decree was entered, the deed of May 11, 1928, had not been recorded and was not recorded until December 17, 1929; that after the decree quieting their title to the property had been rendered, petitioners sold said property for a valuable consideration and a new certificate was issued to the purchasers; that petitioners had no knowledge or information of the asserted claim of Ora La Berge until after they had disposed of the property; that the sale made by them was a bona fide sale for valuable consideration paid by the purchasers at the time of said sale. On April 22, 1930, the court made its order setting aside the decree rendered on April 25, 1929, and granting leave to Ora E. La Berge to answer to the merits of the action.

[1] In support of their appeal from the order vacating the decree and granting permission to respondent to file her answer, appellants first contend that the court was without jurisdiction to make such an order. As

upholding the contention thus advanced, appellants have cited and rely upon the decisions in Cooper v. Buxton, 186 Cal. 330, 199 P. 6, and Sharp v. Eagle Lake Lumber Co., 60 Cal. App. 386, 212 P. 933. In the first of these decisions it was held that an action to set aside a decree of registration of title under the Land Title Law, on the ground of mistake, must be brought within one year after such registration. In the second case it was held that a direct attack upon a void judgment may be made by any one interested by a motion to set it aside in the court which rendered it. It was specifically noted that the motion to set aside the judgment was not made pursuant to the provisions of section 473, Code of Civil Procedure. It is immediately apparent that neither of the above-cited cases is applicable to the situation here presented for the reason that respondent did not seek to set aside the judgment by an independent action based upon mistake, but that she made a motion in the very court which rendered the judgment to be relieved from it and to be permitted to answer to the merits of the cause pursuant to the provisions of section 473, Code of Civil Procedure. Nor was her motion based upon the ground that the decree from which she sought to be relieved was taken against her through her mistake, inadvertence, surprise, or excusable neglect. It was made upon the sole ground that summons in the action had not been personally served upon the defendant William C. La Berge, her predecessor in interest. That portion of the statute (section 473, Code Civ. Proc.) under which respondent's application for relief was presented is in the following language: "When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action." It is conceded that notice of the filing of the petition was not personally served on the defendant William C. La Berge nor on respondent and that the court's order permitting respondent to answer to the merits of the proceeding was made within one year after the rendition of the decree which adjudged that William C. La Berge had no interest in the property involved and quieted the title of appellants to such property. If, therefore, section 473, Code of Civil Procedure, is available to a defendant in a proceeding of the character here instituted, the contention of appellants that the court lacked jurisdiction to grant the relief sought is fully answered. In Beggs v. Riordan, 44 Cal. App. 230, 186 P. 187, 188, a defendant in a proceeding brought under the provisions of the Land Title Law moved the court to set aside the judgment rendered against her and to permit her to defend. The motion was denied and defendant appealed. The court's order refusing the relief sought was reversed, the appellate court holding that the affidavits of merits presented by the defendant were sufficient and that the court erred in denying the motion. The following language from the decision is pertinent to the problem here under consideration: "Under the circumstances shown by the record there is no doubt that appellant's motion, which was made within one year after the rendition of the judgment, should have been granted, if the affidavits of merits upon which the motion was made were sufficient. Code Civ. Proc. § 473." In Shupe v. Evans, 86 Cal. App. 700, 261 P. 492, 493, an appeal was taken from an order of the superior court, vacating a default judgment in an unlawful detainer action. It was contended by appellant that section 473 had no application to cases in unlawful detainer. This contention was not upheld. The court pointed out that the statute has a very wide application, citing that it had been held applicable to various special proceedings, among others. "Torrens title proceedings (Beggs v. Riordan, 44 Cal. App. 230, 186 P. 187)." The above-cited decisions are in conformity with the well-settled rule that the statute under consideration is a remedial provision and should be so applied as to dispose of cases upon their substantial merits. 14 Cal. Jur. p. 1012; Nicoll v. Weldon, 130 Cal. 666, 63 P. 63; Mitchell v. Calif., etc., S. S. Co., 156 Cal. 576, 105 P. 590; Waybright v. Anderson, 200 Cal. 374, 377, 253 P. 148; Weck v. Sucher, 96 Cal. App. 422, 425, 274 P. 579.

[2, 3] In conformity with the policy thus established of viewing the statute as a remedial provision to be liberally construed and in accordance with the decision in Beggs v. Riordan, supra, we entertain no difficulty in holding that the court had jurisdiction to make the order vacating the judgment. In connection with the contention that the court lacked jurisdiction to make the order some question is raised as to the sufficiency of respondent's affidavit of merits. Since that clause of section 473, Code of Civil Procedure, under which the motion to vacate the judgment herein was made, provides for the granting of relief for the purpose of permitting a defendant to answer "to the merits of the original action," the condition is implied that it must be made to appear that the defendant has a good defense on the merits. 14 Cal. Jur. p. 1031; Gray v. Lawlor, 151 Cal. 352, 90 P. 691, 12 Ann. Cas. 990; Boland v. All Persons, etc., 160 Cal. 486, 490, 117 P. 547, 548; Osmont v. All Persons, etc., 165 Cal. 587, 590, 133 P. 480. An examination of the affidavit of respondent filed in support of the motion discloses that the objections raised by appellants are entirely unfounded and that the instrument contains a full and satisfactory statement of the existence of a defense on the merits.

[4] The second contention advanced by appellants is that the court erred in holding that respondent is entitled to the relief sought under the above-quoted clause of section 473, Code of Civil Procedure. In this connection, it is pointed out that she is not a defendant in the proceeding and it is confidently asserted that she is not the legal representative of a defendant. It must be conceded that she was not made a defendant in the proceeding since the only defendant named in the petition is William C. La Berge. It must also be conceded that it is at least doubtful whether she may properly be considered to be the legal representative of William C. La Berge since her affidavit filed in support of her motion for relief shows that she claims title in herself by virtue of a deed executed in her favor more than seven months prior to the filing of the petition for registration by appellants. Her claim therefore has no reference to the proceeding herein instituted by appellants nor to the fact that her grantor is the defendant in such proceeding. However, in order that we may arrive at a proper determination of whether the court erred in granting her application for relief, some consideration of the result sought to be achieved by the proceeding here instituted is required. The court found that all persons interested in the action have either filed their assent to the registration or have been duly and properly served with notice of the filing of the petition and that the time for appearance has expired and all such persons "known and unknown" are properly before the court; that appellants are owners of an estate in fee simple in the property; that two named defendants, Belmont Pier Tract Company, a corporation, and William C. La Berge, have no claim, right, title, or interest in the land and are forever debarred from asserting any claim thereto; that applicants (appellants) are the owners of the premises; that no other person, firm, or corporation has any right, title, or interest in said land or any part thereof. The decree rendered by the court adjudges that the title of appellants be confirmed and registered and that it shall forever quiet the title to the land "and be final and conclusive against the rights of all persons, known and unknown, to assert any claims, interest, estate, lien, or demand of any kind or nature whatsoever, against said land, or any part thereof." It is apparent that the effect of the decree thus rendered is to foreclose finally the claim of any person, other than appellants, to the land whose title is adjudged to be in appellants. It is in conformity with the very purpose of the statute under whose provisions the proceeding was instituted, which is not only to create and perpetuate a marketable title to land sought to be registered but also to determine conclusively every and all adverse claims against the registered land. Title Guarantee & Trust Co. v. Griset, 189 Cal. 382, 388, 208 P. 673. The act (St. 1915, pp. 1932, 1936, § 16) provides that "a decree of the court ordering registration shall be in the nature of a decree in rem, shall forever quiet the title to the land therein ordered registered and shall be final and conclusive as against the rights of all persons, known and unknown, to assert any estate, interest, claim, lien or demand of any kind or nature whatsoever, against the land so ordered registered." Respondent herein is a person unknown to appellants, unnamed by them in their petition for registration, who asserts a claim in the land and whose claim is effectually and for all time destroyed by the comprehensive decree rendered by the court. It is not open to doubt that, had she been advised of the pendency of the proceeding, she might have entered an appearance and asserted her claim to the land. In this event, she would have appeared as a defendant in the proceeding presenting her claim in opposition to that of appellants. Her application for relief from the decree which so conclusively disposes of whatever interest she has in the land amounts to an application of an unnamed and unknown defendant. Had her claim in the property been known and had she been named as a defendant in the proceeding and served by publication she would have been entitled to apply for relief under section 473, Code of Civil Procedure. Beggs v. Riordan, supra. Although she was not named as a defendant, it is obvious that her interest in the land is as certainly extinguished by the decree as though she had been named in the petition. It is therefore impossible to escape the conclusion that she was entitled to make her application for relief not as the legal representative of her husband, but in her own right as an adversary of appellants, asserting a claim in opposition to the granting of the petition.

[5] The final contention presented by appellants is that the court erred in vacating the judgment and in permitting respondent to answer to the merits for the reason that such action affected the rights of purchasers of the property who acquired title subsequent to the rendition of the decree, in good faith, for valuable consideration, and without notice of any claim of respondent in such property. The record herein shows that the fact of the transfer of the property by appellants subsequent to the rendition of the decree to bona fide purchasers for a valuable consideration was alleged in the affidavit of appellant Walter Leo Whitesell filed in opposition to respondent's motion to set aside the default judgment. An affidavit of appellants' counsel also filed in opposition to respondent's motion alleges that the deed from defendant William C. La Berge to respondent dated May 11, 1928, was recorded December 17, 1929, one year lacking three days subsequent to the filing of the petition for registration of the property by appellants and seven

months and seventeen days after the entry of the decree of registration sought to be vacated by respondent. This fact is not contradicted. The question presented for determination is whether under these facts the trial court had any discretion in passing upon the motion and, if so, whether it was abused. In the early case of Roland v. Kreyenhagen, 18 Cal. 455, the facts are strikingly similar to those which are here presented. In a suit to recover possession of certain land the defendant Kreyenhagen, who claimed to be owner, was not served with process. The occupants of the land were served and defaulted, whereupon the action was dismissed as to Kreyenhagen and judgment was entered against the occupants. Kreyenhagen moved to vacate the judgment and for leave to defend. Counter affidavits filed by the plaintiff alleged that subsequent to the entry of judgment plaintiff had sold his interest in the property to a bona fide purchaser without notice. The trial court granted the motion of defendant Kreyenhagen and vacated the judgment. On appeal the order was affirmed. The Supreme Court in its decision adverted to the desirability of having cases tried upon their merits and held that the court had not abused its discretion in vacating the judgment. With respect to the rights of third parties acquired subsequent to entry of judgment the court said: "If third persons have acquired any rights since the judgment, or the respondent waived any, that matter can be set up on the trial. We cannot try these questions on affidavit." In Holiness Church v. Metropolitan Ass'n, 12 Cal. App. 445, 107 P. 633, it was held that a defendant upon whom service of process was constructive and not personal is entitled as a matter of absolute right to have a judgment entered against him by default vacated and that the court has no discretion in the premises. In American Land Co. v. Zeiss, 219 U. S. 47, 31 S. Ct. 200, 208, 55 L. Ed. 82, the Supreme Court of the United States, in commenting upon that clause of section 473, Code of Civil Procedure, which is involved herein, says: "The right conferred by § 473 of the Code, it is to be observed, is an absolute right, although the section declares that the court may impose 'such terms as may be just.'" In Hoffman v. Superior Court, 151 Cal. 386, 393, 90 P. 939, 942, the Supreme Court of California, in discussing the effect of constructive service of process, says: "In this connection it is proper to say that in determining whether or not due process of law is afforded other statutes applicable to the proceeding may be considered. The provisions of section 473 of the Code of Civil Procedure apply in such cases. Any person interested in the property and having no actual notice of the decree, may come in at any time within a year after its rendition, and by showing that he has not been personally served with process, and stating facts constituting a good defense to the proceeding —that is, facts sufficient to show that he has a valid adverse interest in the property— he may have the decree vacated as to him and be allowed to answer to the merits. Gray v. Lawlor, 151 Cal. 352, 90 P. 691 [12 Ann. Cas. 990]."

In Gray v. Lawlor, supra, the Supreme Court points out the distinction between that clause of section 473, Code of Civil Procedure, which authorizes a court to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, and the clause which authorizes a court to allow a defendant who has not been personally served with summons in an action, to answer to the merits of the action at any time within one year after the rendition of judgment. When there has been no personal service of summons upon a defendant it is declared that the defendant need not present any excuse for his failure to appear except the fact that he was not personally served with the summons. The above-cited decisions seem to indicate that in cases where summons has not been personally served upon a defendant the court has no discretion and is required, upon production by such defendant, within one year after rendition of judgment, of an affidavit showing the fact of no personal service of summons in the action, to set aside the judgment and permit the defendant to answer to the merits. The doctrine that a defaulting defendant who has not been personally served with process in an action is entitled as a matter of right to be permitted to plead to the merits of the suit within a period of one year after the rendition of judgment against him and that the court has no discretion, but is required to grant the relief upon a showing that such defendant has not been personally served with process, has received one material modification. In Boland v. All Persons, supra, the court in discussing that clause of section 473, Code of Civil Procedure, which permits the granting of relief to a defendant not personally served with process says: "In applications for relief under this clause of the section there is no presumption of neglect, as in cases where there has been personal service. The party is not required, in the first instance, to do more than show that he has not been personally served and that he has a good defense to the action on the merits which he could have presented had he been informed of its pendency. Gray v. Lawlor, 151 Cal. 354, 90 P. 691 [12 Ann. Cas. 990]. But his opponent may show in opposition to the application that the applicant had actual notice of the action in time to have entered an appearance and present the defense, and that the failure to do so was owing to his neglect or to his consent to the judgment. In that event a case arises for the exercise of the discretion of the court, and it must deter-

mine whether or not the laches is of a character that should preclude the relief. Bogart v. Kiene, 85 Minn. 262, 88 N. W. 748; Mueller v. McCulloch, 59 Minn. 409, 61 N. W. 455; Keenan v. Daniells, 18 S. D. 102, 99 N. W. 853; Blyth v. Swenson, 15 Utah, 352, 49 P. 1027; Jordan v. Hutchinson, 39 Wash. 373, 81 P. 867."

[6] In Palmer v. Lantz et al. (Cal. Sup.) 9 P. (2d) 821, 823, it is said: "Service by publication and mailing a copy of the complaint and summons is not personal service (Lilly-Brackett Co. v. Sonnemann, 157 Cal. 192, 106 P. 715, 21 Ann. Cas. 1279), however, and by reason of this fact appellant contends that under section 473, Code of Civil Procedure, he is entitled to be relieved from the default as a matter of right without further showing than that he was not personally served (Daniels v. Colkins, 201 Cal. 10, 255 P. 182, and cases there cited). That this is sufficient to make a prima facie case for relief must be conceded. The law presumes from the fact of constructive service only that the failure to answer is due to lack of notice of the service. Gray v. Lawlor, 151 Cal. 352, 90 P. 691, 12 Ann. Cas. 990. But the provision is not designed to afford relief from a judgment which may be validly entered upon constructive service to those who with full knowledge of such service upon them, by reason of receipt of a copy of the summons and complaint through the mail, remain inactive. Gray v. Lawlor, supra; Boland v. All Persons, 160 Cal. 486, 117 P. 547." It therefore appears that there may be circumstances when the court in passing upon an application for relief under the clause of section 473, Code of Civil Procedure, under consideration will be called upon to exercise its discretion. In the instant case, however, no showing was made by appellants that respondent had actual knowledge of the pendency of the action in time to make an appearance and present her defense prior to the rendition of judgment. What was shown is that she failed to record the deed on which she relies for a period of 19 months after it was executed and that, during this period, the proceeding to have the land registered under the Torrens Act was instituted by appellants, a decree quieting their title in the property against all persons was rendered, and the land was sold by them to bona fide purchasers who, at the time the sale was made, paid valuable consideration therefor. The question which then presents itself is whether these circumstances call for the exercise of discretion by the trial court in passing upon respondent's application for relief. We think that they did not. Respondent's neglect to record her deed has no bearing upon her application for relief under the statute. It is a false quantity in the equation. The reasons for the adoption of the modification declared in Boland v. All Persons, supra, and Palmer v. Lantz, supra, is that a showing of actual notice overcomes the inference of lack of notice arising from the fact of constructive service and the court is then called upon to decide whether, under the circumstances, the failure of a defaulting defendant to make timely appearance should preclude the relief. The exercise by the court of its discretion involves a determination of whether the defendant's neglect makes it inequitable to grant the relief. The corner stone of the whole doctrine is the possession of actual notice by the defaulting defendant. This fundamental feature is lacking in the instant case. It is not contended that respondent had actual notice of the proceeding. Her failure to place her deed on record may, upon the trial of the action, be held to constitute laches foreclosing her interest in the property in favor of bona fide purchasers for value without notice but it should not preclude her from being allowed to present her claim to the land. The quotation from Sharp v. Eagle Lake Lumber Co., supra, to the effect that where innocent third parties have acquired interests through or by virtue of a judgment, the more orderly course is to proceed by an independent suit in equity to set aside the judgment, is, in the first place, pure dictum, and in the second place, it does not pretend to declare that, under the circumstances therein stated, an independent suit in equity is the exclusive remedy.

In conclusion, it may be remarked that in the order from which this appeal is taken, the court granted the relief upon the express condition that respondent bring in as parties defendant the present record owners of the property. The imposition of this condition would appear to insure a final adjudication of the merits of the action.

For the reasons herein stated the order from which this appeal is taken is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

126 Cal.App. 675

SALINAS v. RIVERSIDE FINANCE CO.

Civ. 953.

District Court of Appeal, Fourth District, California.

Oct. 7, 1932.

Rehearing Denied Nov. 1, 1932. Hearing Denied by Supreme Court Dec. 5, 1932.

Appeal and error ⇐612(1).

On appeal from order refusing to vacate a default and from a default judgment, record which was not properly authenticated could not be considered (Code Civ. Proc. § 951).

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Rodolfo Salinas against the Riverside Finance Company. Judgment for plaintiff. From an order refusing to vacate a default, and a default judgment, defendant appeals.

Affirmed.

Morse & Shoop, of Los Angeles, for appellant.

J. L. Hoffiund, of San Diego, for respondent.

MARKS, J.

This is an appeal from an order refusing to vacate a default and a default judgment, which motion was made under the provisions of section 473 of the Code of Civil Procedure.

The action was filed September 8, 1931, and personal service of summons was had on appellant. Its default for failure to appear was taken October 17, 1931. Judgment was rendered after evidence was taken on November 16, 1931. A notice of motion to vacate the default and the judgment on the grounds of mistake, inadvertence, surprise and excusable neglect was filed November 28, 1931, and denied December 14, 1931. This appeal followed.

Appellant has presented a typewritten transcript which is denominated a "Clerk's Transcript," in which is the judgment roll, except the summons, a copy of the minute order denying the motion, a proposed answer, the notice of motion to which three affidavits are attached, the notice of appeal, and certificates by the trial judge and the county clerk. There is no bill of exceptions. The certificates of the judge and the county clerk are so nearly similar to those quoted in Guyot v. Cassab (Cal. App.) 5 P.(2d) 912, that it will be unnecessary to detail them here.

The record in the instant case is so parallel to that in the Guyot Case that it furnishes us with authority for holding here that "the record before us not being authenticated either as required by the rule of court or any provision of the law, we cannot consider it." Guyot v. Cassab, supra. The following authorities support this conclusion: Section 951, Code of Civil Procedure; Clark v. McCain, 107 Cal. App. 668, 290 P. 901; Patterson v. Rutherford, 39 Cal. App. 647, 179 P. 704; Harrison v. Cousins, 16 Cal. App. 515, 117 P. 564; Spreckels v. Spreckels, 114 Cal. 60, 45 P. 1022; Stern & Goodman Investment Co. v. Danziger, 206 Cal. 456, 274 P. 748.

Although the record is imperfect, we have examined it, and have concluded that, if we should consider the appeal on its merits, we would have to affirm the order. While the answer presents a complete defense, if its allegations be taken as true, the record discloses such a lack of diligence on the part of appellant in protecting its rights after the service of summons upon it that we could not hold that the trial judge abused the discretion which the law vests in him in denying the motion.

The order appealed from is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

126 Cal.App. 723

RAINEY v. JACKSON.

Civ. 923.

District Court of Appeal, Fourth District, California.

Oct. 10, 1932.

1. Bills and notes ⇐518(2).

Evidence *held* to support finding that note was given to bank by maker as accomodation and without intention to deceive bank examiners.

2. Bills and notes ⇐520.

Evidence *held* not to support finding that note sued on was fraudulently secured for bank by its president.

3. Bills and notes ⇐113.

Maker who gave note in pretended purchase of safety deposit department of bank to enable bank to evade clearing house rule *held* estopped to deny liability thereon after bank's failure.

4. Bills and notes ⇐534.

Where no actual tender of amount due on notes was made, maker's request that collateral be delivered to him for collection so he could pay note *held* not "tender," so as to relieve maker of attorney's fees (Civ. Code, § 3151).

[Ed. Note.—For other definitions of "Tender (Verb)," see Words and Phrases.]

Appeal from Superior Court, San Diego County; G. K. Scovel, Judge.

Action by Edward Rainey, by substitution for Will C. Wood, as State Superintendent of Banks, trustee in charge of the liquidation of California Savings & Commercial Bank, in liquidation, against R. A. Jackson. From judgment for defendant, plaintiff appeals.

Reversed.

Albert A. Rosenshine, Elbert W. Davis and J. H. Hoffman, all of San Francisco, for appellant.

Fitzgerald & Selleck, of San Diego, for respondent.

JENNINGS, J.

Appellant is the superintendent of banks of the state of California, and as such took possession of the property and business of the California Savings & Commercial Bank of San Diego on July 24, 1930. Among the assets of the bank which came into appellant's possession was a promissory note dated May 19, 1930, payable August 18, 1930, in the principal sum of $25,000, signed by respondent. The evidence shows that no payments either on principal or interest had been made on the note. The complaint filed by appellant is in the usual form employed in actions of the character here instituted. Respondent's answer pleaded entire lack of consideration and that the note was executed solely for the accommodation of the bank at the request of its president, I. I. Irwin. The trial court found that there was no consideration for the execution of the note; that it was given with the intention of accommodating the bank, and was not given for the purpose of deceiving bank examiners or to work a fraud on the public; that the execution of the note was procured through fraudulent misrepresentation of I. I. Irwin, president of the bank. From the aforesaid findings the court drew the conclusion that appellant was not entitled to recover from respondent and rendered judgment accordingly.

[1, 2] A brief statement of the facts developed by the evidence may assist in clarifying the problem presented by the appeal herein. On February 29, 1928, I. I. Irwin, president of the California Savings & Commercial Bank of San Diego, proposed to respondent, a stockholder in said bank, that the latter should go through with the formality of purchasing the safety deposit department of the bank. The reason advanced by Irwin for the proposal thus made was that the bank was keeping open its safety deposit department throughout the 24 hours of each day, and that the San Diego Clearing House Association refused to clear the bank's checks because the bank's action in keeping open its safety deposit department for the full 24 hours in each day constituted a violation of a rule of the Clearing House Association which forbade such action. Respondent demurred to the proposal thus made on the ground that he did not have the money with which to make the purchase and had no desire to acquire the safety deposit department of the bank. Respondent was then assured by Irwin that no money was required for the consummation of the scheme; that the money ostensibly necessary would be advanced to respondent by the bank; that respondent would execute his note for the amount representing the purchase price of the safety deposit department and would return to the bank the money advanced to him; that there would be no obligation upon him to pay the note, as the money would always be held available at the bank to offset his note. Upon the aforesaid representations, respondent accepted the proposal. He executed a note for $25,000 payable to the bank. His account with the bank was credited with the sum of $25,000 on the same day, and on this date he drew his check for $25,000 payable to I. I. Irwin. This check bore the following indorsement: "Pay to the order of Calif. Savings & Commercial Bank of San Diego. I. I. Irwin." The original note thus executed by respondent was renewed by him on its due date, and there were successive renewals, the last note given being the one on which the present action was instituted. Payments of interest due on the notes thus given were made by respondent, but his account was consistently credited with sums equivalent to the amounts paid by him as interest on the notes. From the aforesaid facts it sufficiently appears that the hereinabove mentioned findings of the court were fully justified, with the single exception of the finding that "the note was secured by fraudulent misrepresentation of I. I. Irwin, President of the California Savings and Commercial Bank." The testimony of respondent himself shows that he fully understood the nature of the transaction, and that it was purely fictitious; its object being the evasion of the rule of the San Diego Clearing House Association forbidding safety deposit departments of banks being kept open 24 hours in the day.

[3] The problem presented for determination is, therefore, whether upon the facts as above narrated the court was justified in concluding that no liability attached to respondent on the note for $25,000 executed by him and in rendering judgment accordingly. It is appellant's contention that respondent is estopped from raising the defense of lack of consideration against appellant, representing the creditors of the insolvent bank. With this contention we find ourselves impelled to agree. We are of the opinion that the instant case is not distinguishable on principle from the decision in Wood v. Kennedy, 117

Cal. App. 53, 3 P.(2d) 366, decided by this court, in which a hearing was denied by the Supreme Court. While it is true that there is not here present the element of lending credit to the bank for the purpose of ostensibly increasing the bank's assets with the intention of deceiving a bank examiner, an element often found in cases of this character, nevertheless, when respondent executed the note and made successive renewals thereof, he must have known that one certain effect produced thereby would be to increase its assets fictitiously. Since the rights of creditors of the insolvent bank have now intervened, and these innocent third parties will suffer injury if respondent is permitted to set up the true state of facts, a proper case for the application of the doctrine of estoppel is presented. First National Bank v. Reed, 198 Cal. 252, 261, 244 P. 368.

The fundamental reason for the application of the equitable doctrine of estoppel to a situation such as is here presented is because the accommodation maker joins in the perpetration of a scheme which is essentially deceitful. He may do so unwittingly. Nevertheless, the certain effect produced by his action in making the note without consideration and delivering it to the bank is that the bank's assets are ostensibly increased. This ostensible increase is, from the viewpoint of the accommodation maker, purely fictitious. The bank's creditors, however, are ignorant of the true situation. To them the accommodation note represents a real, not a fictitious, asset. They are justified in relying upon the note as being that which on its face it appears to be, a contract by the maker to pay a certain sum of money on a definite date. That the result of sustaining the defense of lack of consideration in a case of the character here presented would be seriously to jeopardize the rights of innocent creditors is apparent. For the sake of illustration, let us suppose the existence of the following facts: A bank on the brink of failure, for the purpose of delaying closing its doors, secures accommodation notes purporting to represent promises to pay large sums of money. Depositors, relying upon these fictitious evidences of indebtedness, continue to make deposits. When the true condition of the bank can no longer be concealed and insolvency occurs, shall the makers of accommodation notes escape liability to the bank's depositors on the ground that they had lent their credit to the bank without receiving any consideration therefor? We apprehend not. The depositors are entitled to say: You lent your credit to the bank, we relied upon your notes as being what they purported to be, true promises to pay; in reliance thereon we continued to make deposits; you may not now be heard to say that your notes were given without consideration and are therefore unenforceable.

[4] One further point remains to be considered. Appellant's complaint contained counts seeking recovery from respondent on two other notes executed by him. There was no denial of liability on these latter notes by respondent, but it was contended that there was no necessity of bringing suit upon them, and that therefore appellant was not entitled to recover costs and attorney's fees upon such notes. The court found that respondent had on deposit with the bank collateral security for the payment of these notes, and offered to pay such notes if appellant would deliver to him the aforesaid collateral security, which appellant refused to do; that appellant had no right to withhold the collateral security; that there was no necessity of bringing suit upon the notes. The evidence with reference to this feature of the case shows that, as collateral security for the payment of these latter notes, there was deposited with the bank a trust deed, the property of respondent, on which there was due to respondent approximately $10,000, and that, after appellant took possession of the assets of the bank, respondent requested that the trust deed be delivered to him, and that he be permitted to collect the money due thereon and pay off the notes; that appellant declined to deliver the trust deed as requested; that there was no actual tender of money by respondent. Since the only evidence bearing on the feature of tender is that no actual tender of money by respondent was made, it remains to consider whether respondent's action in requesting delivery of the trust deed and for permission to collect the money due thereon and from the proceeds pay off the notes amounted to a tender of payment which, while it would not discharge the debt which the notes represented, might relieve him from liability for attorney's fees. Section 3151, Civil Code, provides that, if an instrument is, by its terms, payable at a special place, and the person primarily liable thereon is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment. But respondent's ability to pay the amounts due on the notes was not made to appear, and his willingness to pay was qualified by the imposition of a condition which appellant was under no duty to perform. An expression of willingness to pay thus qualified is not equivalent to tender of payment. Rottman v. Hevener, 54 Cal. App. 485, 202 P. 334. We are therefore of the opinion that the court's finding that there was no necessity for bringing action upon the notes is not supported by the evidence, and that the court's conclusion that appellant is not entitled to recover attorney's fees is incorrect.

For the reasons stated, the judgment is reversed.

We concur: BARNARD, P. J.; MARKS, J.

126 Cal.App. 772

CORBETT et al. v. BENIOFF et al.

Civ. 8357.

District Court of Appeal, First District, Division 2, California.

Oct. 14, 1932.

1. Trusts ⇐217(1).

Trustee selling stock in violation of declarations of trust requiring owner's authorization for sale *held* liable for value thereof (Civ. Code, § 2237).

Stock was transferred pursuant to declaration of trust whereby trustees were to hold stocks which were to be placed with bank under trust investments savings plan, with profits to belong to owners, and which provided that trustees would execute all orders of owners with respect to sale or exchange of stock.

2. Trusts ⇐236.

Provision of declaration of trust that owners agreed to save trustees free and harmless *held* not to protect trustees against wrongful acts in violation of trust.

Declaration of trust pursuant to which certain stocks were turned over to trustees to be delivered to bank under trust investments savings plan, with provision that trustees would execute all orders of owners with respect to sale or exchange of stocks, provided that owners agreed to save trustees free and harmless and indemnify them against any and all demands and losses whatsoever arising out of declaration of trust, without anything therein warranting conclusion that it was intended to protect trustees against their own wrongful acts.

3. Stipulations ⇐18(1).

Stipulation of parties respecting amount of damages in event of judgment precluded any inquiry on appeal regarding sufficiency of pleading and proof relating to damages.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Peter B. Corbett and another against Fred Benioff and another, wherein defendants filed a cross-complaint. Judgment for defendants and cross-complainants, and plaintiffs and cross-defendants appeal.

Affirmed.

Philip S. Ehrlich, of San Francisco (Albert A. Axelrod, of San Francisco, of counsel), for appellants.

Morris, Jaffa & Thompson, of San Francisco, for respondents.

SPENCE, J.

Plaintiffs brought this action to recover a money judgment against defendants. Defendants answered and filed a cross-complaint seeking to recover a money judgment against plaintiffs. The cause was tried by the court sitting without a jury, and, from a judgment in favor of defendants and cross-complainants, the plaintiffs and cross-defendants appeal.

The pleadings are lengthy and reveal that both sides claimed a right of recovery arising out of the somewhat complicated dealings between the parties. From the pleadings and evidence it appears that both plaintiffs and defendants were independently speculating in stocks and owed certain obligations in connection with their operations. They entered into an agreement whereby certain stocks of defendants were turned over to plaintiffs, who in turn executed a declaration of trust in favor of defendants. Plaintiffs thereby agreed that they held said stocks in trust for defendants; that said stocks would be placed "with the Humboldt Bank under its trust investment savings plan"; that all profits thereon would belong to defendants; and that plaintiffs would execute all orders of defendants with respect to the sale or exchange of said stocks. It was further provided by the terms of said declaration of trust that plaintiffs could at their option place certain specified stocks of their own in said trust investment savings plan, and that the provisions relating to defendants' rights to profits, and so forth, should not apply to plaintiffs' stocks. Under the trust investment savings plan, entered into with the Humboldt Bank in the name of plaintiffs alone pursuant to the agreement between plaintiffs and defendants, plaintiffs borrowed the sum of $20,000 from the bank, which loan was secured by said stocks. This money was apparently used to pay off the prior obligations of defendants on said stocks, and, as part of the general agreement between the parties, defendants loaned certain money to plaintiffs to pay off the prior obligations on plaintiffs' stocks. Subsequently some of defendants' stocks so held under the trust investment savings plan were sold upon defendants' orders as agreed, but the controversy here arose out of the alleged unauthorized sale of fifty shares of Los Angeles First National Bank stock belonging to defendants and included in the trust. On November 14, 1928, this stock was sold and a block of General Motors stock was purchased by the bank, all upon instructions from plaintiffs. The main issue on the trial of the cause was whether this sale and purchase was authorized by defendants. The trial court found against plaintiffs on this issue and there is ample evidence to support this finding. Defendants denied any

such authorization, and testified that these unauthorized transactions were concealed from them for almost a year despite the fact that they had frequently demanded a statement of their affairs. They further testified to facts showing that plaintiffs had led them to believe that said bank stock was still included in the trust after the sale thereof, and that plaintiffs had endeavored to purchase defendants' entire interest in the trust prior to the time that defendants learned of said unauthorized sale.

The purpose of plaintiffs' action was to obtain judgment against defendants for the balance due on plaintiffs' obligation to the bank under the trust investment savings plan, deducting therefrom the amount which they had borrowed from defendants. They claimed this right under the following provisions of the declaration of trust: "The said Fred Benioff and Helen Benioff, by accepting this declaration of trust, and the benefits thereof, agree to save the said Peter B. Corbett and Josephine Brownlow Corbett, his wife, free and harmless from and indemnify them, and each of them, against any and all claims or demands or losses of any kind or nature arising out of the holding of the said securities, or any replacement thereof, by said Peter B. Corbett and Josephine Brownlow Corbett and/or the said trust investment savings plan agreement and/or any obligation incurred by the said Peter B. Corbett and Josephine Brownlow Corbett in favor of the said Humboldt Bank relating thereto and to the said securities, or any replacement thereof." By the cross-complaint defendants included in their cross-demands against plaintiffs the amount of the proceeds of the unauthorized sale, and claimed that they were entitled to a money judgment against plaintiffs. During the pendency of the action all of the remaining stocks, with the exception of the General Motors stock, were sold by mutual consent of the parties, and proceeds were credited to the amount remaining due to the bank on the original $20,000 note of plaintiffs executed in connection with the trust investment savings plan. Upon the trial the parties entered into a stipulation regarding the amount due in the event that judgment was entered in favor of plaintiffs, and also regarding the amount due in the event that judgment was entered in favor of the defendants. At the conclusion of the trial the court entered judgment in favor of defendants in the amount specified in the stipulation.

[1] Appellants contend that they should not be held answerable for the proceeds of the sale of said bank stock, but we are of the opinion that this contention is without merit. Appellants were not authorized to sell or cause to be sold any of respondents' stocks included in the trust except upon orders from respondents. Their action in causing said bank stock to be sold without any authority from defendants constituted a breach of their trust for which they were liable. In this connection appellants argue that "Respondents must ratify the transaction as a whole or repudiate it as a whole. They cannot accept its benefits and reject its burdens." The point which appellants endeavor to make is that the sale of the stock of the Los Angeles First National Bank and the purchase of the stock of General Motors was a single transaction, and that respondents have ratified the sale by claiming the proceeds thereof and repudiated the purchase. It is a sufficient answer to state that respondents have never ratified either the sale or the purchase. Both were unauthorized, and respondents are merely claiming the amount of the proceeds of the unauthorized sale as the measure of the liability of appellants for the breach of trust. Civ. Code, § 2237.

[2] Appellants further contend that they should not be held liable as "Respondents agreed to save appellants free and harmless and indemnify them against any and all demands and losses whatsoever arising out of the declaration of trust." This contention is based upon the clause of the declaration of trust which is above quoted. In our opinion appellants seek to place an unwarranted construction upon said clause. The language is quite broad, but nothing therein contained leads to the conclusion that it was intended to protect appellants against their own wrongful acts in violation of the trust. The construction contended for would practically relieve appellants from every duty which would be otherwise imposed upon them by the creation of said trust.

[3] Appellants make the further contention that respondents neither alleged nor proved any loss. Our attention is called to section 2238 of the Civil Code, which provides: "A trustee who uses or disposes of the trust property in any manner not authorized by the trust, but in good faith, and with intent to serve the interests of the beneficiary, is liable only to make good whatever is lost to the beneficiary by his error." We need not determine whether the burden was upon appellants to plead and prove that the unauthorized sale of the stock was made in good faith or upon respondents to plead and prove that said unauthorized sale was made in good faith. In our opinion this issue merely affected the measure of damage. Here the parties went to trial upon one main issue, namely, whether the sale of the stock of the Los Angeles First National Bank and the purchase of the General Motors stock was authorized or unauthorized. Before any evidence was introduced, counsel for both sides stipulated upon the amount of the judgment to be entered in favor of appellants in the event that the main issue should be determin-

ed in appellants' favor, and also upon the amount of the judgment to be entered in favor of respondents in the event that the main issue should be determined in favor of respondents. This stipulation left no issue of damage before the court and it was followed up by a written stipulation after the trial court had orally announced its decision, which contained, among other things, a provision that "the amount thereof is correct." These stipulations preclude any inquiry upon this appeal regarding the sufficiency of the pleading and proof relating to damage. In 23 California Jurisprudence 826, it is said: "A valid stipulation is, of course, binding upon the parties, and precludes objection to matters concerning procedure and evidence which have been expressly or impliedly agreed upon."

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

126 Cal.App. 760

YOUNG v. PURE ICE CO.

Civ. 922.

District Court of Appeal, Fourth District, California.

Oct. 11, 1932.

Rehearing Denied Nov. 1, 1932.

Hearing Denied by Supreme Court Dec. 8, 1932.

Contracts ⇐346(8).

In action for breach of contract for hauling ice, wherein defendant denied each allegation of complaint, excluding evidence regarding occasion for dispensing with plaintiff's services because not pleaded after defendant's manager testified he had dispensed with services *held* error.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by D. U. Young against the Pure Ice Company. From a judgment for plaintiff, defendant appeals.

Reversed.

Utley & Nuffer, of El Centro, for appellant.

Harry W. Horton and Whitelaw & Whitelaw, all of El Centro, for respondent.

BARNARD, P. J.

This is an appeal by the defendant from a judgment in favor of the plaintiff in an action for damages for breach of a contract. The plaintiff alleged in his complaint that he entered into a contract with the defendant under which he was to haul all ice sold by the defendant in a certain territory during a certain season, also alleging his readiness, willingness, and ability at all times to perform, and that the defendant, without cause, violated the agreement and refused to permit him to do the work. In its answer the defendant denied each and every allegation of the complaint.

During the trial the court refused to permit the defendant to introduce evidence going to show that the plaintiff was not available for the work when wanted and tending to show that by his conduct he had given the defendant good cause for discontinuing his services. Evidence along this line was refused on the ground that such matters had not been pleaded as an affirmative defense. Thereupon, the defendant offered an amendment to its answer in which such matters were set up as a defense to the action. Permission to thus amend was refused. That these rulings of the court were erroneous is the main point raised on this appeal.

Were we of the opinion that the proposed amendment was necessary in order to permit the defense indicated, we would feel compelled to hold that the court abused its discretion in refusing permission to amend. As was said in Williams v. Flinn & Treacy, 61 Cal. App. 352, 214 P. 1024, 1026, "It is true that it is only in exceptional cases that the action of the trial court upon a matter of this kind will be disturbed upon appeal, but we think this is such an exceptional case. It is the aim and aspiration of our system of law and the policy of our courts to afford substantial justice to litigants, and to that end liberal amendments are expressly permitted by our Code, and encouraged by our courts. In a case like this one, when a party has presented evidence such as would be sufficient upon which to base a finding in his favor as to his right to certain credits, and this evidence is presented during the course of a comprehensive investigation into the facts and figures, and at a time when the rights of the opposing party can be fully protected by the allowance of a continuance to enable him to meet such proof if he so desires, we can see neither reason nor justice in refusing permission to amend to conform to the proof. Indeed, to allow the plaintiff to recover a large amount in an accounting suit which the evidence has disclosed is not due him, merely because through inadvertence or other excusable neglect the defendant failed to set out in his answer all the credits to which he was entitled would be to settle a controversy without regard to the merits."

A similar rule should apply where, as here, the evidence offered so clearly goes to the merits of the controversy, and where the

amendment asked for follows so closely the original pleadings.

However, we think no amendment was here necessary and that the proffered evidence was admissible under the existing pleadings. The defendant's manager, having testified that he had dispensed with the services of the plaintiff, was not permitted to testify as to what was the occasion therefor. Although a formal offer of proof was made, the defendant was not permitted to introduce evidence to the effect that the plaintiff was not available and could not be found at times when his services were wanted; that on certain occasions his services could not be secured; that on a number of such occasions the defendant was forced to hire other people to do the work; and that on some of these occasions the plaintiff refused to come when notified that his services were required. Finally, the defendant was told that no evidence would be permitted which went to show the reasons why the services of the plaintiff were discontinued. By the allegations of the complaint and the answer, direct issues were raised as to whether the plaintiff had been ready, able, and willing to perform his agreement and as to whether the refusal of the defendant to continue the employment had been without cause. The evidence sought to be introduced and formally offered went directly to these issues and its exclusion was error.

The judgment is reversed.

We concur: MARKS, J.; JENNINGS, J.

126 Cal.App. 737

W. F. HUTTON, Jr., Doing Business under the Fictitious Firm Name of Guarantee Investment Co., Plaintiff and Respondent, v. Charles C. CHANDLER and Alma L. Chandler, Defendants and Appellants.

Civ. 7454.

District Court of Appeal, Second District, Division 1, California.

Oct. 11, 1932.

Appeal from Superior Court, Los Angeles County; Thomas A. Selvage, Judge.

Todd, Pawson & Watkins, of Long Beach, for appellants.

Louis N. Whealton and Raymond J. Kirkpatrick, both of Long Beach, for respondent.

HOUSER, J.

Defendants appeal from a judgment whereby plaintiff recovered damages on account of services rendered to the defendants by plaintiff in the capacity of broker in an exchange of properties between the defendants and third persons.

The first point of law presented by appellants as a compelling reason for a reversal of the judgment is that certain controlling findings of fact made by the trial court were not supported by the evidence. No useful purpose would be subserved by a review by this court of the evidence which was presented by the respective parties for consideration by the trial court. It is enough to state that, after a careful examination of the record herein, this court is of the opinion that the evidence adduced on the trial of the action was amply sufficient to sustain the findings of fact of which complaint is made.

Since each of the other specifications of alleged error presented by appellants depends upon an assumed decision by the court that the evidence was insufficient to support the findings of fact in question, it follows that a consideration of the several additional questions of law raised by appellants becomes unnecessary.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

126 Cal.App. 735

BENGEL v. KENNEY et al.

Civ. 7046.

District Court of Appeal, Second District, Division 1, California.

Oct. 11, 1932.

Rehearing Denied Nov. 9, 1932.

Hearing Denied by Supreme Court Dec. 8, 1932.

1. Corporations ⇐617(2).

Assignment of corporation's right to certain fund *held* void where charter was suspended for nonpayment of taxes and there was no evidence of authority to execute assignment.

2. Corporations ⇐432(5).

In action for money had and received, finding that plaintiff was not holder of corporation's right to fund *held* supported, where plaintiff failed to prove authority for execution of assignment of corporation's right to plaintiff's assignor.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by E. M. Bengel against David M. Kenney and others. From a judgment in favor of defendants, plaintiff appeals.

Affirmed.

Chas. M. Easton, of Los Angeles, for appellant.

Greenberg & Beilenson, of Los Angeles, for respondents.

CONREY, P. J.

This action was brought by the plaintiff to recover on a cause of action which, according to the complaint, had been the property of Matthews-Kenney Company, and by assignment of which, it was alleged, the claims of said company, together with its right to sue for and collect the moneys in question, had passed to the plaintiff. Judgment was in favor of defendants, and plaintiff appeals therefrom.

The court found as a fact that said claim or demand never was assigned to the plaintiff and that plaintiff is not the holder thereof. We think that this finding is sustained by the evidence.

In April, 1924, respondent Kenney and one Frank T. Matthews agreed that they would form a corporation under the name of Matthews-Kenney Company, for the purpose of manufacturing clothing, etc. As a preliminary to the creation of such corporation they deposited in the Hellman Commercial Trust & Savings Bank the sum of $3,500, of which Kenney furnished $3,000 and Matthews $500. They then proceeded to the organization of a corporation under the name of Matthews-Kenney Company, Inc. The money was deposited in the name, Matthews-Kenney Company, accompanied by the following notation over the signatures of Matthews and Kenney: "Not incorporated. It is mutually understood and agreed that the undersigned are all the copartners and that any and all withdrawals against said account may be made upon the signatures of Frank T. Matthews and David M. Kenney." The present controversy arises out of conflicting claims to ownership of the unexpended portion of said $3,500 fund.

[1] The plaintiff offered in evidence a document made in June, 1926, purporting to assign and transfer to E. M. Bengel all of the right, title, and interest of Matthews-Kenney Company, and of Frank T. Matthews, "in and to all of the money which was heretofore on deposit" in said Hellman Bank in the name of the Matthews-Kenney Company. This purported assignment was signed "Matthews-Kenney Co., by Frank T. Matthews," and by Frank T. Matthews. It was a stipulated fact that in February, 1925, the charter of the Matthews-Kenney Company, Inc., was suspended for nonpayment of taxes. The assignment (assuming that it was an attempted corporation act) was void because at the time of its execution the powers of the corporation were suspended, and also because there is no evidence of authority of Frank T. Matthews to execute such assignment on behalf of the corporation.

[2] But the plaintiff introduced other evidence under which she claims that the right of Matthews-Kenney Company to said money was assigned to her. Charles M. Easton gave testimony to the effect that in November, 1924, in order to secure Easton for moneys advanced by him to the Matthews-Kenney Company, "Frank T. Matthews executed an assignment substantially in the form here as is shown on this assignment I hold here in my hand. It was an assignment to me individually." He further testified concerning the attempted assignment made in June, 1926, as follows: "I had Mr. Matthews execute the second paper (plaintiff's exhibit 16), and I executed one, assigning the claim which I had to Miss Bengel prior to the time the action was started."

We may assume, as does appellant, that the purported assignments were attempted to be made by or on behalf of Matthews-Kenney Company, Inc. Appellant failed to prove a proper or valid authorization for the execution of any assignment to Easton of the corporation's claim to the money in question. Since the court did not err in making its finding against appellant on the issue relating to appellant's ownership of the rights constituting the cause of action, the judgment must be affirmed upon that ground alone. So it becomes unnecessary to enter into a discussion of the other grounds of appeal set forth in the briefs.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

126 Cal.App. 754

PEOPLE v. BUCHANAN.

Cr. 2187.

District Court of Appeal, Second District, Division 2, California.

Oct. 11, 1932.

Criminal law ⇐1202(6).

Clerk correctly noted in minutes that defendant admitted prior convictions of two felonies, though not part of judgment orally pronounced by court (Pen. Code § 1207).

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

George Buchanan was convicted of forgery, and he appeals from an order denying his motion to correct the judgment.

Order affirmed.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

George Buchanan, in pro. per.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

IRA F. THOMPSON, J.

The defendant was charged by an information containing five counts with that number of offenses of forgery and two prior convictions. He admitted the previous convictions, but pleaded not guilty, and not guilty by reason of insanity. He was found guilty on three counts. Judgment was pronounced, the sentences being made to run concurrently. At the time the defendant was arraigned for judgment on February 24, 1928, he was informed not only of the pleas to the counts of forgery and the verdicts thereon, but also of the allegations of the prior convictions and his admission of them. A motion for a new trial was then made and denied. On the same day as the arraignment, and, in fact, as soon as the motion for new trial was disposed of, the court sentenced the defendant to be confined in the state prison at Folsom for the term prescribed by law. The minutes of the court read with respect to count IV are as follows:

"Whereas said George Buchanan having been already found guilty in this court of the crime of forgery, a felony, as charged in count 4 of the information and having admitted prior convictions of two felonies,

"It is therefore Ordered, Adjudged and Decreed that said George Buchanan be punished by imprisonment in the State Prison of the State of California at Folsom for the term prescribed by law."

The language is identical respecting the other two counts. The record does not disclose the language of the commitment, but on March 17, 1930, an amended commitment reciting the two prior convictions was issued and forwarded to the board of prison directors. On November 24, 1931, the defendant filed a motion to correct the judgment by striking therefrom, as it appeared in the minute book and from the amended commitment, all reference to the prior convictions. The motion was denied, and this appeal is from that order.

The appellant asserted in the lower court and now says that the words "and having admitted prior convictions of two felonies" were not a part of the judgment orally pronounced by the court, and were, in fact, added subsequently by the clerk in his minute entry.

The contention of appellant cannot be sustained. First of all we direct attention to section 1207 of the Penal Code, which reads as follows: "When judgment upon a conviction is rendered, the clerk must enter the same in the minutes, stating briefly the offense for which the conviction was had, and the fact of a prior conviction, if any, and must, within five days, annex together and file the following papers, which constitute a record of the action: 1. The indictment or information, and a copy of the minutes of the plea or demurrer, and all rulings thereon. 2. A copy of the judgment."

It is to be observed that according to statutory mandate it is the duty of the clerk to note, in the minutes, the fact of a prior conviction, if any. It is well in this connection to call attention to the fact that the guilty person is not punished a second time for the prior offense, but is punished more severely for the offense then before the court. Hence the following language in Ex parte Williams, 89 Cal. 421, 426, 26 P. 887, 889, is pertinent: "It was not necessary that the entry of the judgment in the minutes should repeat the entries that had already been made in previous proceedings in the case. These had already become a part of the record, and would obtain no greater validity by being a second time recited in the minutes. 'From the mere fact that these several papers are taken into and made a part of the record, it is clear that each one was intended merely to tell its own story, or, rather to relate its particular branch of the whole history. Thus, the indictment states the jurisdictional facts, the nature of the offense, and the facts and circumstances so far as they are material. The other papers give the history of the trial, including the verdict; and the judgment, which constitutes the last chapter, merely finishes the account by stating of what offense defendant was finally convicted, and the penalty imposed by the court. The judgment need not, and it was not intended that it should, repeat anything contained in the papers which precede it, for, in view of the fact that they go into the record and make a part of it, such repetition would be idle and serve no useful purpose. The only material parts of a judgment are the statement of the offense for which the defendant has been convicted, omitting therefrom all that is contained in the previous papers, and therefore not necessary to be repeated, and the sentence of the court.' Matter of Ring, 28 Cal. 253."

Recognizing the duty of the clerk to note the prior conviction in his minute entry, we yet fail to find it incumbent upon the judgment to do more than was already done in the instant case.

Another approach which brings us to the same conclusion is illustrated by the case of People v. Kelly, 120 Cal. 271, 52 P. 587, 588, wherein it was held that the failure of the clerk to note the prior conviction "is a mere clerical misprision" not affecting the substantial rights of the defendant.

Order affirmed.

We concur: CRAIG, Acting P. J.; STEPHENS, Justice pro tem.

126 Cal.App. 665

PEOPLE v. SHOWALTER.

Cr. 2241.

District Court of Appeal, Second District, Division 1, California.

Oct. 7, 1932.

1. Embezzlement ⇐21.

Receiver in civil action *held* not "public officer" nor engaged in holding "public moneys" within statute defining crime of embezzling public moneys (Pen. Code, §§ 424, 426).

Such receiver is not a public officer engaged in the handling of public moneys within Pen. Code, §§ 424, 426, because the duties of such receiver relate solely to such assets and liabilities as affect private individuals, and receiver being in nowise concerned with public moneys, in which the entire state is interested.

[Ed. Note.—For other definitions of "Officer" and "Public Money," see Words and Phrases.]

2. Statutes ⇐241(1).

Construction of criminal statute wherein language is ambiguous is favorable to person accused.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

A. J. Showalter was indicted for the crime of embezzling public moneys. From a judgment for defendant on demurrer, and from an order of dismissal, the People appeal.

Affirmed.

U. S. Webb, Atty. Gen., John D. Richer, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Frank W. Stafford, Deputy Dist. Atty., both of Los Angeles, for the People.

Paul Barksdale D'Orr and Thomas A. Reynolds, both of Los Angeles, for respondent.

HOUSER, J.

Defendant, who was a receiver appointed by the trial court, was indicted by the grand jury on six separate counts for the commission by him of the "crime of embezzling public moneys, in violation of section 424 of the Penal Code." A demurrer to the indictment was sustained and the action "dismissed" by order of the trial court. The plaintiff has appealed "from a judgment for the defendant on the demurrer and the order of dismissal."

The pertinent portion of section 424 of the Penal Code, under the provisions of which defendant was indicted, is as follows:

"Each officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safe-keeping, transfer, or disbursement of public moneys, who * * * without authority of law, appropriates the same, or any portion thereof, to his own use, or to the use of another; * * * is punishable by imprisonment in the state prison. * * *"

"The phrase 'public moneys,' * * * includes * * * all moneys * * * held by state, county, district, city, or town officers in their official capacity." Pen. Code, § 426.

[1] It is thus apparent that in a determination of the correctness of the judgment from which the appeal is taken, the questions which may be considered include, first, whether, within the intent of section 424 of the Penal Code, a receiver appointed by the court in a civil action is an officer; and, if so, whether the moneys held by such person as such receiver are "public moneys."

In effect, it is urged by appellant that since by the authorities generally, a receiver is an officer of the court, it necessarily follows that, in its nature, his position complies with the well-recognized requirement that to constitute one an officer of the state, or any subdivision thereof, in his official capacity he must exercise some portion of the sovereign functions of government. In other words, that since the court itself represents the judicial department of the government of the state, and since a receiver is "an arm of the court," the inevitable conclusion must be that a receiver is a part of the judicial machinery of the government, and hence is a public officer within the meaning and intent of the statute.

It would be a useless task, if not an endless one, to attempt to distinguish the numerous cases which have been decided throughout the several jurisdictions of the United States in which the respective facts with relation thereto have been considered and a definition of the term "public officer" has been given; and thus endeavor to harmonize the several conclusions found in such cases with any judgment which should be rendered herein. As is stated in Pacific Finance Corp. v. City of Lynwood, 114 Cal. App. 509, 300 P. 50, 52, 1 P.(2d) 520, "it would be futile to attempt to reconcile the many definitions * * * of 'public officer.' * * *" And in that connection, although by some authorities it has been perhaps loosely declared that a receiver is a public officer, whenever the question has been directly at issue the weight of authority is to the contrary of that so generally announced. It is clear that, based on the argument of plaintiff, any person, such as an executor, an administrator, a guardian, or a referee appointed by the court to assist in the administration of its functions, likewise would be a public officer.

In § 1 of Mechem on Public Officers it is

said: "A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is vested with some portion of the sovereign functions of government, to be exercised by him for the benefit of the public. As here used, the word 'office' is to be distinguished from its application to such positions as are at most quasi public only, as the charge or office of an executor, administrator, or guardian. * * *"

In the Matter of Hathaway, 71 N. Y. 238, where the question is considered at length, it was held that a person who had been appointed to act as surrogate in a particular case was not a public officer. In part, the syllabus is as follows: "The term 'public office' as used in the Constitution, has respect to a permanent public trust or employment, to be exercised generally and in all proper cases; it does not include the appointment, to meet special exigencies, of an individual to perform transient, occasional or incidental duties, such as are ordinarily performed by public officers. * * *"

The case of Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113, 118, involved the question of whether an administrator of an estate was a public officer. In that connection, the court said: "It is contended, however, that an administrator is a state officer, and as such is included within the meaning of section 12, art. 8, of the Constitution of this state, which declares that 'no person shall be elected or appointed to any office in this state, civil or military, who is not a citizen of the United States and who shall [not] have resided in this state one year next preceding his election or appointment.' An administrator belongs to the same class of officers as curators, guardians, receivers, referees, and the like, whose duties are private and concern private interests, and are in no sense of the term public. He is invested with no portion of the sovereign functions of the state, to be exercised by him for the benefit of the public, and is therefore not an officer of this state within the meaning of the constitutional provision just quoted. * * *"

The case of Baird v. Lefor, 52 N. D. 155, 201 N. W. 997, 38 A. L. R. 807, is directly in point. It is there held (syllabus) that: "Receiver is not public officer, but is officer of court in sense of agent or representative in holding property over which court may acquire jurisdiction and in disposing of it."

In the course of the opinion, in part, the following appears: "We think that a receiver appointed by a court is not the holder of a civil office within the meaning of that term as used in the Constitution. It is true that he is an officer of the court. [Citing authorities.] * * * A receiver is an officer of the court in the sense that he is the agent or representative of the court in holding any property that the court may acquire jurisdiction over and in disposing of the same; the hand and arm of the court through whom the court acts. He is appointed by, and is removable at, the pleasure of the court. He is responsible to no one but the court. His compensation is fixed by the court. He can sue or be sued, but only under the direction and with the permission of the court. His authority comes from the court and in its exercise he has no discretion independent of the court. He exercises none of the powers of civil government. He is no more a civil officer than is an attorney at law, or a guardian, or a referee, or a jury commissioner, or a juryman, or any 'officer' appointed by the court to enable it to properly function as a court."

[2] It is of course manifest that the duties of a receiver in a civil action relate solely to such assets and liabilities as affect private individuals, especially the parties to the particular proceeding in which the receiver is appointed; and that, strictly speaking, he is in nowise concerned with public moneys, in which the entire state is interested. As affects criminal statutes, the policy of the law is to make plain that which is intended to constitute an infraction of its provisions. Where the language employed is ambiguous or doubtful in its intent, a construction of the statute should always be favorable, rather than unfavorable, to any person accused of a violation of the law. In other words, although the common-law rule that penal statutes be strictly construed has no application to the provisions contained in the Penal Code, nevertheless a criminal statute should be construed according to the fair import of its terms. 23 Cal. Jur. 790, 802, and authorities there cited.

Looking to the title of the Penal Code in which is located the particular statute under the provisions of which defendant was accused, it is noted that its heading is "Crimes Against the Revenue and Property of the State." Since it is apparent that a receiver appointed in an ordinary civil action has nothing to do with the "revenue and property of the state," but that his duties and activities are necessarily confined to an administration of the business affairs of private individuals, it would seem clear that within the meaning and intent of the statute, in accordance with the law as announced in the authorities to which attention has been directed, a receiver is not a public officer, nor engaged in the handling of "public moneys."

It follows that the judgment and the order from which the appeal is taken should be affirmed. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

126 Cal.App. 788

The PEOPLE of the State of California, Plaintiff and Appellant, v. Charles F. ALLISON, Defendant and Respondent.

Cr. 2238.

District Court of Appeal, Second District, Division 1, California.

Oct. 7, 1932.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

U. S. Webb, Atty. Gen., John D. Richer, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Frank W. Stafford, Deputy Dist. Atty., both of Los Angeles, for the People.

Hal Hughes, of Los Angeles, for respondent.

HOUSER, J.

In effect, the facts involved in this appeal and the principles of law applicable thereto are alike identical with the facts and the law respectively set forth in the case of People v. Showalter, 14 P.(2d) 1034, this day decided by this court.

It is ordered that the judgment and the order from which the appeal is taken be, and the same are, affirmed.

We concur: CONREY, P. J.; YORK, J.

127 Cal.App. 39

PEOPLE v. McGOWAN.

Cr. 1211.

District Court of Appeal, Third District, California.

Oct. 17, 1932.

Criminal law ⇐97(1).

California court could not try defendant for burglary committed outside state, though it could try such defendant for larceny for bringing within state property taken in burglary (Pen. Code, § 27, subd. 2; §§ 459, 497, 777, 786, 789).

Court within state could not try defendant for burglary committed in another state because the burglary was a completed offense in the state where it was committed; and while asportation of stolen goods into state where defendant was tried constituted a larceny, such offense as regards jurisdiction of courts within state was a distinct separate offense from the burglary committed without the state.

Appeal from Superior Court, Del Norte County; Warren V. Tryon, Judge.

Lyle Clyde McGowan was convicted of burglary, and he appeals.

Reversed.

G. Fletcher Dodd, of Crescent City, and John F. Quinn, of Eureka, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The defendant was convicted of the crime of burglary upon two counts contained in an information filed against him by the district attorney of Del Norte county. The information contains four counts. The defendant was acquitted on counts 1 and 3, and convicted on counts 2 and 4. From the judgment of conviction based upon counts 2 and 4, and the order denying his motion for a new trial, the defendant appeals.

Count 2 is in the following words and figures, to wit: "The District Attorney of the said County of Del Norte, State of California, hereby accuses Lyle Clyde McGowan of a felony, to-wit, burglary, in that on or about the 24th day of July, 1931, at Pistol River Bridge, Curry County, State of Oregon, he wilfully, unlawfully and feloniously entered a certain building known as the Oregon State Highway Commissioner Tool Shed, with the intent then and there in him, said Lyle Clyde McGowan, to commit petit theft therein, and that said Lyle Clyde McGowan did then and there bring and transport into the County of Del Norte, State of California, the personal property of said Oregon State Highway Commission, which he, said defendant, had then and there stolen by means of said burglary, to-wit: 15 gallons of Fuller's Imperial Graphite paint; four lengths of rope; 2 cans of Japan Drier; 4 long-handled wire brushes; 1 hack saw; 2 cardorundum stones; 1 can spirits of turpentine; one pair of overalls, and one can Fuller's Imperial Graphite; all of which is contrary to the form, force and effect of the statute in such cases made and provided, and against the peace and dignity of the People of the State of California."

Count 4 of the information charges the commission of a burglary by the defendant on or about the same date, and at Wedderburn, in Curry county, state of Oregon, in that he entered a building known as the Mercer-Fraser Company Tool Shed, to commit petty larceny, and that he did then and there steal a chest of tools belonging to one Arthur Hanseth, and thereafter transported the same into the county of Del Norte.

The defendant's appeal is based upon the sole ground that in so far as the offense of

burglary is concerned, it was a completed offense in the state of Oregon, and that over such an offense the courts of California have no jurisdiction; that while asportation of the stolen goods into the county of Del Norte would, with each removal or movement of the goods, constitute larceny, on the theory that every asportation thereof constitutes offense of larceny, it is, so far as the jurisdiction of the courts of this state may be concerned, a distinct and separate offense from the crime of burglary wholly committed in the state of Oregon.

At common law the essential elements of the offense of burglary are: "A breaking and entry, of the dwelling house, or other structure belonging to another, with intent to commit a felony therein." 9 C. J. 1009.

Section 459 of the Penal Code enlarges somewhat on the definition, and is as follows: "Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, mine, or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary."

By both the common law and the statutes of this state the breaking and entry of the building or structure belonging to another, with intent to commit some crime, is the constituent element of the offense. It is not necessary that any larceny be committed; it is not necessary that any felony be committed; the breaking and the entry, with intent, constitutes the crime.

It is unnecessary to cite authorities to the effect that the courts of this state have no jurisdiction over completed offenses committed in other states. It is only when the offense committed is a continuing offense, or one which reaches across boundary lines, that jurisdiction is given. Thus, if the one who commits the offense of burglary also commits larceny by stealing property, brings that stolen property across the boundary line, the offense of larceny is continued from the adjoining state into this state, and the superior court of any county into which the stolen property is brought may take jurisdiction of the offense committed in such county, to wit, the offense of larceny, not the offense of burglary.

Subdivision 2 of section 27 of the Penal Code, specifying who are liable to punishment, reads: "All who commit any offense without this state which, if committed within this state, would be larceny, robbery, or embezzlement under the laws of this state, and bring the property stolen or embezzled, or any part of it, or are found with it, or any part of it, within this state." Recognizing, again, the principle that the bringing of the stolen property within the jurisdiction of this state constitutes an offense within itself. The offense of burglary committed in another state is not mentioned in the section for the simple reason that burglary has a distinct situs and does not move with the asportation of the stolen property.

Section 497 of the Penal Code further amplifies the description of the offense of larceny when committed in another state. That section reads: "Every person who, in another state or country steals or embezzles the property of another, or receives such property knowing it to have been stolen or embezzled, and brings the same into this state, may be convicted and punished in the same manner as if such larceny, or embezzlement, or receiving, had been committed in this state." Jurisdiction to punish such an offense is set forth in section 789 of the Penal Code, as follows: "The jurisdiction of a criminal action for stealing or embezzling, in any other state, the property of another, or receiving it knowing it to have been stolen or embezzled, and bringing the same into this state, is in any county into or through which such stolen or embezzled property has been brought."

Respondent calls our attention to section 786 of the Penal Code, which provides as follows: "When property taken in one county by burglary, robbery, larceny, or embezzlement, has been brought into another, the jurisdiction of the offense is in either county. But if at any time before the conviction of the defendant in the latter, he is indicted in the former county, the sheriff of the latter county must, upon demand, deliver him to the sheriff of the former." Here, the term "burglary" is used, but the jurisdiction is confined to the respective counties of the state. All the other sections to which we have referred relate to property brought from some place without the state.

Section 786, supra, purports to and does only deal with an offense committed in one county, and the taking of property from the county where the property is obtained and the bringing of it into another county. Under our Constitution the venue of any offense committed within the state is subject to legislative determination. Section 7 of article 1 of the Constitution guarantees the right of trial by jury, but does not specify that the trial by jury shall be in any particular place. Section 777 of the Penal Code fixes the place of trial, providing that every public offense shall be punished in the county where it is committed, except as otherwise provided in the Codes. Thus, while states having different constitutional provisions have held that Legislatures have no authority to provide a place of trial other than the county in which it is committed, they do not apply, and therefore we do not need to review the cases on this subject cited by the appellant.

As to larceny, the rule is different from

burglary, and is very clearly stated in 4 Ruling Case Law, p. 236, to wit: "As to the venue in cases of larceny it has been held that the defendant can be tried either in the county where the offense was committed or in the county to which the goods have been removed. This is on the theory that each asportation of the stolen property constitutes a new theft, thereby making the crime a continuing crime." As we have stated, there being no constitutional provision in this state limiting venue to the county where the offense is committed, the Legislature has full power in this particular, and has provided therefor as we have stated in the sections of the Code set forth herein. The only change in the law relative to the venue in burglary cases is the provision allowing prosecution in different counties of the state where the burglary has been committed in one county and the property carried into another. The statute, however, goes no further than providing for jurisdiction of burglaries committed within the state. A clear statement of this is found in 4 California Jurisprudence, 736, where the text reads: "At common law the crime of burglary, like crimes generally, was considered altogether local, and was cognizable and punishable exclusively in the jurisdiction where committed. In California, however, it is provided by statute that where a burglary is committed in one county, and the property taken is brought into another county, the Superior Court of the latter county has jurisdiction of the offense." The text then sets forth the manner in which the offense must be pleaded if the prosecution is had in the county into which the stolen property is asported.

The cases of People v. Tyree, 21 Cal. App. 701, 132 P. 784, and People v. Jochinsky, 106 Cal. 638, 39 P. 1077, have to do only with offenses wholly committed within the boundaries of this state, and are not authorities for reading into the sections which we have quoted, language not therein found, in order to extend the jurisdiction over offenses wholly committed without the state.

Nor is the case of People v. Ellis, 204 Cal. 39, 266 P. 518, applicable to any of the facts here involved. In the Ellis Case the defendant was charged with bigamy. The act which constituted the crime of bigamy was wholly committed within this state. The defendant was a married man, having been married in another state; came to this state, and went through a marriage ceremony with another woman. This constituted a complete offense within this state, as we find by section 281 of the Penal Code: "Every person having a husband or wife living, who marries any other person * * * is guilty of bigamy." The first marriage was no part of the crime. The offense was wholly confined to the second marriage, and that, having taken place in this state, gave the local court jurisdiction.

It follows from what we have said that although the trial court had jurisdiction to try the defendant for larceny by reason of the alleged asportation of the stolen goods from the state of Oregon to the state of California, and the county of Del Norte, it did not, by reason of any such facts, have jurisdiction to try the defendant for an offense wholly committed within the state of Oregon.

The order and judgment are reversed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

127 Cal.App. 16

ROBERTS v. HENDERSON et al.

Civ. 988.

District Court of Appeal, Fourth District, California.

Oct. 15, 1932.

Mortgages ⊂=600(2).

Mortgage foreclosure purchasers, not furnishing redemptioner verified statement of amount due on demand during redemption period, cannot collect interest after expiration thereof (Code Civ. Proc. §§ 707, 2074; Civ. Code, §§ 1496, 1504, 3517).

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Action by Belle McCord Roberts against H. O. Henderson and others. From the judgment rendered, plaintiff appeals.

Reversed, with directions.

W. A. Alderson, of Los Angeles, for appellant.

W. I. Gilbert and Kenneth Keeper, both of Los Angeles, for respondents.

MARKS, J.

Respondents H. O. Henderson and Louisa P. Henderson held a mortgage on property in the city of Long Beach, which they were compelled to foreclose and which they bid in at the foreclosure sale for $35,000. R. E. Allen was the commissioner who made the sale. Before the redemption period expired on December 28, 1928, appellant acquired assignments of the redemptioners' right to redeem and received quitclaim deeds to the property. The property was rented for a substantial sum, and on December 8, 1928, appellant served on Mr. and Mrs. Henderson a notice that she had acquired the right to redeem the

property and desired to do so. She demanded of them a verified statement of the amount necessary to redeem with a statement of the credits and debits to be made on the $35,000, consisting of rents received and taxes and other proper expenditures made by them. Such a statement is authorized by section 707 of the Code of Civil Procedure. The trial court found that no such verified statement was furnished appellant, and that she was at all times since December 8, 1928, ready, willing, and able to redeem the property from the foreclosure sale. On December 29, 1928, appellant served a notice on R. E. Allen informing him that she had acquired the right to redeem the property; that she had served the notice on Mr. and Mrs. Henderson; that they had refused to furnish her a verified statement of the amount necessary to redeem, and demanded of him that he refuse to execute the commissioner's deed to Mr. and Mrs. Henderson. The deed was delivered the same day, and this action was then commenced to cancel the deed and compel a redemption of the property.

The trial court found all facts in favor of appellant, and gave judgment canceling the deed and fixing the sum of $63,826.10 as the amount necessary to redeem the property. This sum included $25,000 paid by Mr. and Mrs. Henderson to release the property from the lien of a prior mortgage, interest on $35,000 at 12 per cent. per annum for the full year of the redemption, and at the rate of 7 per cent. per annum thereafter up to April 1, 1930, and at the same rate on $63,826.10 after judgment until paid. Appellant complains solely of the allowance of interest on the $35,000 after the expiration of the redemption period. The case comes before us on the judgment roll alone.

Section 707 of the Code of Civil Procedure provides in part as follows: "* * * When any rents or profits have been received by the judgment creditor or purchaser, or his or their assigns, from the property thus sold preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption-money to be paid; and if the redemptioner or judgment debtor, before the expiration of the time allowed for such redemption, demands in writing of such purchaser or creditor, or his assigns, a written and verified statement of the amounts of such rents and profits thus received, the period for redemption is extended five days after such sworn statement is given by such purchaser or his assigns, to such redemptioner or debtor. If such purchaser or his assigns shall, for a period of one month from and after such demand, fail or refuse to give such statement, such redemptioner or debtor may bring an action in any court of competent jurisdiction, to compel an accounting and disclosure of such rents and profits, and until fifteen days from and after the final determination of such action, the right of redemption is extended to such redemptioner or debtor."

It is the contention of appellant that, since the trial court found "that at all said times she was ready, willing and able to redeem said property as said successor in interest; that in order for her to do it it was necessary that she be informed as to the amount of the rents and profits received during said year by said purchasers from said property; that if she had been informed of the amount of said rents and profits she could and would have paid to the defendants H. O. Henderson and Louisa P. Henderson, said purchasers, the full amount which they were entitled to receive in the exercise of said right of redemption," she was prevented from making the redemption and paying Mr. and Mrs. Henderson the money necessary to redeem. As a conclusion from this, she contends that she should not be charged any interest on $35,000 after December 28, 1928, as this would be permitting Mr. and Mrs. Henderson to profit by their own wrong in failing to furnish her the verified statement of the amount necessary for the redemption.

The question thus presented seems to be of first impression in California. Appellant cites dicta in the cases of Benson v. Bunting, 141 Cal. 462, 75 P. 59, and Webb v. Vercoe, 201 Cal. 754, 258 P. 1099, 54 A. L. R. 1200, in support of her position. These actions were not statutory actions to redeem under the provisions of section 707 of the Code of Civil Procedure, but were actions under the general equity powers of the court, and were commenced after the time for redemption had expired. Benson v. Bunting, 127 Cal. 532, 59 P. 991, 78 Am. St. Rep. 81; Bunting v. Haskell, 152 Cal. 426, 93 P. 110.

Section 1504 of the Civil Code provides that an offer of payment duly made stops the running of interest. Section 1496 of the same Code provides: "The thing to be delivered, if any, need not in any case be actually produced, upon an offer of performance, unless the offer is accepted." Section 2074 of the Code of Civil Procedure provides: "An offer in writing to pay a particular sum of money * * * is, if not accepted, equivalent to the actual production and tender of the money." While it is true that the record discloses no direct offer to pay the amount necessary to redeem the property, such an offer could not be made by appellant, as the amount which she would be required to pay was unknown by her, but was known by Mr. and Mrs. Henderson. The demand which she served on them was to obtain knowledge of this amount, and the trial court held that, if she had obtained this knowledge, she would have paid them "the full amount they were entitled to receive." It then follows that the real reason the money for a redemption was not paid or at least actually tendered was because of

the failure of Mr. and Mrs. Henderson to make the verified statement required of them by section 707 of the Code of Civil Procedure.

It is a familiar rule of equity that "no one can take advantage of his own wrong." Section 3517, Civ. Code. This section has been variously applied by our courts. Southern Pacific Co. v. Grangers' Business Ass'n., 115 Cal. App. 256, 1 P.(2d) 477; Eberhard v. Pacific S. W. Loan & Mtg. Co. (Cal. Sup.) 9 P.(2d) 302; Mathews v. Wilson, 38 Cal. App. 148, 175 P. 647; England v. Winslow, 196 Cal. 260, 237 P. 542; Brazil v. Silva, 181 Cal. 490, 185 P. 174. We have concluded that this section supports the contention of appellant that to permit Mr. and Mrs. Henderson to collect any interest on the $35,000 after the expiration of the original redemption period on December 28, 1928, would be permitting them to take advantage of their own wrong and cannot be supported. Appellant makes no point on the interest allowed on the balance of the $63,826.10, and this question has not been considered by us.

The judgment is reversed, with directions to the trial court to deduct from the sum of $63,826.10 found necessary to redeem the property the portion representing interest on $35,000 after December 28, 1928, and to enter judgment as before, permitting the appellant to redeem the property within the statutory period for the sum thus found as necessary to effect the redemption.

We concur: BARNARD, P. J.; JENNINGS, J.

126 Cal.App. 705

In re STRONG'S GUARDIANSHIP.

McKEE v. STRONG.

Civ. 8437.

District Court of Appeal, Second District, Division 1, California.

Oct. 10, 1932.

1. Divorce ⇐172.

Finding in divorce decree that mother had abandoned minor children was sufficient on which to predicate such finding in guardianship proceedings (Code Civ. Proc. § 1963, subd. 32).

2. Appeal and error ⇐1011(1).

Finding of trial court on conflicting evidence is conclusive on appellate court.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Application by Louise May Strong for appointment as guardian of the persons and estates of Fay Louise Strong and others. From an order granting the petition, Ida Fay McKee appeals.

Affirmed.

Phi. O. Clough, of Los Angeles, for appellant.

Beardsley & Beardsley, of Los Angeles, for respondent.

YORK, J.

[1] This is an appeal from an order granting a petition made by the aunt of minors under fourteen years of age, by which order said aunt was made the guardian of the persons of said minors. No appeal is taken from that portion of the order which made the said aunt the guardian of the estate of all of said minors, and of the person of the minor who was over the age of fourteen years. The appeal is prosecuted by the mother of the children, who specifies insufficiency of the evidence to justify the findings, in that there is no evidence proving, or tending to prove, that the said appellant, Ida Fay McKee, had abandoned or deserted the said four minor children. A decree of divorce between appellant and the father of the children, who is now deceased, was introduced into evidence, in which decree such a finding was made and which finding is sufficient upon which to predicate the finding of the court in the present case. Subdivision 32, § 1963, Code of Civil Procedure: "All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind: * * * 32. That a thing once proved to exist continues as long as is usual with things of that nature."

Appellant also contends that the evidence is insufficient to prove that she is now unfit or incompetent to have the care, custody, and control of the said minor children. This also is covered by the findings in the decree of divorce, above mentioned.

[2] Appellant also contends that the evidence is insufficient to justify the finding by the court that petitioner, Louise May Strong, is more competent and better fitted to have the custody and control of said children than is the appellant. The evidence introduced upon this subject was highly conflicting, and therefore the finding of the trial court is conclusive upon an appellate court.

The judgment and order appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

WHITE v. LANTZ et al.

Civ. 8648.

District Court of Appeal, First District, Division 2, California.

Oct. 10, 1932.

Rehearing Denied Nov. 9, 1932. Hearing Denied by Supreme Court Dec. 8, 1932.

1. Judgment ⇐585(4).

Where, by cross-bill, defendants claimed legal title and tendered issue regarding plaintiff's interest, which plaintiff in action to quiet title refused to accept, judgment for cross-complainant *held* bar to plaintiff's subsequent action to foreclose mortgage.

2. Quieting title ⇐7(2).

Legal owner of land may maintain action to quiet title against mortgage claimed to be invalid.

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Action by Genevieve H. White against Charles Lantz, as administrator of the estate of Walter I. Wilson, deceased, and another. From judgment for plaintiff, defendants appeal.

Reversed.

Winslow P. Hyatt and H. P. Hibbard, both of Los Angeles, for appellants.

Hugh A. McNary, of Los Angeles, for respondent.

GRAY, Justice pro tem.

The complaint, which contains only the usual allegations, essential for that purpose, prays the foreclosure of a mortgage, given on May 5, 1916, by decedent to respondent, during their marriage, as security for the payment weekly of specified sums, in full settlement of all her claims and demands against him and his estate. The answer, among other defenses, pleads as a bar to recovery a final decree granted on September 27, 1928, in a prior action between the same parties, adjudging that title in fee simple to the mortgaged premises was vested in decedent's heirs, subject to administration; that all claims of respondent therein were invalid; and that respondent be estopped from asserting any claim thereto. On this issue the trial court found: "That that certain action No. 235,394 in the above entitled Superior Court, wherein Genevieve H. White was plaintiff and Charles Lantz as Administrator of the Estate of Walter I. Wilson, deceased, was defendant, (1) which said action was brought for the purpose of quieting title to the property described in plaintiff's mortgage, (2) is not a bar to plaintiff's action to foreclose her said mortgage, (3) that said mortgage was not mentioned in the pleadings, findings or judgment in the matter of said action No. 235,394, (4) nor was said mortgage an issue in said case, (5) nor were plaintiff's rights under said mortgage adjudicated and (6) that said action No. 235,394 involves a controversy entirely separate and apart from that in the case at bar." (Numerals inserted for subsequent reference.) If the evidence established this defense, the finding is erroneous and the decree of foreclosure must be reversed.

As the only evidence introduced upon this issue was the judgment roll in the prior action, the sole question for determination is the legal effect of that decree upon respondent's interest as mortgagee. An examination of the judgment roll shows that the pleadings, findings, and judgment are each in the usual form, common to ordinary quiet title actions, and that, therefore, parts 1 and 3 of the finding, which state the purpose of the action and the absence of mention of the mortgage in either the pleadings, findings, or judgment, are true. It is also true (part 4) that the mortgage was not expressly and specifically an issue, although the issues of ownership and adverse claims were broad enough to have permitted consideration of the mortgage. Likewise it is true (part 5) that respondent's rights under the mortgage were not expressly adjudicated, but whether they were included within the larger adjudication that she had no interest in the mortgaged property is a legal question to be hereafter considered. The sixth part of the findings to the effect that the quiet title action involved a controversy entirely separate and apart from that in the foreclosure suit is true in the sense that different causes of action were stated, but it is not true in the sense that the rights of the parties in the property were not involved in both actions. See Green v. Thornton, 130 Cal. 482, 62 P. 750. The second portion, finding that the decree quieting title was not a bar to the foreclosure of the mortgage, is really a deduction from the other facts, whose correctness will be determined by a consideration of the legal effect of such facts.

"In an action to quiet title, all matters affecting the title to the parties to the action may be litigated and determined, and the judgment therein is final and conclusive. A general finding of title in the plaintiff, and consequently of no title in the defendant, is a conclusive and binding decision against the defendant on the question of title, from whatever source it may be derived, and forever estops him from asserting a claim which existed at the time of the finding and judgment." Black on Judgments, § 664; Freeman on Judgments, § 874. "Action to Quiet Title—In this form of action all matters affecting the title of the parties to the action may be litigated and determined, and the

judgment is final and conclusive, and cuts off all claims or defenses of the losing party going to show title in himself, and which existed at the time of suit, whether pleaded therein or not." 34 C. J. 959. "Where the right, title, or ownership of property is directly put in issue, whether by the pleadings or the course of the litigation, and is tried and determined, the judgment is conclusive thereon in all further litigation between the same parties or their privies, whatever may have been the nature or purpose of the action in which the judgment was rendered or of that in which the estoppel is set up." Rauer v. Rynd, 27 Cal. App. 556, 150 P. 780, 782. A judgment necessarily affirming the existence of any fact is conclusive upon the parties whenever the existence of that fact is again in issue between them, not only when the subject-matter is the same, but when the point comes incidentally in question in relation to a different matter in the same or any other court. Estate of Clark, 190 Cal. 354, 212 P. 622.

A decree quieting plaintiff's title against defendant's testator estops such defendant in a second quiet title action from asserting title adverse to plaintiff, anterior to the entry of the decree. Riverside Land, etc., Co. v. Jensen, 108 Cal. 146, 41 P. 40. A plaintiff in an action to declare a deed a mortgage and to quiet title is estopped by a prior judgment in ejectment in which title to the property was put in issue and adjudged to be in the defendant. Wehle v. Price, 202 Cal. 394, 260 P. 878. This case cites numerous authorities to the effect that an adjudication of title estops the loser from subsequently litigating a claim existing at the time of such adjudication but not actually litigated therein. In holding that a final judgment in partition, adjudging that plaintiffs had no lien on lands awarded to defendant, estopped them from asserting, in a subsequent action, a lien on such lands for defendant's share of the cost of redeeming the unpartitioned lands from the foreclosure of a joint mortgage, although such lien had not been litigated in the partition action, the court, in Ivancovich v. Weilenman, 144 Cal. 757, 78 P. 268, 269, said: "The rule is well settled that a judgment between the same parties is conclusive, not only as to the subject-matter in controversy in the action upon which it is based, but also in all cases involving the same question, and upon all matters involved in the issues which might have been litigated and decided in the case; the presumption being that all such issues were met and decided. Bingham v. Kearney, 136 Cal. 177, 68 P. 597; Quirk v. Rooney, 130 Cal. 511, 62 P. 825." A decree quieting defendant's title in a former action in which plaintiff claimed his deed was a mortgage is res adjudicata in a second action in which plaintiff asserts such deed was a deed of trust. Albertson v. MacFarlane, 54 Cal. App. 50, 201 P. 479. A final judgment in partition is a conclusive determination upon all parties as to whatever title or claim to the land they had at the time of the rendition of the judgment and precludes them from subsequently asserting any right or claim to the land which they acquired prior to the rendition of the judgment. Christy v. Spring Valley W. W., 97 Cal. 21, 31 P. 1110. The validity of a lease which might have been but was not offered in support of a plea of right of possession in an action of ejectment is adjudged against the tenant by the landlord's recovery. Flynn v. Hite, 107 Cal. 455, 40 P. 749. A party cannot relitigate title to property involved in the former judgment, notwithstanding he failed to assert his claim properly or to present the proper evidence in the first action. Keller v. McGilliard, 5 Cal. App. 395, 90 P. 483.

[1] Respondent's claim of ownership and denial of any interest in appellant, as alleged in her complaint to quiet title, is inconsistent with her present claimed interest as mortgagee. Simmons v. Rowe, 4 Cal. App. 752, 89 P. 621; 20 C. J. 12. Appellant's allegation in his cross-complaint in the quiet title action that respondent claimed an adverse interest, without right, tendered an issue which respondent should have met by the assertion, in her answer, of her interest under the mortgage. Since it is not the policy of the law to permit the trial, by piecemeal, of claims to real property, respondent, by failing to avail herself of the offered opportunity to litigate the mortgage, cannot withdraw such mortgage from inclusion within the determination of the decree quieting title that she has no interest in the mortgaged property. It would appear from the above authorities that the legal effect of the decree quieting title was an adjudication that respondent had no interest as mortgagee and therefore the above finding that such decree is not a bar to the present action is erroneous.

[2] Respondent, in addition to her argument as to the effect of the decree as res adjudicata, also argues (1) that, since only legal interests are involved in a quiet title action, she could not set up her mortgage, and (2) since equity will not quiet title even against an outlawed mortgage, the only way in which the mortgage could be discharged would be by voluntary release or payment. It may be conceded that respondent, as the owner of an equitable interest as mortgagee, could not maintain a quiet title action. But here appellant by his cross-complaint sued as legal owner against the equitable claim of respondent as mortgagee. The legal owner of land may maintain an action to quiet title against a mortgage claimed to be invalid. Withers v. Jacks, 79 Cal. 297, 21 P. 824, 12 Am. St. Rep. 143. The cross-complaint hav-

ing tendered the issue of title and all adverse claims thereto, the court was authorized to determine the same. Gunst v. Zimdars, 89 Cal. App. 37, 264 P. 544. It was respondent's duty to have pleaded the mortgage if she wished the court to have protected her rights. Lange v. Geiser, 138 Cal. 682, 72 P. 343. Of course, if the mortgage had been presented to the court, it could not have quieted title without protecting the lien of the mortgage. Chapman v. Hicks, 41 Cal. App. 158, 182 P. 336.

Since the judgment must be reversed because the decree quieting title was a bar to this foreclosure, it is unnecessary to consider other objections urged by appellant.

The judgment is reversed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

126 Cal.App. 677

HERKNER v. RUBIN.

Civ. 8206.

District Court of Appeal, First District, Division 1, California.

Oct. 8, 1932.

Rehearing Denied Nov. 7, 1932. Hearing Denied by Supreme Court Dec. 5, 1932.

1. Corporations ⇐78.

Lapse of 143 days from date of stock subscription agreement to date of incorporation and failure of articles of incorporation to recite facts of defendant's subscription rendered agreement unenforceable, under circumstances (St. 1917, p. 679, § 12; p. 685, § 25, as amended by St. 1925, p. 972; St. 1917, p. 674, § 2, subd. 6, now subd. 7, as amended by St. 1925, p. 963).

Subscription agreement was unenforceable, notwithstanding defendant had made deliveries of merchandise in pursuance of the agreement which was payable in merchandise, since St. 1917, p. 685, § 25, as amended by St. 1925, p. 972, requiring incorporation within 90 days, became a part of the agreement and as the corporation was permitted to issue stock for cash only, stock issued in violation of the permit would be void under St. 1917, p. 679, § 12, and p. 674, § 2, subd. 6, now subd. 7, as amended by St. 1925, p. 963.

2. Appeal and error ⇐1010(1).

Whether corporation commissioner granting permission to issue stock for cash knew corporation intended to issue stock for merchandise *held* for trial court, under evidence.

3. Contracts ⇐105.

Where statute prohibits or attaches penalty to doing of act, act is void.

4. Licenses ⇐18½.

Stock of corporation issued in violation of permit granted by corporation commissioner is void (St. 1917, p. 679, § 12, and § 13, as amended by St. 1925, p. 970).

5. Estoppel ⇐52.

Doctrines of estoppel by conduct and ratification have no application to contract which violates express mandate of law.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by D. C. Herkner against Alexander Rubin, doing business under the name and style of the Better Hat Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

Livingston & Livingston, of San Francisco, for appellant.

Leo H. Shapiro, Harry K. Wolff, and Norman Sanford Wolff, all of San Francisco, for respondent.

PER CURIAM.

This is an action to recover the sum of $3,000 upon an agreement for the purchase of certain preferred capital stock of Lubin, Inc., a corporation.

The corporation became insolvent, and certain of its creditors procured judgments against it, upon which executions issued. These were returned wholly unsatisfied, and the claims were subsequently assigned to plaintiff, who is also a judgment creditor.

The subscription agreement reads as follows: "March 24, 1926. I agree to take $3,000 worth of pref. stock paying 6 per cent dividend in the J. Lubin Stores Inc. as explained by J. Lubin. It is understood that I pay for the above in trade. Better Hat Co., Alexander Rubin."

According to the findings Lubin, Inc., was incorporated under the laws of California on August 16, 1926, and the above agreement was executed on the day it bears date. On August 18, 1926, the corporation for the first time applied to the commissioner of corporations for permission to issue to the defendant for cash the stock called for in the agreement. A permit to do so in accordance with the application was issued on September 7, 1926, upon the condition that the stock was escrowed in conformity with the terms of the permit. It was also found that the corporation at no time pursuant to the terms of the permit issued said stock to defendant. The

articles of incorporation filed did not contain defendant's name as a subscriber for the stock. The permit issued authorized the corporation to sell its stock upon certain terms and conditions, those material here being as follows: "To sell and issue to the 22 persons named in its application an aggregate of not to exceed 1,000 shares of its class A preferred capital stock at par for cash lawful money of the United States for the uses and purposes recited in its application and so as to net applicant the full amount of the selling price thereof." The court further found that the corporation failed to comply with the permit in that it did not sell and issue to defendant any shares for cash lawful money, or have approved by the commissioner a depositary to hold the stock authorized to be issued, and that no part thereof was escrowed as provided in the permit.

Defendant after the incorporation of the company and pursuant to the agreement mentioned delivered to it merchandise of the value of $1,595.45. Since November 12, 1926, the company has been insolvent, and on April 19, 1927, the permit was suspended by the commissioner of corporations.

From the facts found the court concluded that the stock subscription agreement was not enforceable. Accordingly a judgment in favor of defendant was entered, from which plaintiff has appealed.

By the Corporate Securities Act a company, except as authorized by certain specific statutory provisions not applicable here, was forbidden to sell, offer for sale, negotiate for the sale of or take subscriptions for any security of its own issue, without procuring a permit from the commissioner of corporations permitting it to do so. A security was defined therein as including "all shares or other interests or rights into which the capital, capital stock, or property of companies or rights of stockholders or members thereof are divided * * *" (section 2, subd. 7, St. 1925, p. 962); and by section 12 of the act any security issued by a company without such permission was declared to be void (St. 1917, p. 673). An amendment to the act adopted in 1925 (St. 1925, pp. 962, 972) provided that "neither this act nor any provision hereof shall be deemed to prohibit subscriptions for shares of a domestic corporation made prior to the incorporation thereof and set forth in the articles of incorporation; but such subscription shall be deemed to have been made and accepted upon the condition that such corporation shall be incorporated within ninety days thereafter and, when incorporated, shall with reasonable diligence apply for and secure from the commissioner a permit authorizing the issue of the shares so subscribed for, in accordance with such subscriptions. * * *"

[1] Here the findings show a lapse of 143 days from the date of the subscription agreement to that of incorporation, and also that the articles of incorporation failed to recite the facts of defendant's subscription.

It has been held that under such circumstances the statute becomes a part of the subscription agreement, and unless the conditions are complied with a subscription agreement is not enforceable. First Nat. Bank of Calexico v. Thompson, 212 Cal. 388, 298 P. 808; Rossi v. Jedlick, 115 Cal. App. 230, 1 P.(2d) 1065.

Plaintiff concedes that the statutory requirements were not met, but contends that the agreement having been valid when executed, as was found by the trial court, and deliveries of merchandise pursuant thereto having been made after the company was incorporated, this was tantamount to an election to adopt its terms and conditions as those of a new subscription agreement, and that defendant is consequently liable. That such facts standing alone might have the effect claimed finds support in Moore v. Moffatt, 188 Cal. 1, 204 P. 220, where, notwithstanding a subscription agreement was executed previous to the procurement of a permit required by the Investment Companies' Act (St. 1913, p. 715), a valid permit was subsequently obtained, and pursuant thereto the stock was issued and accepted. But in the case at bar the subscription agreement provided for payment in merchandise, and the application was for permission "to sell and issue one thousand (1,000) shares of class A preferred stock for the par value thereof, to wit, one hundred thousand ($100,000) dollars, to net the corporation one hundred per cent (100%)," and the permit obtained provided that the same should be sold "at par for cash lawful money of the United States and so as to net applicant the full amount of the selling price thereof."

[2] The resolution adopted by the directors of the corporation authorizing the issuance of the stock provided that the same should be sold for cash, and a copy of the resolution was filed with the commissioner. The only portion of the application which might have directed the commissioner's attention to the plan the organizers of the corporation apparently had in mind was the following: "The bulk of said stock will be issued to persons who are stockholders in said J. J. Milburn & Co., and the balance will be issued to parties from whom new merchandise is to be purchased for sale in said business as aforesaid." This did not clearly disclose their intention, but the company's representative who presented the application testified that he explained to the commissioner that no cash would be actually received from certain of the subscribers, but merchandise in lieu thereof. According to the testimony of the corporation commissioner he did not understand that such was to be the case, otherwise the permit would not have been drawn in the form in

which it issued. The statements in the application were by no means plain, and the question was one for the trial court. The evidence was sufficient to support its conclusion that the commissioner's permit expressed exactly his determination upon the facts presented to him. It is admitted that the permit was never modified and that no other was procured. The stock was not issued in conformity with the permit; and where such is the case section 12 of the Corporate Securities Act declared the same to be void, and section 13 of the same act (as amended by St. 1925, p. 970) that any company so issuing its stock would be guilty of a public offense.

[3-5] Where a statute prohibits or attaches a penalty to the doing of an act the act is void (Smith v. Bach, 183 Cal. 259, 191 P. 14); and this is true of an issuance of stock in violation of the permit granted by the corporation commissioner (Boss v. Silent Drama Syndicate, 82 Cal. App. 109, 255 P. 225; Live Oak Cemetery Ass'n v. Adamson, 106 Cal. App. (Supp.) 783, 288 P. 29; Commercial Building Co. v. Levy, 108 Cal. App. 54, 290 P. 1048, 1049; Otten v. Riesener Chocolate Co., 82 Cal. App. 83, 254 P. 942; Becker v. Stineman, 115 Cal. App. 740, 2 P.(2d) 444; Domenigoni v. Imperial, etc., Mortgage Co., 189 Cal. 467, 209 P. 36; Gridley v. Tilson, 202 Cal. 748, 262 P. 322; Barton v. El Canto Apartments (Cal. Sup.) 14 P.(2d) 501). Moreover, the doctrines of estoppel by conduct and ratification have no application to a contract which violates an express mandate of the law (Pollak v. Staunton, 210 Cal. 656, 293 P. 26).

Nor do the facts bring the case within the exception noted in such cases as Michell v. Grass Valley Gold Mines Co., 206 Cal. 609, 275 P. 418. The creditor in actions of this character affirms the contract of the corporation, and cannot recover if by reason of a defense good against the corporation the latter could not recover thereon. Spencer v. Anderson, 193 Cal. 1, 222 P. 355, 35 A. L. R. 822.

In Commercial Building Co. v. Levy, supra, the court pointed out the opportunities for fraud if corporations were allowed to depart from the terms of permits directing sales to be made for cash. As the court said: "The policy of the enactment is to protect buyers from possibility of injury, as far as the law will permit. Irrespective of the integrity of the organizers or directors of a corporation, the law must be obeyed. If under a permit to sell for cash only some of the stock should be sold for cash and some on deferred payments, irrespective of the contract, those who purchased for cash might find the assets of the corporation tied up in some project, wherein the directors had invested in reliance upon the unfulfilled promises with the result that further headway was impossible and the funds invested lost."

We are satisfied that the conclusions of the trial court from the facts are correct, and that nothing has been shown which would warrant a reversal of the judgment.

The judgment is affirmed.

126 Cal.App. 486

BALLARD v. SACRAMENTO NORTHERN RY. CO.*

Civ. 4611.

District Court of Appeal, Third District, California.

Sept. 28, 1932.

Rehearing Denied Oct. 28, 1932.

Hearing Denied by Supreme Court Nov. 25, 1932.

1. Master and servant ⇐111(1).

To comply with Federal Safety Appliance Act and rules promulgated thereunder, it was necessary that hand brake of gondola car could be operated with safety, not merely that brake operated efficiently (Federal Safety Appliance Act 1910, § 2 [45 USCA § 11]).

2. Master and servant ⇐278(6).

Evidence sustained finding that death of brakeman was caused by slipping of brake club while tightening hand brake on gondola car due to defective condition of brake, not dizziness or other physical infirmity (Federal Safety Appliance Act 1910, § 2 [45 USCA § 11]).

3. Death ⇐58(1).

Presumption is that deceased exercised due care for own safety.

4. Commerce ⇐27(3).

To authorize action for death under Federal Safety Appliance Act, it is sufficient if employer carries over its railway interstate traffic (Federal Safety Appliance Act 1910, § 2 [45 USCA § 11]).

It is not necessary that employee or employer at time of injury be actually engaged in interstate commerce.

5. Master and servant ⇐276(1).

Right to recover for death of brakeman resulting from defective hand brake of gondola car *held* governed by Federal Safety Appliance Act, not Workmen's Compensation Act (Federal Safety Appliance Acts, § 2 [45 USCA § 11]; St. 1917, p. 877, § 69 (c).

The action was controlled by the Federal Safety Appliance Act 1910 (45 USCA § 1 et seq.), not by Workmen's Compensation Act, because evidence showed that interstate commerce was carried on over lines of defendant railroad.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Rehearing denied 15 P.(2d) 793.

6. Master and servant ⇐111(1).

It is railroad's absolute duty to maintain braking appliances in condition to be safely operated (Federal Safety Appliance Act 1910, § 2 [45 USCA § 11]).

7. Master and servant ⇐111(1).

Violation of Federal Safety Appliance Act constitutes negligence (Federal Safety Appliance Acts [45 USCA § 1 et seq.]).

8. Master and servant ⇐204(2), 228(2).

In actions based on violation of Federal Safety Appliance Act, contributory negligence, assumption of risk, and concurrent negligence are no defenses (Federal Employers' Liability Act §§ 3, 4 [45 USCA §§ 53, 54]).

9. Appeal and error ⇐1066.

Instructions that contributory negligence or assumption of risk were no defenses in action under Federal Safety Appliance Act, even if erroneous, were harmless (Federal Employers' Liability Act §§ 3, 4 [45 USCA §§ 53, 54]).

The giving of such instructions, even if erroneous, was harmless because there was not a scintilla of evidence indicating contributory negligence or showing that deceased brakeman committed a single negligent act, and because contributory negligence, where it applies, requires proof by party relying thereon unless plaintiff's testimony tenders such issue.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by Mamie M. Ballard, administratrix of the estate of Charles K. Ballard, deceased, against the Sacramento Northern Railway Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

J. Hampton Hoge, of San Francisco, Hinsdale, Otis & Johnson, of Sacramento, R. W. Jennings, of San Francisco, and Loyd E. Hewitt, of Yuba City, for appellant.

Thomas F. McCue, of San Francisco, and Rich, Weis, Coats & Carlin, of Marysville, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment based upon the second cause of action set out in her complaint, from which judgment the defendant appeals. The second cause of action in the complaint sets forth, after reciting preliminary matters showing the right of the plaintiff to maintain this action, that Charles K. Ballard was, on and prior to the 11th day of November, 1930, a brakeman regularly employed by the defendant. That on the 11th day of November, 1930, at Marysville, Yuba county, said Charles K. Ballard came to his death by being thrown from the top of a freight car then and there being operated by the defendant. That the direct and proximate result of the death of Charles K. Ballard was the hauling, and permitting to be hauled and used on its railway line, a certain freight car known as a "gondola car," that was not equipped with efficient hand brakes; that the hand brake on said car had a defective and crooked brake shaft; that by reason of the defect in the brake shaft the brake on said car could not be set with safety; that when the wheel at the top of the brake shaft was turned, the crook in the shaft would cause the wheel to flare up on one side and down on the other, thereby causing the deceased to lose his balance and to fall from the top of the car to, and beneath the wheels thereof, which instantly caused his death; that the defendant was operating said car with a defective and inefficient brake that could not be set with safety, contrary to the terms and provisions of the Federal Safety Appliance Act. The section of the Federal Safety Appliance Act (45 USCA § 11) and the rules and regulations of the Interstate Commerce Commission promulgated in pursuance thereof, required that the rim or perimeter of the brake wheel on the top of the brake shaft should, on gondola cars, have a clearance of at least four inches above the top of the car. The evidence in this case showed a violation of this rule, and that there was not such clearance.

The photographic exhibits in this case show that in order to set the brake on a gondola car, the brakeman must take a position upon a narrow footboard on the end of the car, placing his foot against the "dog" or "pawl," give the brake wheel a turn with his hands, and with one of his feet push the "dog" or "pawl" into the ratchet which holds the brake as set. The footboard upon which the brakeman is required to stand is about midway between the top of the car and the bottom of the sill of the framework upon which the car is built. The photograph shows that this footboard is very narrow, and only of sufficient length to afford standing room for the brakeman operating the brake. Whenever it is desired to set the brake more securely than can be done by simply using the wheel at the top of the brake shaft, a club is inserted in the wheel, placing one end against the shaft as a fulcrum, and pressing the club against a spoke of the wheel. The length of the club reaching out beyond the circumference of the wheel gives the brakeman added power in setting the brake.

It appears from the testimony that this manner of setting brakes is required whenever the car is stopped upon a grade or in-

cline, such that the brake cannot be efficiently operated from the power afforded by the simple use of the wheel.

The record shows that at the time of the accident the appellant was, and had prior thereto maintained, a railway of interstate commerce, or a railway over which interstate commerce was carried. As heretofore stated the deceased was employed in the capacity of a brakeman. On the day in question the crew of which the deceased was a member was engaged in backing a string of cars propelled by an electric motor, for the purpose of setting out two cars at a place known as the "Sandpit" in Marysville. At the place where the cars were to be spotted the grade or incline of the track was such that in order to set the brakes sufficiently tight for them to remain stationary upon the grade, it was necessary for the deceased to use a brake club. The gondola car to which we have referred was one of the cars so spotted and the car upon which the deceased was engaged in setting the brakes at the time he met with his death. This car was known as No. 4467, and was being spotted for the purpose of being loaded with sand.

The testimony is conflicting as to the flare of the brake wheel; that is, as to the difference between a horizontal plane and the plane described by the wheel in its revolutions. Some of the witnesses testified that there was a variation of two inches. One witness, who apparently made a minute examination of the wheel and the brake shaft, testified that there was a difference of six inches between the higher and the lower side of the wheel as it was turned upon the bent shaft.

It is admitted in the record that the brake wheel did not have the clearance prescribed by the rules promulgated by the Interstate Commerce Commission governing braking appliances on gondola cars. This negligence on the part of the defendant, while not controverted upon this appeal, is held by the appellant not to have been the efficient cause of the accident.

On the part of the respondent it is contended that the braking appliance which we have described was not only violative of the Federal Safety Appliance Act, but that it could not be efficiently operated safely. The question of whether the braking appliance could or could not be operated efficiently can only be resolved by taking into consideration the conditions surrounding the location of the car at the time when it became necessary to operate the appliance; that is, whether the condition of the braking appliance was such that it could be safely operated by the use of what is called a "brakeman's club," in order to set the brakes sufficiently tight to hold the car in place while being loaded. The respondent contends that the flare of the wheel giving, as one witness said, a drop of six inches in its revolutions, could not be safely operated when a brakeman was using a club, as the flare in the wheel or the variation from a horizontal plane in its revolutions was such as to create the hazard of the club slipping on the brake shaft and endangering the person of the brakeman. The photograph to which we have referred shows that the operator of the brake had a very narrow footboard upon which to stand, and that any defect which would cause the brake club to have a tendency to slip, might very readily imperil the person of the operator. True, if the operator of the brake had a very tight hold of the wheel with his right hand, while he was pushing the brake club with his left (this being the manner of operation), it might be possible, even though the brake club slipped and the operator's balance on the footboard was disturbed, he might save himself by holding to the brake wheel with his right hand. Contrarywise, if the full force and strength of his body were used in pressure upon the brake club in order to securely set the brakes, under the conditions presented it is reasonable to infer that any slight defect in the mechanism or a defect such as we have described might reasonably and probably would result in injury to the operator.

It may here be said that the photograph of the car in question, although very small, being about 2½x4½ inches, clearly shows the slant of the brake wheel at the top of the shaft.

[1] It is not simply a question of whether the brake in this case was efficient. In order to comply with the Safety Appliance Act and the rules promulgated in pursuance thereof, it was necessary that it could be operated with safety. The deceased in this instance had succeeded in setting the brake so as to hold the car in place. The question before the jury was really whether the appliance was such that the brakes could be safely set in the ordinary routine of a brakeman's duty, and as we have seen, in the ordinary routine of a brakeman's duty, whenever the cars were to be held upon a grade or an incline in the track, it was a part of the brakeman's duty, and the custom of brakemen to use the auxiliary means of a brakeman's club in order to exercise greater power in setting the brakes. This would necessitate a wheel equipment on the top of the brake shaft revolving upon a plane so limited in its variations as not to create the hazard of a slipping club. It requires no great mechanical knowledge to appreciate the extent to which this hazard would be created by a wheel which rose and fell a few inches in its revolutions. The jury had a right to take all these conditions and circumstances, and the up and down variation of the force that the brakeman exerted upon the club that would be caused by its

rise and fall in the revolution of the brake wheel, into consideration.

[2] The testimony of the one witness to the accident may be summarized as follows: An ordinary man could not set the brake with his hands, enough to hold the car on the grade. It is the regular practice and necessary to use a brake club so that the brake will hold on a grade. The deceased was applying the brake on the gondola car; he was standing on the footboard at the end of the car. "I saw him make two efforts to set the brake; I saw him place the brake-club, taking hold of it and apparently using his strength in setting the brake; I saw him tip back and fall out of sight between the cars; his hands went up at the time, and the brake-club went out of his left hand; the deceased fell on the north side of the track and the wheels of the gondola car ran over his body killing him instantly."

As against this testimony and the circumstances which we have set forth herein, it is contended by the appellant that if the brake club slipped or was caused to slip, the deceased would have fallen forward, and therefore the defendant must have met his death from some other cause, dizziness being suggested, based upon the circumstance that a witness testified that a number of years previously the deceased had a dizzy spell. We see no compelling force in this contention. It is a matter of common knowledge, as every one who has ever set a brake on a freight car or observed a brakeman operating the same knows, that the operator places his feet near the ratchet on the brake shaft into which the "pawl" is forced to retain the pressure of the brake as it is being set, takes hold of the wheel with his hands, and in order to exert his full strength, throws the major portion of his body away from the wheel and brake shaft, describing an arc, so that if a perpendicular line were drawn from the instep of his feet to the top of his head, practically all of the body of the operator, in fact all except the arms and hands, would be from instead of toward the brake wheel side of that perpendicular line. This is in order to exercise the operator's full strength, aided by the weight of his body, in setting the brake. In doing this the swing of the body would describe an arc parallel with the top of the car.

The jury had before it a photograph of the car, and could easily visualize what we have just stated, and hence could not escape the conclusion that the law of gravity would carry the body downward with a slight side motion, just as occurred in this case, so that the body would be thrown prone across the tracks. We think the jury had a right to infer that the brake club slipped, for the reasons which we have stated, and that the added weight of the body of deceased (the testimony showing his weight to have been between 185 and 190 pounds) caused the grasp of his right hand upon the brake wheel to be loosened, and that the fall did not result from any attack of dizziness or physical infirmity on the part of the deceased.

Supporting its theory that the facts disclosed are insufficient to support the judgment, appellant cites the cases of Collins v. Great Northern Ry. Co., 181 Minn. 125, 231 N. W. 797, 798, Nealis v. Chicago, R. I. & P. Ry. Co., 173 Minn. 587, 218 N. W. 125, and Bruckman v. Chicago, St. P., M. & O. Ry. Co., 110 Minn. 308, 125 N. W. 263. The difference in the facts of these cases we think readily distinguishes them, and shows their inapplicability to the circumstances disclosed by the record presented for our review.

In the Collins Case the plaintiff testified that he was riding on the front end of the car traveling east; that he had the brake club in the wheel, and had tightened it up as much as he could; that he had his right foot against the top of the grabiron; that he put his weight, all he could, against the club, and the car began to slow down; that the car slowed down so that it was going about eight or ten miles an hour when it came in contact with other cars to which it was to be coupled; that normally it should have been going about two or four miles per hour; that he did not reduce the speed more because the brakes would not work; that the brake wheel just gave or went around suddenly; and that he went down with it; he could not say just how he went down. The record in the Collins Case shows neither defect nor inefficiency in the brake mechanism. The opinion of the court contains the following: "After the accident the brakes were found tightly set. They then worked properly. Plaintiff has no substantive proof to the contrary. The claim that the brakes were inefficient must be proved. It cannot rest on theory alone. The record leaves the cause of the accident uncertain. The most favorable view for plaintiff is that it rests in conjecture as to whether it was inefficient brakes, the fault of plaintiff, an unaccountable or unavoidable accident. The brake club may have slipped. The cause of the accident must be proved. Unless the cause is shown affirmatively, there can be no recovery."

It will be observed that while the court says that the brake club may have slipped, it does not set forth any facts or circumstances such as we find existing in the case at bar, from which the jury might very reasonably infer that the brake club was caused to slip. There is nothing in the Collins Case showing that the brake wheel had other than a revolution upon an invariable plane. There is nothing in the Collins Case showing failure on the part of the defendant to comply strictly with the Federal Safety

Appliance Act, and from which failure or defect in the appliance, an inference might be drawn that the accident resulted therefrom.

The record in the case of Nealis v. Chicago, etc., supra, shows that the deceased was seen near the defective brake wheel. After the accident it was found that the brake was partly wound up. The brake staff was bent about two inches above the sill, and was thereby thrown an inch or two out of line; bent perhaps 10 or 15 degrees, and wobbled a little. It was claimed by the plaintiff in that case that the chain would pile up and slip off the shaft, having a tendency to throw the operator off his balance. The court in its opinion spoke as follows: "We will assume that the brake was defective, and that its defective condition was negligence. Plaintiff's case rests upon circumstantial evidence to establish a causal connection between such negligence and the accident. Such proof is not established when the evidence is merely consistent with the plaintiff's theory of how the accident occurred. The rule is that circumstantial evidence in such a case must furnish a reasonable basis for the inference by the jury of the ultimate fact that the negligence was the cause of the accident. The burden is upon the plaintiff to show that the causal connection is fairly and reasonably inferable from the facts and circumstances actually disclosed by the evidence. Such evidence must justify an inference that the accident resulted from such negligence rather than from some other cause." (Citing a number of cases). Here again the record fails to disclose that the deceased was actually operating the brake, and that the mechanism was defective or in anywise calculated to imperil the person of the operator. In the instant case the defective appliance and the deceased are found to have been working together, and the inference is fairly logical that the result was brought about just as we have heretofore stated.

In the Bruckman Case, supra, the evidence shows that the deceased was seen approaching a gondola car and reached for the ladder, and the lantern which the deceased was holding was carried up the ladder to the top of the car, and shortly afterward was seen to fall to the ground. The brake appliance on the gondola car was found to be defective. After the accident the brake was partly set. After the gondola car and others had passed by the witnesses, the deceased was found lying across an adjoining track, face downward, over which a passenger train had passed. The body had been dragged some 60 or 70 feet. The court held that there was no causal connection shown to exist between the defective brake appliances and the death of the brakeman.

Not having been seen upon the defective footboard necessary to be occupied in operating the brake, it could not be said that such defect had anything to do with the accident. The connecting links were found to be absent in the Bruckman Case, but we may add that the language of the court shows it to have been a border-line case and not of sufficient convincing power to be controlling here.

[3] We think the facts of the instant case as we have reviewed them, especially when taken in connection with the law of this state, that the deceased was presumed to have exercised due care for his own safety, sufficiently disclosed the causal connection between the defective appliance and the death of the deceased, and that the judgment should be affirmed, unless the trial court had no jurisdiction, or other errors are shown by the record.

In this particular it is urged that the trial court had no jurisdiction, and also that prejudicial error was committed by giving an instruction on the subject of contributory negligence. Section 56 of title 45, USCA, page 515, so far as applicable here, reads as follows: "The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

[4] Referring to section 11, 45 USCA, page 59, being a portion of the acts involved herein, the rule appears to be well settled that it is not necessary that either the employee or the company, at the time of the injury, be actually engaged in interstate commerce. All that is necessary is that the carrier conducts and carries over its railway, interstate traffic. Stearns v. Chicago, etc., Ry. Co., 166 Iowa, 566, 148 N. W. 128; Texas & P. Ry. Co. v. Rigsby, 241 U. S. 33, 36 S. Ct. 482, 60 L. Ed. 874, 875; St. Louis S. W. Ry. Co. of Texas v. Smith (C. C. A.) 254 F. 581; Texas & Pac. Ry. Co. v. Sprole (Tex. Civ. App.) 202 S. W. 985. Other cases might be cited, but the foregoing appear to be sufficient.

[5, 6] The contention that the Workmen's Compensation Act applies we think is without merit. In Smithson, etc., v. A., T. & S. F. Ry. Co., 174 Cal. 148, 162 P. 111, in speaking of the Federal Employers' Liability Act, which corresponds in force and effect with the Safety Appliance Act, the Supreme Court said, quoting from the syllabus: "In actions brought in the state courts under the provisions of the Federal Employers' Liability Act, approved April 22, 1908, the decisions of the supreme court of the United States are controlling in the construction of the act." Here, jurisdiction to try cases based upon the Federal Safety Appliance Act is vested in district and superior courts. By subdivision (c) of section 69 of the Workmen's

Compensation Act (St. 1917, p. 877), it is expressly provided that where interstate commerce questions are presented, resort to the courts is not prohibited. We do not need to review the testimony showing that interstate commerce is carried on over the lines of the defendant, further than to state it is sufficient to establish such character, and the record shows that the defendant practically admitted such character in the trial court. Under the Safety Appliance Act, it is the absolute duty of the carrier to maintain the several parts of the braking appliances in such condition that they may be safely operated. Armitage v. Chicago, M. & St. P. Ry. Co., 54 Mont. 38, 166 P. 301; LaMere v. Railway Transfer Co. of City of Minneapolis, 125 Minn. 159, 145 N. W. 1068, Ann. Cas. 1915C, 667.

In the case of Lockhart v. S. P. Co., 91 Cal. App. 770, 267 P. 591, the Safety Appliance Act was not involved. The cause was prosecuted under the Federal Employers' Liability Act, and it was not shown that the car upon which the injured workman was engaged was, or ever had been, employed in interstate commerce. The same may be said of the case of Johnson v. S. P. Co., 199 Cal. 126, 248 P. 501, 49 A. L. R. 1323.

[7] We do not need to cite the long list of authorities holding that violation of the Safety Appliance Act constitutes negligence. One case only needs to be referred to. Spokane & Inland Empire Ry. Co. v. Campbell, 241 U. S. at page 509, 36 S. Ct. 683, 60 L. Ed. 1125.

[8, 9] At the request of the plaintiff the court instructed the jury that contributory negligence or assumption of risk could not avail the defendant in actions based upon violation of the Safety Appliance Act. This the appellant urges as prejudicial error. Irrespective of the law on this subject, which we believe to be adverse to the appellant's contention, the instruction of the court must be held harmless. There is not a scintilla of evidence set forth in the record indicating contributory negligence, or showing that the deceased committed a single negligent act. Contributory negligence, where it applies, is a matter requiring proof by the party relying thereon, unless the testimony of the plaintiff tenders that issue. The only evidence submitted on the part of the appellant was concerning the condition of the braking appliance. No attempt was made to show any facts indicating negligence on the part of the deceased.

Our attention is called to the case of Minneapolis, etc., Ry. Co. v. Popplar, 237 U. S. 369, 35 S. Ct. 609, 59 L. Ed. 1000, where a reference is made in the opinion to the former case of Schlemmer v. Buffalo, etc., Ry. Co., 220 U. S. 590, 598, 31 S. Ct. 561, 55 L. Ed. 596, where it is said the defense of contributory negligence was not dealt with by the statute, and that the federal statute touched the duty of the master at a single point and, save as provided in the statute, the right of the plaintiff to recover was left to be determined by the law of the state. Later decisions, however, hold applicable section 53 of title 45 (see 45 USCA, p. 379), which reads in part as follows: "Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." Again, section 54, supra, holds that where there is a violation of any statute enacted for the safety of employees, assumption of risk is not a defense.

In Spokane v. Campbell, supra, the Supreme Court of the United States distinctly holds that under the Safety Appliance Act, recovery may be had even when there is a concurrence of a violation of the act and negligence of the employee. This case refers to the case of San Antonio & A. P. Ry. Co. v. Wagner, 241 U. S. 476, 36 S. Ct. 626, 60 L. Ed. 1110, where it is held that a violation of the Safety Appliance Act is negligence in itself.

In Union Pacific R. R. Co. v. Huxoll, 245 U. S. 535, 38 S. Ct. 187, 62 L. Ed. 455, it was held that the concurrent negligence of the deceased did not prevent recovery based upon the violation of the Safety Appliance Act.

In LaMere v. Railway Transfer Co., etc., supra, it was held that the defense of contributory negligence did not bar recovery, based upon the Federal Employers' Liability Act (45 USCA §§ 51–59) and Federal Safety Appliance Acts (45 USCA § 1 et seq.).

In Southern Pacific Co. v. Thomas, 21 Ariz. 355, 188 P. 268, the Supreme Court of Arizona held (quoting from the syllabus): "Where the carrier failed to have proper couplers on cars, as required by the Federal Safety Appliance Acts (45 USCA § 1 et seq.), the brakeman's contributory negligence in going between parting cars without giving the proper signal is no defense."

In Thayer v. Denver & R. G. R. Co., 25 N. M. 559, 185 P. 542, 544, we find the following: "The action being based upon a claimed violation of the Safety Appliance Act, the defense of assumption of risk and contributory negligence are eliminated." (Citing sections of the act and the cases to which we have heretofore referred.)

The judgment is affirmed.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

126 Cal.App. 763

TONNER v. SPEARS-WELLS MACHINERY CO., Inc., et al.

Civ. 8492.

District Court of Appeal, First District, Division 2, California.

Oct. 13, 1932.

Trial ⇐296(13).

Alleged error in giving of instruction *held* cured by subsequent withdrawal thereof, although court did not tell jury that instruction was incorrect.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Lawrence H. Tonner against the Spears-Wells Machinery Company, Inc., and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Kilpatrick & Goodman, of Oakland, for appellant.

Raymond Salisbury, of Oakland, for respondents.

SPENCE, J.

Plaintiff sought damages for personal injuries alleged to have been caused by the negligence of defendants. The cause was tried by a jury, and, from a judgment in favor of defendants, plaintiff appeals.

Plaintiff claimed to have sustained his injuries when the motorcycle upon which he was riding upon a city street, at a speed of about eight miles per hour, skidded on some oil which had drained out of a road oiler operated by defendants.

The only assignment of error is that the trial court erred in giving a certain instruction to the jury. It appears, however, that the trial court subsequently withdrew the instruction when the jury returned and requested further instructions on the subject of contributory negligence. The trial court then gave the jury further instructions thoroughly covering this subject, and continued as follows:

"In addition to that I gave an instruction which I myself had marked, and about which I was in doubt, and I am satisfied that I did not intend to read the instruction, but I did read it, and at this time I withdraw that instruction from the consideration of the jury, because I am rather inclined to think that that infringes upon the province of the jury, and that instruction was this:

"If you find from the evidence that the plaintiff was riding his motorcycle at such a rate of speed that he could have observed the oil upon the street and could have stopped his motorcycle before coming in contact with the oil, and that he failed to do so, then the plaintiff was negligent and he cannot recover.

"That instruction is withdrawn from the consideration of the jury, because I have become satisfied after considering it—I had a doubt, because I marked a question mark on it that in that instruction the Court was entrenching upon the province of the jury as to what really amounts as to a matter of fact, so I withdraw that instruction entirely from the consideration of the jury, and you are to consider these instructions as I have heretofore read, and they are the only instructions you are to consider on the question of contributory negligence. I think I have covered everything, but as I say I was in doubt, there was a doubt in my mind about that instruction that I read, and I am withdrawing that entirely from the consideration of the jury, that is the instruction that I have just read to you."

Assuming, without deciding, that the challenged instruction was erroneous, any error in the giving of said instruction was cured by its subsequent withdrawal from the consideration of the jury. Counsel for appellant concedes that error in the giving of an instruction may be so cured, but contends that "the instruction here complained of was not properly withdrawn." We find no merit in this contention. The trial court was at pains to tell the jury not only once but four times that said instruction was withdrawn from their consideration. In our opinion, it was entirely unnecessary for the trial court in withdrawing said instruction to tell the jury that the instruction as originally given was not a correct statement of the law.

The judgment is affirmed.

We concur: NOURSE, P. J.: STURTEVANT, J.

126 Cal.App. 707

ROHWER v. GIBSON (WILSON, Intervener).

Civ. 4764.

District Court of Appeal, Third District, California.

Oct. 10, 1932.

1. Mandamus ⇐3(1).

Unpaid bondholders of reclamation district have no speedy or adequate remedy, so that their rights must be enforced and adjusted according to equitable principles (Pol. Code, § 3459; §§ 3456, 3480, as amended by St. 1931, pp. 754, 762, §§ 1, 6; § 3466a, as added by St. 1931, p. 773, § 7).

2. Drains ⇐18.

Levees and flood control ⇐34.

Each bondholder holding matured coupons is entitled to share, in proportion to his

holdings, in fund realized from assessment levied on lands within reclamation district (Pol. Code, § 3459; §§ 3456, 3480, as amended by St. 1931, pp. 754, 762, §§ 1, 6; § 3466a, as added by St. 1931, p. 773, § 7).

3. Mandamus ⇐10.

Writ of mandate must be based on existing right, which can be neither enhanced nor lessened by application for writ.

4. Mandamus ⇐1.

Prerogative writ of mandamus should issue to prevent failure of justice, but not where injustice will result.

5. Mandamus ⇐110.

Where reclamation district funds are insufficient to pay all outstanding matured coupons attached to bonds, mandamus may issue to require substantial pro rata distribution where funds are sufficient for substantial payment (Pol. Code, § 3459; §§ 3456, 3480, as amended by St. 1931, pp. 754, 762, §§ 1, 6; § 3466a, as added by St. 1931, p. 773, § 7).

6. Mandamus ⇐176.

Where reclamation district funds are insufficient to pay all outstanding matured coupons attached to bonds, bondholder applying for mandamus is entitled to pro rata share in funds and no more (Pol. Code, § 3459; §§ 3456, 3480, as amended by St. 1931, pp. 754, 762, §§ 1, 6; § 3466a, as added by St. 1931, p. 773, § 7).

Application by C. Rohwer for writ of mandate to be directed to California Gibson, as Treasurer of Colusa County, wherein Delaplane Wilson intervened.

Writ directed to issue as to petitioner and intervener.

Harry B. Seymour and Clyde H. Brand, both of Sacramento, for petitioner.

Ralph W. Rutledge, of Colusa, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The petitioner in this action is the owner and holder of 1,395 of the outstanding bonds of reclamation district No. 2047, of the aggregate value of $1,395,000. All of said bonds are dated July 1, 1924, and are of the face value of $1,000 each, bearing interest at the rate of 6 per cent. per annum, payable semi-annually. On July 1, 1932, there became due on each bond the sum of $30, as evidenced by the coupons attached thereto; that on the 1st day of July, 1932, there became due on the bonds held by your petitioner the sum of $41,850, being the amount of the interest coupons falling due on said date; that the respondent in this action is the county treasurer of Colusa county, and is the custodian of the bond fund of reclamation district 2047; that reclamation district 2047, hereinafter referred to as "Reclamation District," is a duly organized and existing reclamation district under the laws of the state of California existing in Colusa and Glenn counties, the greater portion thereof existing in the county of Colusa, which county is designated as the main county of said reclamation district; that on the 1st day of July, 1932, the predecessor in interest of the petitioner presented to said county treasurer of Colusa county, and custodian of the funds of said reclamation district, all of the coupons herein referred to, and demanded payment of the same by the said county treasurer; that the respondent, as treasurer of said Colusa county, and custodian of the funds of said reclamation district, thereupon refused, and still continues to refuse to pay the amount due on said coupons, or any proportion thereof; that thereupon, and after refusal of the respondent to pay said coupons, demand was made for the registration thereof, and said coupons were registered by the respondent by listing the same in a book kept by her designated as "Registration Ledger of Reclamation District No. 2047," and indorsing the fact and date of registration on the back of said coupons; that on the 1st day of July, 1932, there was in the bond fund of said reclamation district the sum of $50,742.12 applicable to the payment of interest coupons on the bonds of said reclamation district falling due on said date.

The petition then sets forth that there was due on the 1st day of July, 1932, on coupons outstanding, the sum of $54,840. The record shows, however, that these figures are inaccurate, and that there was in fact an outstanding indebtedness on coupons falling due on the 1st day of July, 1932, in the sum of $65,340. The petition concludes with a prayer that a writ be issued by this court directing and commanding the respondent, as custodian of the funds of said reclamation district, to pay to the plaintiff, in cancellation of the coupons referred to, the sum of $41,850, or to show cause why such payment should not be made.

The petition of the intervener, Delaplane Wilson, sets forth that he is the owner and holder of five certain bonds of said reclamation district of the value of $5,000; that said bonds were registered on the 1st day of June, 1928; that interest became due on said bonds on the 1st day of July, 1932, in the sum of $150; that demand has been made upon the respondent as custodian of the funds of said reclamation district, for payment, but that no such payment has been made; and that said payment has been refused. The prayer of the intervener is that the respondent be required to pay the interest

due on said registered bonds and that priority be given in the making of such payment.

The answer of the respondent sets forth that following the 1st day of July, 1932, and the 8th day of August, 1932, there had been presented to the respondent for payment additional coupons on bonds of said reclamation district, maturing on July 1, 1932, the sum of $20,130, and that demand had been made upon the respondent for payment of the same; that the amount of money on hand in the bond fund of said reclamation district, available for the payment of said coupons of said bonds maturing July 1, 1932, is and was insufficient to pay the coupons so presented, and for which payment was demanded; that the deficiency in the amount of money in the hands of the respondent to pay the total of the interest coupons maturing July 1, 1932, arose by reason of the fact that the installment of the assessment theretofore levied on the several tracts of land in the reclamation district from which said bonds and interest are to be paid, and of which an installment thereof in an amount sufficient to pay said coupons maturing July 1, 1932, plus 15 per cent. allowed for estimated delinquencies, though regularly called, had not been paid on all of the lands lying within said reclamation district; that the tracts of land upon which said call for the payment of an installment of said assessment had become delinquent, had been regularly sold in the manner provided by law, and in large part had been bought in by said respondent as trustee of said reclamation district, and that when redeemed, if they are redeemed or otherwise disposed of, sufficient money will be available to pay all of the coupons maturing July 1, 1932.

It is further shown that, if the installments now delinquent on certain tracts of land are paid, or the lands redeemed from delinquent sales, additional sums will come to the hands of the respondent applicable to the payment of said coupons. The record does not show to what extent the delinquencies will affect the ability of the district to pay and discharge all of the coupons maturing on July 1, 1932; nor is there anything of record showing whether any moneys will actually be received by the payment of delinquent taxes, or the sale of the lands upon which delinquent taxes have become due; nor is any time fixed within which such moneys will be or can be received. In other words, the record leaves us wholly uncertain to what extent the insufficiency of the funds will affect the ability of the district to discharge its obligations. The only certainty shown by the record in relation to the funds of the reclamation district is that the total of the coupons falling due July 1, 1932, and presented for payment, exceeded the money in the hands of the respondent as custodian of the funds of the reclamation district in the sum of about $15,000, against which demands have been made for payment of coupons of the value of $61,980.

Upon the facts thus presented, What are the rights of the petitioner and intervener? Are they entitled to an order of this court directing full payment of the coupons presented by them, by reason of the fact that they have followed up their demand by this proceeding seeking to compel such payment? Or should the court, recognizing that the money should not be held by the treasurer for an indefinite time, direct payment to the petitioner and intervener of a proportionate share of the moneys in the hands of the treasurer available for payment of matured coupons?

Before reviewing the cases cited by the respective counsel and making their application, the various sections of the Political Code relating to reclamation districts may profitably be compared with the sections of the California irrigation district laws, and their dissimilarity pointed out in order that the holding of the different cases may be correctly applied to our decision herein. This course is necessitated by reason of the fact that some of the cases cited are based upon reclamation laws and others upon irrigation district laws.

Section 52 of the California irrigation district laws specially provides that matured bonds and interest coupons shall be paid upon presentation. This section was amended after the decision of the Colorado Supreme Court based upon irrigation district laws reading the same as section 52, supra, prior to its amendment. The portion of the section referred to reads as follows: "Upon presentation of any matured bond or any matured interest coupon of any bond of the district, the treasurer shall pay the same from the bond fund." St. 1897, p. 272, § 52, as amended by St. 1919, p. 667, § 11. The section was amended as to time of payment in 1931 (Stats. 1931, p. 172, § 1). Section 52, supra, also provides that unpaid coupons may be registered and shall bear interest at the rate of 7 per cent. per annum from the date of presentation for payment until notice is given that funds are available for making such payment. Section 39 of the California irrigation district laws (as amended by St. 1931, p. 122) provides for the levy and collection of taxes every year. This levy of taxes is not made or based upon any benefits theretofore determined as being received by any of the lands within the district. The taxes are levied practically in the same manner as county or municipal taxes, to wit, the value of the land is taken into consideration in making the assessment, and then the taxes levied upon the value of the land in the district sufficient to meet the bond and coupon interest fund, or as it is now called in the

act, "the bond fund." The irrigation district laws also provide for enforcing the collection of the taxes in the manner similar to that of collecting county or municipal taxes.

It is further provided in the California irrigation district laws that unpaid registered interest coupons shall be paid in the order of their registration; thus, if at any semiannual period coupons are presented after the funds have been exhausted by payment of coupons previously presented, the holder of the coupons registered under such circumstances is entitled to priority of payment whenever funds are available therefor. The taxing power conferred by the California irrigation laws continues so long as the district is in existence, and by reason of the fact that unpaid coupons may be registered and thereafter draw interest at an advanced rate, compensation is made to the holder of such coupons for any disadvantage suffered by reason of deferred payments. The reclamation district laws are silent as to many of these provisions. The paragraph of section 3480 of the Political Code, as amended by St. 1931, p. 762, § 6, establishing a bond fund reads as follows: "All moneys collected by any county treasurer upon any assessment upon which bonds shall have been issued, including all moneys derived from sale of land for delinquent installments, or from redemption thereof, or from sale of lands bought by the treasurer at any such sale, shall be by such treasurer forthwith paid into the main county treasury and except as otherwise provided in section 3466a of this code, shall be credited to the bond fund of such reclamation district and used exclusively for the payment of principal and interest of said bonds issued on such assessment, and of the principal and interest of any refunding bonds issued thereon." Section 3466a, supra (as added by St. 1931, p. 773, § 7), relates to procedure of the sale of lands for delinquent taxes, and need not be further considered herein. Section 3456 of the Political Code (as amended by St. 1931, p. 754, § 1) contains the procedure to be followed in making assessments of the lands lying within reclamation districts.

After the plans for the reclamation district had been approved and the cost thereof ascertained or estimated, commissioners are appointed to view the lands within the district, and to make an assessment thereon according to the benefits that will accrue to each particular tract by reason of the reclamation. After this is done, the amount of the assessment is called at different times and in different installments, as may be necessary to meet the expenses and pay the bonded indebtedness and the interest on the bonds.

Section 3459 of the Political Code authorizes the levying of a supplemental assessment in the event that the original assessment is insufficient to provide for the complete reclamation of the lands of the district, or if further assessments are from time to time required to provide for the protection, maintenance and repair of the reclamation works.

Section 3456, supra, also provides that in the levying of taxes there shall be included in incidental expenses an amount necessary for the payment of interest on any refunding bonds that may be issued by the district.

Section 3480, supra, also provides that the lien of any unpaid assessment upon which bonds shall have been issued shall continue until all said bonds and any refunding bonds that may be issued shall have been paid in full, and, in the event that any bonds are unpaid, a supplemental assessment may be made upon the lands within the district, according to the provisions of section 3459, sufficient to pay the unpaid principal and interest. The supplemental assessment is authorized to be enforced in the same manner as the original assessment.

It will be noted that in the California irrigation district laws there is no limit to the levying of taxes similar to the provisions found in the reclamation district laws. One is a straight levying of taxes from year to year upon the assessed valuation of the property; in the other there is first an assessment placed upon the lands according to the estimated value of the benefits to accrue thereon. When the collection of taxes has reached the value of the benefits conferred upon the lands within the district, there is then no legal provision for placing any additional burdens. In other words, if under such conditions the bonded indebtedness has not all been paid, there exists no legal provision by means of which the holders thereof may receive payment. Reassessments or supplemental assessments can only be made upon the lands of a reclamation district so that the amount thereof will not exceed the benefits accruing to the lands assessed. Kadow v. Paul, 274 U. S. 175, 47 S. Ct. 561, 71 L. Ed. 982. Nor can any reassessment be made until all the installments covering the original assessment have been called and proceedings taken looking to the collection of delinquent taxes and sales of lands for delinquent taxes fully completed. This is true for the simple reason that it cannot be ascertained what amount is necessary to cover the outstanding indebtedness of the district, reassessment being possible only when the original assessment undervalues the benefits received by the different parcels of land from the reclamation works carried out by the district.

We do not need to consider the provisions of the Political Code relating to refunding bonds, nor to the sections relating to the calling of installments of taxes, further than to

say that the assessment mentioned in the section refers to the estimated value of the improvements to the respective tracts of land placed thereon by the commissioners appointed to view the lands of the district, and that the several installments relate to the amount of money called for when the estimate is made as to the sum needed to pay the maturing bonds and maturing interest coupons thereon. The assessment to which we have referred underlies the bond issue, and, if the assessment is equal to the benefits accruing to the lands, there is nothing left to support the bond issue to the extent, if and when such bond issue exceeds in value the amount of the assessment.

The provisions of the Political Code relating to the collection of money for the payment of bonds and interest coupons refer only to the collection of installments. The installments are not separate assessments. There is only one assessment, although there may be a number of installments; that is, the payment of the one assessment may be called for at different times and in different amounts until the whole of the assessment has been called for. As we read the Political Code it contemplates that there shall be but one assessment supporting a bond issue; that the assessment shall be sufficient therefor; and that supplemental or additional assessments can only be made, as we have stated, when such supplemental or additional assessments will not exceed the value of the benefits accruing or conferred.

A reading of the different Political Code provisions prescribing the procedure to be followed in enforcing the payment of any particular installment shows very clearly that a long time must necessarily intervene between the calling of the installment and the realization, if ever, of the collection of any delinquent taxes.

Section 3466a, supra, after providing for the sale of lands upon which taxes had become delinquent, empowers the trustees of the district, when the land has been sold to the treasurer as trustee, to manage and control the land, lease it out to tenants upon such reasonable rental as may be determined upon, and the revenues derived therefrom credited to the particular delinquent tract.

[1] From this résumé of the Political Code it is evident that the holders of unpaid bonds have no speedy or adequate remedy; that the process of levying supplemental or additional assessments is not only long and tedious, but involves court proceedings and uncertainties which readily distinguish the right of such bondholders from the holders of bonds issued under and in pursuance of the irrigation laws of the state. These contingencies and differences we think differentiate the one from the other so that equitable principles which might not apply to one may be readily invoked and applied in the other in order that bondholders may have equal treatment and no one given special advantages.

The differences in the laws relating to irrigation districts and reclamation districts in other states from the Code provisions of California must be kept in mind in considering the cases having to do with bonds of different districts. In the case of State ex rel. Bliss et al. v. Grand River Drainage District of Livingston and Linn Counties, 49 S.W.(2d) 121, 125, the Supreme Court of Missouri, in an action in mandamus, brought for the purpose of compelling payment of interest coupons, we find the following: "This statute [referring to the act of 1929] clearly contemplates that the taxing power with which a drainage district is vested shall be so exercised as to make provision for the payment in full of all bonds which it authorizes. It does not appear from the record here that the power with which respondent drainage district is armed to assess, levy, and collect taxes for the purpose of paying its bonds and the interest thereon has been exhausted, nor that the future exercise of that power will not be fruitful in obtaining the necessary funds. On the contrary, it is admitted 'that the proper officers of said district and of said Livingston and Linn Counties are now engaged in collecting said taxes levied and assessed as aforesaid.' In these circumstances the equitable doctrine of equality as applied in the apportionment among creditors of the funds and assets of an insolvent debtor is without application. It is also within the contemplation of the statute * * * as shown by various and sundry of its provisions, that taxes levied by a drainage district may become delinquent and that because of such delinquency bonds issued by it may not be paid at their maturity. Yet, the statute is wholly silent as to preferences or priorities as between the holders of matured bonds, when the funds at a given time are not sufficient to pay all. Nor does it contain a requirement, or even an intimation, that none of such bondholders shall be paid until funds are available to pay all. On the contrary, by the clearest implications it places upon the board of supervisors the imperative duty to pay matured and maturing bonds and interest installments as long and as often as funds are available for that purpose."

The opinion in the Grand River Drainage District Case further states that, if the district were a private corporation with definite ascertainable assets, and those assets insufficient, when liquidated, to meet its obligations to creditors, principles of equitable adjustment could probably be invoked, but that the district was a municipal corporation with general assets, etc., and that its indebtedness was payable solely from a special fund to be

derived from taxation of lands lying within the boundaries of the district.

The circumstances of the Grand River Drainage District Case are not similar to those presented here. In the former case it is shown that the officers are proceeding with the collection of the taxes, and the court there was justified in assuming that a sufficient amount to pay all the maturing obligations would be realized. Here, it is shown that taxes have gone delinquent; that sales have been made and the realization of sufficient funds depends upon many contingencies, to wit, whether the lands will be redeemed; whether the lands can be sold to pay the taxes; and whether the lands that have been bought in by the treasurer as trustee of the district can be disposed of, or as we have seen, managed by the trustees of the district in such a way as to realize any revenues therefrom. In any event, realization of funds is dependent on postponed events which may never take place.

Again, section 10788 of the Revised Statutes of Missouri (Mo. St. Ann. § 10788), providing for the issue of bonds by reclamation districts, makes all the deferred interest coupons interest-bearing, that is to say, whenever an interest coupon is presented for payment, and funds are not sufficient to redeem the same, that coupon bears interest from the date of its presentation for payment until it is paid. The reading of the section is as follows: "All bonds and coupons not paid at maturity shall bear interest at the rate of six per centum per annum from maturity until paid, or until sufficient funds have been deposited at the place of payment and the said interest shall be appropriated by the board of supervisors out of the penalties and interest collected on delinquent taxes or any other available funds of the district." There is no similar provision in the Political Code of this state. Under the California reclamation laws interest coupons do not bear interest, and the holder thereof is not compensated for any delay caused by payment to a bondholder who has previously presented his interest coupons for payment and exhausted the fund available therefor.

The opinion of the court in the Grand River Drainage District Case, supra, does not indicate that the court had before it or considered any question as to the moneys collected on account of the special improvement assessment being a trust fund to which all bondholders must look for payment, and to payment out of which each bondholder was equally entitled. That money paid into the hands of a depositary on account of improvement assessments is a trust fund is supported by all the authorities, some of which we will hereafter cite.

[2, 3] If the holders of bonds issued by the district stood upon an equality immediately preceding the filing of a petition for a writ of mandate by one of them, we do not perceive how the rights of any of the bondholders can be changed by reason of any such action. In the instant case it appears that there is in the hands of the respondent, as the custodian of the moneys received on account of the assessment levied on the lands within reclamation district 2047, sufficient to pay approximately 75 per cent. of the matured interest coupons. Each bondholder holding matured coupons is entitled to his equal proportion of that sum, and to have payment made to him of that sum. Thus, if the petitioner in this case was entitled only to a payment of 75 per cent. of the amount of the interest accrued upon the coupons held by him, how can it be concluded that he is entitled, either equitably, legally, or logically, to enhance his payment 25 per cent. simply by filing a petition praying for a writ of mandate? As we understand the law, a writ of mandate must be based upon an existing right, and that existing right can neither be enhanced nor lessened by the filing of a petition praying for such writ. Hence, the right of the petitioner to only 75 per cent. of the payment upon his coupons out of the trust fund was and is the right upon which his petition is based. That the petitioner may be entitled to full payment or remedies that may exist against the district, is an entirely different proposition from demanding payment out of the trust fund in the hands of the custodian, other or greater than the equitable proportion to which he is entitled.

In the cases of Meyer v. Porter, 65 Cal. 67, 2 P. 884, and Meyer v. Widber, 126 Cal. 252, 58 P. 532, payment was allowed in full in mandamus proceedings, but an examination of those cases discloses that what we are here presenting was not considered. The opinions in those cases entirely overlooked the fact which exists in this case of the moneys collected upon a special assessment constituting a trust fund.

Some weight appears to have been given in the Widber Case to the fact that six months elapsed before any of the coupon holders had instituted an action; nor is there anything in either one of the cases indicating that there were any circumstances showing that full payment of the bonds would probably never be made. So far as those cases are concerned, the fund, to all intents and purposes, was spoken of as though it were inexhaustible, and in the Widber Case, that the coupon holders might otherwise have been compensated; all of which distinguishes the two California cases just cited from the circumstances with which we are dealing.

In Bates v. McHenry (Cal. App.) 10 P.(2d) 1038, relied upon by the petitioner, this court was dealing exclusively with the irrigation laws which we have pointed out as being

essentially dissimilar in its provisions from the reclamation district laws. We there called attention to the particular wording of section 52 of the irrigation district laws, as amended in 1931 (Stats. 1931, p. 172, § 1), wherein the irrigation laws were amended providing that bonds and interest coupons should be paid upon presentation. Unpaid bonds and coupons could be registered, bear interest, and thereafter take priority in payment. Those questions are not involved here.

Again, the moneys raised to pay the indebtedness of an irrigation district depend upon an inexhaustible taxing power which may be continued from year to year until all outstanding obligations are discharged. Under the reclamation laws this is not the case. A special fund, fixed by a special assessment, depending in its amount upon benefits conferred, is created for the redemption of the bonded indebtedness of the district. The holder of a bond against an irrigation district receives compensation on account of deferred payments, and at the same time relies upon the inexhaustible taxing power of the district. The holder of a bond issued by a reclamation district has simply one fund raised, as we have stated, out of which he may expect payment, and the taxing power is limited and circumscribed, and cannot constitutionally go beyond the benefits conferred upon the land.

It follows from these considerations that, while if it were necessary to reaffirm everything said in the case of Bates v. McHenry, that case would not be controlling here by reason of the differing provisions of the acts of the Legislature involved in the respective cases.

[4] In the Bates Case, supra, this court called attention to the holding of the Colorado Supreme Court, Thomas v. Patterson, County Treasurer, etc., 61 Colo. 547, 159 P. 34, and the case of Norris et al. v. Montezuma Valley Irr. Dist. et al. (C. C. A.) 248 F. 369, in which cases the irrigation district law of the state of Colorado, being similar in its provisions relative to the payment of bonds and interest coupons, with the reclamation law of this state, it was held that as there was no priority between bondholders, one bondholder could not maintain mandamus proceedings to compel payment in full of his interest coupons to the exclusion of others who are equally entitled to payment. Those cases distinguished by this court in the case of Bates v. McHenry, supra, are authority for the holding here that priority should not be given to any coupon holder by reason of the fact that he is first in filing a petition for a writ of mandate; that his right was only to a proportionate share of the trust fund, a right which could not be enhanced, but might be enforced by mandamus proceedings. We may here state that mandamus is a prerogative writ and should never be used by the court to effectuate an injustice, but only to prevent a failure of justice (16 Cal. Jur. 764); and, while the writ may always be employed to enforce a right, we have not been able to discover any authority holding that the writ may be used to enhance a right.

The circumstances under which a writ of mandate will be issued requiring payment in full, are clearly stated in the opinion of the Supreme Court of Florida in the case of State ex rel. Gillespie et al. v. Carlton et al., 138 So. 612, 618, to wit: "To support relators' contentions in this respect, there appear to be many adjudicated cases which hold that the rule is that, when a fund has accrued in the hands of a debtor which is insufficient to pay all bonds payable out of such fund, one bondholder of the series for which the raising of such fund was pledged when the bonds were issued may have his bonds ordered paid in full from the funds in his debtor's hands, even though the fund at the time of bringing suit is not sufficient to pay all the outstanding bonds then matured, it appearing that the funds in hand are accruals from the exercise of an inexhaustible power of taxation, and that the whole fund required, of which the fund in hand is but a part, is replenishable by the further exercise of the inexhaustible taxing power, thereby enabling the debtor to ultimately pay all who may have claims against the fund as a whole. City of Galena v. U. S. ex rel. Amy, 5 Wall. 705, 18 L. Ed. 560; City of New Orleans v. U. S. ex rel. Stewart, 49 F. 40 (C. C. A., 5th Circuit); Meyer v. Porter, 65 Cal. 67, 2 P. 884; Ward v. Piper, 69 Kan. 773, 77 P. 699, 700; Voorhies v. Mayor, etc., of City of Houston, 70 Tex. 331, 7 S. W. 679; United States ex rel. Dana v. Village of Kent (C. C. N. D. Ohio) 107 F. 190; City of Austin v. Cahill, 99 Tex. 172, 88 S. W. 542, 89 S. W. 552; State ex rel. v. City of New Orleans, 37 La. Ann. 13 (cited with approval in City of New Orleans v. U. S. ex rel., supra); Select and Common Councils of City of Williamsport v. Commonwealth, 90 Pa. 498; Henrylyn Irr. Dist. v. Thomas, 66 Colo. 300, 181 P. 980; Hook v. German-American Bank, 152 App. Div. 253, 136 N. Y. S. 1019." The fund in that case was found to be not inexhaustible, and the writ applied for was denied.

In the recent case of Meyers et al. v. City of Idaho Falls et al., 11 P.(2d) 626, 628, the Supreme Court of Idaho, in considering the nature of the fund collected on account of special improvement assessments, held as follows: "Under the statute the municipality had the power to levy the entire cost of each improvement in one assessment. Its officers chose, however, to issue bonds for a ten-year period. The bonds succeed to the lien of the original assessment, and the assessments thereafter levied and collected is a 'trust

fund pledged by law for the payment of the bonds.' Jewell v. City of Superior (C. C. A.) 135 F. 19. The only duty with which the city officials are charged is the levying of assessments and payment of the funds collected to the bondholders (Moore v. City of Nampa [C. C. A.] 18 F.(2d) 860), and there is no contention that the city has not fulfilled its obligation in this connection. The deficiencies which exist have arisen because the owners of certain parcels of property within each district failed to pay their assessments and general taxes, and the property reverted to the county, freed of the liens of the bonds. It follows, as hereinbefore stated, that the funds collected by the city by means of special assessments are trust funds, pledged to the payment of the bonds issued against each district. Public improvement bonds are instrumentalities for the spreading of local improvement assessments over a period of years, and the maintenance of the lien therefor against the property benefited. Assessments collected are public funds, impressed with a trust in favor of the bondholders. Jewell v. City of Superior, supra."

In addition to the foregoing cases holding such moneys to be trust funds, we may also cite the following: Conway v. City of Chicago, 237 Ill. 128, 86 N. E. 619; Wells v. Village of Wilmette, 193 Ill. App. 30; People v. Flynn, 265 Ill. 414, 106 N. E. 961.

In the case of Rothschild v. Village of Calumet Park, 262 Ill. App. 96, an action to enforce pro rata payment of bonds and interest coupons based upon a special assessment, it was held that the court might properly direct payment of a certain percentage of the moneys held by the treasurer or custodian of such funds, so as to pay to each bondholder his proportionate share of the trust fund.

[5, 6] In People ex rel. Security Trust Co. of Rochester v. Treasurer of Monroe County, 191 N. Y. 15, 83 N. E. 661, the court of appeals of the state of New York upheld a mandamus proceeding directing the payment of a percentage of the moneys collected based upon a special improvement assessment, where the moneys were insufficient to pay the entire indebtedness, holding that the bondholders were entitled to be paid such percentage pro rata out of the moneys in possession of the treasurer; that such distribution should not be delayed indefinitely or await the possibility of collecting all of the assessment, or until sufficient funds might possibly be collected to make payment in full. The procedure pointed out in that case, and also in the case decided by the appellate court of Illinois, supra, seems to us to be both just and equitable. The holding of those cases is to the effect that the treasurer or custodian of the funds collected on account of the special assessment may properly be required to pay, out of the funds so collected, to each of the bondholders, his proportionate share thereof, and that mandamus is a proper remedy; that the person bringing the mandamus proceedings is entitled only to his proportionate share; that the issuance of the writ is dependent upon there being a showing that there is sufficient money in the hands of the treasurer or custodian to make a substantial pro rata distribution. In the New York Case the amount distributed approximated 30 per cent. of the outstanding indebtedness.

It appearing from the record in this case that the respondent now has in her possession as custodian of the funds of reclamation district 2047, the sum of $50,878.50, against which there is an outstanding indebtedness due and payable in the sum of $65,340, distribution can be made of a substantial sum to the respective bondholders, and that at least payment can be made to the extent of 75 cents on each dollar of the indebtedness evidenced by the interest coupons now due.

It is therefore ordered that a writ of mandate issue directing the respondent to make payment in that sum to the petitioner herein, and also to the intervener.

I concur: R. L. THOMPSON, J.

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SHAPIRO v. SHAPIRO.

Civ. 8588.

District Court of Appeal, First District, Division 1, California.

Oct. 17, 1932.

1. Divorce ⇐108, 150(2).

Wife need not prove each allegation of cruelty in her divorce complaint, but if enough material facts relied on to establish cruelty are proved, other findings may be disregarded as surplusage (Civ. Code, § 94).

2. Divorce ⇐286.

Whether wife's conduct toward husband amounted to cruelty or was sufficiently culpable to necessitate denial of divorce sought by her was fact question for trial court to determine on sharply conflicting evidence (Civ. Code, §§ 94, 122).

3. Divorce ⇐286.

It is within trial court's province to pass on weight and sufficiency of conflicting evidence in divorce suit.

4. Appeal and error ⇐1012(1).

Judgment cannot be reversed on appeal merely because greater weight or preponder-

ance of evidence is on appellant's side, but only when there is total absence of competent evidence sustaining material findings.

5. Divorce ⇐286.

Trial court's determination on conflicting evidence as to valuation of, and income from, community property, awarded parties to divorce suit, is conclusive on appeal.

6. Divorce ⇐286.

Appellate court will presume that trial court properly awarded wife, granted divorce for extreme cruelty, larger share of community property than husband, in absence of clear showing of abuse of discretion (Civ. Code, § 146, par. 1, and § 148).

7. Divorce ⇐252.

Wife making out case of extreme cruelty in her suit for divorce on such ground was entitled to more than half of community property (Civ. Code, § 146, par. 1).

8. Divorce ⇐252.

Court's award of community property worth about $35,000 net and producing annual net income of $9,500 to wife granted divorce for extreme cruelty, and property worth only about $19,000 net and producing only $900 net annual income to husband, *held* not abuse of discretion (Civ. Code, § 146, par. 1, and § 148).

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action for divorce by Rebecca Shapiro against M. Shapiro, who filed a cross-complaint and plea of recrimination. Judgment for plaintiff, and defendant appeals.

Affirmed.

Wyckoff, Gardner & Parker, of Watsonville, for appellant.

Edwin T. McMurray, of San Francisco, for respondent.

WOODWARD, Justice pro tem.

Plaintiff instituted an action for divorce on the ground of extreme cruelty, setting forth eleven specific acts of marital misconduct on the part of the defendant. The trial court found in favor of plaintiff and against the defendant's cross-complaint and plea of recrimination.

[1] Appellant states in his opening brief that as to several of the accusations pleaded by plaintiff and found to be true by the court, the evidence is in "substantial conflict," but urges, nevertheless, that the judgment should be reversed for the reason that his own recriminatory plea was fully established. This, of course, is rather an indefinite challenge to the sufficiency of the evidence. It is not suggested, we may observe parenthetically, that the accusations of plaintiff concerning which the evidence was in conflict, were trivial in character, and for this reason it is immaterial whether other accusations, covered by the findings, were supported by the evidence. It was not necessary that plaintiff should prove each of the allegations of cruelty set forth in her complaint. If enough of the material facts relied on were proved to fulfill the definition of extreme cruelty as it appears in section 94 of the Civil Code, other findings may be disregarded as surplusage. Avery v. Avery, 148 Cal. 239, 246, 82 P. 967; Hawkins v. Hawkins, 104 Cal. App. 608, 613, 286 P. 747.

Before discussing appellant's point with reference to his recriminatory defense, it seems pertinent to allude briefly to the evidence adduced in support of the wife's cause of action. We do not, however, deem it necessary to set forth all of the acts of appellant pleaded by the plaintiff and found by the trial court to have been committed. A few of them will suffice.

Plaintiff testified that her husband possessed a violent temper, was in the habit of calling her vile and obscene names, and, on several occasions, slapped her face, beat, and choked her. These instances of personal violence usually climaxed a quarrel between the couple concerning money matters, or the defendant's business. On March 3, 1930, according to the wife's testimony, she suggested to appellant that he pay certain notes at one of the banks in Salinas; appellant immediately resented the suggestion and during a quarrel that ensued struck plaintiff over the head with a heavy book. Sam Shapiro, elder son of the couple, testified that on one occasion (he could not fix the date) he had seen defendant throw a book at plaintiff; that it "glanced off the top of my mother's head and hit her glasses and knocked her glasses back." This witness corroborated his mother as to other instances of appellant's violence. He recalled that, on another occasion, the defendant attacked plaintiff while she was in the kitchen, knocking her down, and otherwise mistreating her. The boy further testified that he had frequently heard his father call the plaintiff vile names, including "whore," and threaten to kill her. One instance of defendant's misconduct is best told in the boy's own language: "Q. How did you happen to leave military school? A. One day my father came down there and he came out with my mother and got me, and on the way my mother started to tell him how much I learned and everything while I was there, and my father told her that he spent a lot of money on me that he would not have to if it was not for her, because he could have trained me just as well at home, and then he got mad and started to going faster and faster in his car

and he told us he was going off the road and into the fence and kill us all, and I talked to him and I cried and he told us that he would run into the fence and then he cooled off a little bit. * * *"

Charles Nadeau, a laborer, testified that during the latter part of the year 1929 he saw the defendant strike plaintiff and knock her down. "Q. (By the Court) You say he knocked her down? A. Yes. Q. Tell what was done then? Let's get that over with. A. Well, in the house they lived in the kitchen is a small one and the dining room is a small one and she was coming from the kitchen into this dining room and he hit her and knocks her down and shoves his fingers toward her eyes, and if I remember right he knocked her glasses off."

Mrs. Ted Hennekin, a neighbor, testified that during the month of November, 1929, she heard a "lot of commotion" in the defendant's home "like blows being struck" and heard plaintiff say, "Don't, please don't." E. J. Emerick, a former employee of the defendant, testified that in October, 1927, he saw the defendant kick plaintiff and heard him call her "an old whore."

"Q. When Mr. Shapiro kicked Mrs. Shapiro, what position was she in? A. She was stooping over.

"Q. Describe exactly how it was done. A. He come up behind her and she was stooped over and he kicked her over. * * *

"Q. Did you see any more conflict between them? A. Yes.

"Q. What was said or done? A. He said that he was going to kill her if she didn't get out, and he picked up a shovel and was going to hit her with it. * * *

"Q. When he had the shovel raised up, what happened? A. She ran into the house."

Appellant now takes the position that his conduct, "if not always justified," in almost every instance was the result of great provocation, and that plaintiff, not having come into court with clean hands, should have been denied a divorce. "Recrimination is a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce." Civ. Code, § 122. It has been said that while a plaintiff's conduct may fall short of the statutory definition of cruelty, yet it may be sufficiently culpable to warrant the court in denying any relief to plaintiff, especially if such conduct was of a kind calculated to cause the acts charged against the defendant. 9 Cal. Jur. 690.

[2-4] The provocative conduct, described in great detail by appellant at the trial and on which he apparently relied as an offset for his own derelictions, seems to have been a firm, and sometimes angry, insistence on the part of the wife that she be given a voice in the management of his business affairs. According to appellant's testimony, Mrs. Shapiro went to his junk yard daily where, without his consent and over his protests, she bought and sold goods, and gave directions to employees. Frequently, he went on to testify, she disagreed with him concerning details of the business, and on such occasions called him a "lazy bum" and other uncomplimentary names. She kept a watchful eye on his bank account, and, on one occasion, according to appellant's version, she visited the bank where his funds were deposited and made derogatory remarks in the presence of officials concerning his credit. Appellant testified that his domestic troubles reached a climax when he undertook to improve certain real property which he owned at Salinas. The improvements consisted of a hotel and several small cottages, the property being referred to at the trial as "Bungalow de Luxe Court." During the construction of these buildings, he averred, plaintiff asserted herself in an officious and meddlesome manner; she insisted on giving orders to the contractor and workmen, and, on one occasion, demanded that certain changes be made in the plans which necessitated expensive alterations in work partially completed. A number of witnesses corroborated appellant as to plaintiff's presence and activity during the building operations. Several of these witnesses insisted that plaintiff endeavored to superintend the work, and, while so doing, often spoke harshly and contemptuously of appellant. Other witnesses, called on behalf of plaintiff, gave an entirely different version of her activities. For example, Fred Miller, one of the carpenters engaged in building bungalow court, testified in part as follows:

"Q. Did Mrs. Shapiro ever interfere with you as a workman on the place? A. No, other than to suggest things. * * *

"Q. Was her approach to you and her talk to you—was that in a commanding and antagonistic way or was it asking your opinion on whatever it was? A. It was just simply asking my opinion or my suggestion.

"Q. Did it in any way interfere or retard you as a workman in your work? A. It didn't."

Plaintiff's own explanation of her "interference" with the building operations undoubtedly satisfied the trial court that she had been actuated solely by a desire to be helpful and not to annoy or harass the appellant. The following excerpt from her testimony is typical of plaintiff's explanations:

"Q. Did you tell him (her husband) your opinion of different things? A. Yes. When we first built the garages he used to go away for a week or two weeks and at that time we had the foundation already and we had the apartments and I said that they shall not work on the front walls of the two houses and

I thought it would take fifteen feet and then when it came I explained to him and showed him the little sketch I had made and when he went back and talked and I showed where he would have an income from these two apartments, three-room apartments.—

"Q. Did you show him that sketch you made? A. Yes.

"Q. Did he use that sketch? A. Well, he didn't want to. He swore and said it was not my business but he went and built it and took my advice."

Without quoting further from the voluminous transcript in this case, it is patent from the foregoing excerpts that there was a sharp conflict in the evidence as to the conduct of plaintiff. That she possessed a sharp tongue and was sometimes contentious and vituperative in her attitude towards defendant is indicated by much of the testimony, but whether her conduct, as a whole, amounted to cruelty, or was sufficiently culpable to necessitate a denial of the relief sought by her was a question of fact addressed to the court below. The trial court doubtless concluded from all the facts and circumstances of the case that the plaintiff's linguistic excesses and other faults, if any, were negligible in comparison with the brutality and torrential obscenity of the defendant. And it scarcely seems necessary to add that, where the evidence is conflicting, as in the present case, it is within the province of the trial court to pass upon its weight and sufficiency. A judgment cannot be reversed on appeal merely because the greater weight or preponderance of the evidence is on the side of one party or the other, but only when there is a total absence of competent evidence to sustain a material finding. Jennings v. Weibel, 204 Cal. 488, 268 P. 901; Reay v. Butler, 95 Cal. 206, 30 P. 208; Hill v. Hill, 106 Cal. App. 309, 313, 289 P. 227; Thoele v. Thoele, 102 Cal. App. 387, 393, 282 P. 1001.

[5-8] Lastly, appellant urges that the trial court was harsh and unjust to him in its assignment of the community property and that the judgment should at least be revised on appeal. Plaintiff was awarded certain real property situate in the city of Salinas and referred to for convenience as "Bungalow de Luxe Court," together with all furnishings and equipment belonging thereto. In addition, the defendant was ordered to pay her $150 a month for the support of herself and two minor children until the entry of the final decree. The court found the value of the real property awarded plaintiff to be in the sum of $59,789.75, which, deducting an incumbrance of $24,100 with accumulated interest in the sum of $842.50, to be assumed by plaintiff, leaves a net value of $34,847.25. The defendant received the remainder of the community property, consisting of the "north Main street lots," valued at $19,000, the "Harvest street lot," valued at $1,000, and miscellaneous personal property having an aggregate value of $3,099.73. The total value of the community property thus assigned to the defendant, less certain debts in the sum of $3,631.51, which, assuming he must pay, is $19,468.22. Appellant complains that the court adopted the lowest valuation testified to with reference to the property awarded plaintiff, and the highest for the property awarded the defendant. It is contended also that the court disregarded, with resultant prejudice and injustice to appellant, the fact that the bungalow court property produced a net income of $9,500 for the year next preceding the trial, while the net income for the same period from the property awarded defendant was only $900. Basing his argument on testimony, which seems to have been received for an entirely different purpose, appellant contends that plaintiff was awarded property paying 6 per cent. on $158,333. This contention possesses more plausibility than substance. The defendant himself did not claim, while testifying, that the property in question was worth more than $65,000. Moreover, the evidence was conflicting both as to valuation and income, and in these circumstances the trial court's determination is conclusive on appeal. Nor does the fact that plaintiff was awarded a larger share of the community property than defendant necessarily indicate an abuse of discretion on the part of the court below. Section 146, paragraph one, of the Civil Code provides that, when the divorce is granted on the ground of adultery, or extreme cruelty, "the community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties, may deem just." It is true, as pointed out by appellant, that, under section 148 of the same Code, the appellate court may modify or revise an award of community property "in all particulars, including those which are stated to be in the discretion of the court." But unless there is a clear showing of an abuse of discretion, it will be presumed that the trial court acted properly, even though the decree may appear harsh. Rose v. Rose, 112 Cal. 341, 44 P. 658; Lynch v. Lynch, 69 Cal. App. 66, 230 P. 462; White v. White, 86 Cal. 219, 24 P. 996. Moreover, the plaintiff having made out her case of extreme cruelty was entitled to more than one-half of the community property. Brown v. Brown, 60 Cal. 579, 580; Thomsen v. Thomsen, 31 Cal. App. 185, 188, 159 P. 1054; Nave v. Nave, 35 Cal. App. 27, 169 P. 253. Indeed, it has been expressly held, as a uniform rule, that "when the decree is on the ground of extreme cruelty the award to the unoffending spouse must be substantially greater than that to the one

who is at fault." Quagelli v. Quagelli, 99 Cal. App. 172, 178, 277 P. 1089, 1091. We cannot say there was an abuse of discretion by the court in its award of community property to plaintiff.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

126 Cal.App. 501

WHITE v. CITY OF SAN DIEGO et al., and three other cases.

Civ. 915–919.

District Court of Appeal, Fourth District, California.

Sept. 28, 1932.

Rehearing Denied Oct. 27, 1932.

Hearing Denied by Supreme Court Nov. 25, 1932.

1. Pleading ⇐36(1).

Pleader is bound by interpretation adopted by him in his pleading.

2. Appeal and error ⇐882(3).

Plaintiffs, defeated on pleadings seeking liquidated damages accruing under unfulfilled options to purchase riparian lands, could not ask for reversal on theory of moneys due in payment for privilege granted.

3. Damages ⇐78(6).

Agreement to pay specified damages if city constructed dam and failed to exercise option to purchase riparian lands *held* "penalty" and not recoverable (Civ. Code, § 1671).

Facts disclosed that the city did not agree to build a dam nor purchase riparian lands, and that, in so far as the amount of specified damages applied to the city's failure to exercise its option, it was but an attempt to compel the acceptance of the option by the city, and, in so far as the amount applied to the construction of the dam, it was not the fixing of damages sustained for the "breach" of an agreement within Civ. Code, § 1671, permitting parties to liquidate damages in advance for breach of contract, but for the performance thereof.

[Ed. Note.—For other definitions of "Penalty," see Words and Phrases.]

4. Damages ⇐78(6).

When, with giving of option, there is coupled a provision for amount to be paid in case option be not accepted, such amount is a "penalty" and not recoverable.

This is so, since such additional provision is so inconsistent with the purpose and intent of the "option" which, by its very nature, vests in the optionee the exclusive right to determine whether the option shall be accepted or rejected, that it necessarily follows that the fixing of such amount was intended as either penalty for failure to perform in certain manner, or attempt to insure such performance, and is but a penalty in either case.

[Ed. Note.—For other definitions of "Option," see Words and Phrases.]

Appeals from Superior Court, San Diego County; A. C. Finney, Judge.

Actions by F. M. White, by Everett Peet and wife, by Lillian P. Judson and others, by Donald A. Moore and another, and by F. Herbert Judson and another against the city of San Diego and others. From judgments for defendants in all cases, the several plaintiffs appeal.

Affirmed.

Wright & McKee, of San Diego, for appellants.

C. L. Byers, of San Diego, for respondents.

SCOVEL, Justice pro tem.

The above-entitled actions, all based on analogous facts were consolidated for trial in the lower court. Judgment was entered in favor of defendants in all cases, from which judgments the several plaintiffs have appealed. The appeals have also been consolidated for hearing in this court.

From the transcript, it appears that in 1926 the city of San Diego was contemplating the construction of a dam on the San Dieguito river, in San Diego county, for the impounding of water to be diverted from the watershed to the city and used for domestic purposes. It was therefore necessary that the city purchase or condemn the lands of the riparian owners lying below the dam site. Negotiations for the purchase thereof were entered into, and as a result the option agreements upon which these various actions are based were executed. With the exception of the amounts set forth in such agreements they are, for the purpose of these appeals, identical. The Prentice option is typical. It recites the city's contemplated construction of the dam, known as the Sutherland dam, the pendency of an application by the city before the department of water rights for the right to appropriate and divert water from the San Dieguito river for domestic purposes and the desire of the city to purchase the lands lying below the dam and riparian to the river in order that it might proceed with the project without prejudice to the owners of such lands. The contractual provisions then follow whereby for a consideration of $50 the city is given the option for one year

to purchase the land described therein for $125,000, with the right to renew or extend the option for an additional two years upon payment of $25,000. Upon acceptance of the option and payment of the purchase price, the landowner agrees to furnish good and sufficient deeds conveying the land to the city, together with a certificate of title thereto.

Then follows the disputed portion of the option agreement, from which this litigation arises. Set forth in full, it reads as follows:

"(a) It is understood by and between the Owner and the City that the City may, before it elects to exercise its option to purchase the Owner's land, as hereinbefore provided, begin the construction of the Sutherland dam, the construction of which would impound and divert from the San Dieguito River into another watershed a large portion of the storm waters that are accustomed to flow down the San Dieguito River and through the San Pasqual Valley toward the sea.

"(b) It is expressly understood and agreed by and between the Owner and the City that in the event the City should commence the construction of said dam and should not exercise its option to purchase the lands of the Owner the said Owner would sustain damages, but the exact amount of said damages is not ascertainable and the parties agree that from the very nature of the case it would be impossible and/or extremely difficult to fix the actual damage, and the City therefore promises and agrees that in the event it should construct the Sutherland dam and should not exercise its option to purchase the lands of the Owner, as in this contract provided, that it will pay to said Owner the sum of sixty-two thousand five hundred dollars ($62,500.00) as liquidated damages, and that said sum so determined as liquidated damages shall be due and payable from the City to the Owner on the day on which the said City, not having exercised its option to purchase the Owner's land, parts with said option and loses its right to purchase the lands of the Owner, as herein provided.

"(c) This obligation and promise on the part of the City to pay the aforesaid sum as liquidated damages, shall attach to and be binding upon the City upon the date on which it loses its option to purchase said lands, regardless of whether the Sutherland dam has been completed or whether water has actually been diverted."

The city did not purchase the lands during the first year of the option, but did pay the $25,000 for a two-year renewal or extension thereof. During the option periods, the city commenced the construction of Sutherland dam, and proceeded with the work until the structure was approximately 50 per cent. completed. At that time all work ceased and the dam virtually abandoned, although it was left in such condition that it might be completed some time in the future.

Thereafter, the option periods provided for in the various agreements expired without the city either purchasing the lands or making any of the payments provided for therein and referred to as liquidated damages, as set forth in the above-quoted portion of the Prentice option. The various plaintiffs filed their claims with the city for the allowance of the specified amounts set forth as "liquidated damages" in their respective options, which claims were refused, and thereupon these actions commenced.

The complaints are substantially the same. They recite the voting of bonds by the city of San Diego for the construction of Sutherland dam, the issuance and sale of such bonds, and the execution of the option agreements above described; copies thereof being attached to the complaints as exhibits. The complaints further allege with particularity that portion of the option agreement above quoted providing for the payment of liquidated damages in case Sutherland dam should be constructed and the city fail to exercise its option to purchase the lands described in the option. It is then alleged that, by reason of the city's commencement and prosecution of the construction of said dam and its failure to exercise its option to purchase, the plaintiffs have sustained actual damage; that, from the nature of the case and the existing circumstances at the time of the execution of such option agreement, it was impracticable and extremely difficult to fix the amount of damage that the owner of said lands would sustain by reason of the city's failure to exercise its option to purchase said lands, and, by reason of its commencing and prosecuting the construction of said dam, specifically setting forth various reasons therefor; that, by reason of the city's having commenced the construction of said dam and failing to purchase the lands described in such option agreement, the amount set forth therein as liquidated damages is due and payable as liquidated damages, for which amount judgment is asked. The answer of defendants is in the nature of a general denial, setting up certain special defenses which, however, are not involved in this appeal.

The court found that, if the Sutherland dam should be completed, it would impound the greater portion of the flow of the stream, and that the damage thereby occasioned plaintiffs, as riparian owners of land below the dam, would have been uncertain in amount and impracticable of ascertainment, but that the construction of such dam had not proceeded to a point where it in any way interrupted the natural flow of the stream, and that therefore none of the plaintiffs had sustained any actual damage thereby. The court

further found that the execution of the agreements, giving the city an option to purchase plaintiffs' land for a three-year period, and the commencement of the construction of said dam, did interfere with and hinder the selling of said lands and the development and handling thereof by the plaintiffs during the life of said agreements; that the provision in each contract providing for liquidated damages in case the dam was commenced and further conditioned upon the failure of the city to exercise its option was in truth and in fact a penalty and unenforceable. Judgment in favor of the defendants was thereupon entered.

A great portion of appellants' brief consists of an argument to the effect that the damages claimed are neither liquidated damages nor a penalty, but an agreement on the part of the city to pay the amount set forth as liquidated damages for the right and privilege of constructing Sutherland dam, and not as damages that might be sustained by plaintiffs through the construction of the dam. He argues that the city had no right to construct a dam even upon lands riparian to the San Dieguito river which it might own where such construction was with the avowed purpose of diverting water from the watershed, without first purchasing or condemning the lands of lower riparian owners, citing Collier v. Merced Irrigation District, 213 Cal. 554, 2 P.(2d) 790. That the option agreement, and particularly that portion of it hereinabove quoted, gave to the city the right, however, to construct such dam without such purchase or condemnation upon payment to plaintiffs of the respective amounts therein set forth, although designated as liquidated damages; that a court is not bound by the terms used in an agreement, and even though the parties may designate the payment of moneys as liquidated damages, the court, in construing the provision therefor, will determine the same according to the fact, and not be bound by the terminology used by the parties; that the agreement involved herein, properly construed, provides for the granting of a right with two alternatives as consideration therefor; that is to say, that the city was given the right or privilege of constructing the dam, and as consideration therefor could either purchase plaintiffs' properties or pay the amount stipulated in the agreement—citing such cases as Smith v. Bergengren, 153 Mass. 236, 26 N. E. 690, 10 L. R. A. 768; Johnston v. Cowan, 59 Pa. 275.

[1] It will be noted that the theory of the pleadings upon which these actions are based is entirely that of a recovery of the various amounts as liquidated damages. The complaint in each action alleges with great particularity that the commencement of the dam and failure of the city to purchase plaintiffs' lands caused actual "damage"; that the amount of such "damage" is impracticable and extremely difficult to fix, and that "the actual loss to the owner of said lands by reason of the city's failure to exercise its right to purchase the lands * * * and by reason of its commencing and prosecuting the construction of said Sutherland dam * * * was not ascertainable" for various reasons therein set forth. The complaint further alleges that, by reason of such action on the part of the city, the amount prayed for became due "as liquidated damages"; that plaintiffs filed with the city their various claims for damages "for the failure of said city to pay said sum agreed upon as liquidated damages." Considerable evidence was introduced at the trial upon the question of damage or injury to plaintiffs' lands. It is quite apparent, therefore, that the case was tried entirely upon the theory of a recovery of "liquidated damages" and not of moneys due in payment for a right or privilege granted. "The pleader is bound by the interpretation adopted by him and set forth in his pleading." Tennant v. Wilde, 98 Cal. App. 437, 277 P. 137, 143; Silvers v. Grossman, 183 Cal. 696, 192 P. 534.

[2] A plaintiff must recover, if at all, upon the issues framed by his pleadings, and cannot for the first time ask for a reversal in the appellate court upon a theory not embraced within the pleadings nor within the issues tried. It is quite possible that, had plaintiffs pleaded in the lower court the facts upon which they now ask for a reversal, defendant city might have set up other and additional defenses. It is sufficient for us to say that we are of the opinion the point now advanced by appellants cannot be considered. 2 Cal. Jur. 237; Merrill v. Kohlberg, 29 Cal. App. 382, 155 P. 824; U. S. Farm Land Co. v. Darter, 42 Cal. App. 292, 183 P. 696.

Appellants further contend, however, that the provisions for liquidated damages were valid and enforceable as such, and that they were therefore entitled to recover the stipulated sums. It will be noted that the parties apparently attempted to liquidate or fix in advance the damages that plaintiffs would sustain, not only by reason of construction of the dam, but also by reason of the failure of the city to purchase lands upon which it had been given an option. It might perhaps be conceded that the construction of a dam of the apparent size and magnitude of that herein involved would of necessity cause injury and damage to the riparian lands lying below the structure by impounding and diverting therefrom the flow of water to which such lands would be entitled as riparian to the stream upon which the dam was located. It might also be conceded that the amount of such damage would be "impracticable or extremely difficult to fix."

[3, 4] Civil Code, § 1671, however, only permits the parties to a contract to liquidate in advance damages which may be sustained by a breach of such contract. In the case at bar, the city did not agree to build a dam nor did it agree to purchase plaintiffs' lands. Any attempt to stipulate the amount of damages which plaintiffs might sustain through construction of the dam or failure to purchase their lands certainly was not the fixing of damages sustained by plaintiffs for the breach of an agreement, but rather for the performance thereof. Such is not within the purview of the statute. And, in so far as the amount stipulated applies to the failure of the city to purchase plaintiffs' lands, it is difficult to see how the fixing of such amount to be paid by the city for its failure to exercise an option which, according to the very terms of the option, might or might not be exercised by it in its own discretion, could be construed as other than an attempt to compel the acceptance of such option by the city. The very nature of an option vests in the optionee the exclusive right to determine whether the option shall be accepted or rejected, and when, with the giving of an option, there is coupled a provision for an amount to be paid in case the option be not accepted, such additional provision is so inconsistent with the purpose and intent of the option, it necessarily follows that the fixing of such amount was intended as either a penalty for failure to perform in a certain manner or an attempt to insure such performance. It is but a penalty in either case, and as such is not recoverable. 8 Cal. Jur. 844.

Certain findings of the court are also attacked. In finding No. 1, the court found that the city did not commence the construction of the dam by reason of or pursuant to the written consent of the plaintiffs contained in the option agreements. In finding No. 2, the court found that the damages which plaintiffs might have sustained, had the dam been completed, were a proper subject of agreement for liquidated damages, but that such damages were waived by plaintiffs and compensated for by the option money paid. In finding No. 3, the court found that the plaintiffs were not damaged by the partial construction of Sutherland dam. In finding No. 5, the court found that the mere commencement of the dam did not injure plaintiffs' lands in any manner, and in the nature of things could not cause any damage until the construction thereof reached a point where water was impounded or diverted by such dam, and in finding No. 6 found that any right given to the city to divert water from the San Dieguito river was dependent upon the consummation of the purchase of plaintiffs' lands and the completion of the dam. Having reached the conclusion that the amounts prayed for are not recoverable by reason of the invalidity of the provision therefor itself, any error in such findings becomes immaterial.

The judgments appealed from are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

126 Cal.App. 787

Edward H. WEBB and Cora Belle Webb, Plaintiffs and Appellants, v. The CITY OF SAN DIEGO (a Municipal Corporation), Defendant and Respondent.

Civ. 912.

District Court of Appeal, Fourth District, California.

Sept. 28, 1932.

Rehearing Denied Oct. 27, 1932.

Hearing Denied by Supreme Court Nov. 25, 1932.

Appeal from Superior Court, San Diego County; A. C. Finney, Judge.

Wirt Francis, of San Diego, for appellants.

C. L. Byers, City Atty., of San Diego, for respondent.

SCOVEL, Justice pro tem.

The facts in this case are identical with those in the case of F. M. White v. City of San Diego et al. (Cal. App.) 14 P.(2d) 1062, except the description of the property involved and the payments set forth in the option agreement upon which the action is based. The decision in the White Case has this day been filed. The questions of law involved in the instant case are identical with those in the White Case.

Therefore, for the reasons given in the case of White v. City of San Diego et al., the judgment in this case is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

126 Cal.App. 777

PEOPLE v. McFARLAN.

Cr. 148.

District Court of Appeal, Fourth District, California.

Oct. 14, 1932.

Rehearing Denied Oct. 27, 1932.

1. Criminal law ⇐196.

Conviction does not bar conviction upon another charge if evidence required to support former is insufficient to warrant conviction upon latter without proving additional fact.

2. Criminal law ⇐200(1).

Conviction for carrying pistol without license *held* not bar to subsequent conviction for carrying revolver after being convicted of felony (St. 1923, p. 695, § 2, as amended by St. 1931, p. 2316; St. 1923, p. 697, § 5).

3. Indictment and information ⇐110(38).

Information charging carrying of revolver by one previously convicted of felony in language of statute *held* sufficient, without alleging facts regarding previous conviction (St. 1923, p. 695, § 2, as amended by St. 1931, p. 2316).

4. Criminal law ⇐429(1).

To prove defendant, charged with carrying firearms, had previously been convicted of felony, portions of records of prison within which he had been confined *held* admissible (Pen. Code, § 654).

5. Criminal law ⇐695(2).

Defendant's counsel claiming that portion of exhibit was inadmissible should have pointed out objectionable portions.

6. Criminal law ⇐1202(3).

In prosecution of exconvict for carrying pistol, evidence of prior conviction of embezzlement *held* admissible; statute being inapplicable (Pen. Code, § 1025).

7. Criminal law ⇐1201.

In statute respecting habitual criminals, word "theft" must be construed as including crime which was formerly designated as embezzlement (Pen. Code, §§ 490a, 644).

[Ed. Note.—For other definitions of "Theft," see Words and Phrases.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Robert Roy McFarlan was convicted of violating the Firearms Act, and he appeals.

Affirmed.

Tom Okawara, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

AMES, Justice pro tem.

The appellant was convicted of a violation of the provisions of section 2 of an act of the Legislature approved June 13, 1923, commonly known as the "Firearms Act" (St. 1923, p. 695, as amended by St. 1931, p. 2316). The charging part of the information is as follows: "The District Attorney of the County of Fresno hereby accuses Robert Roy McFarlan of a felony to-wit: Possession by an exconvict of a firearm capable of being concealed upon the person, in that on or about the 27th day of May, 1932, in the County of Fresno, State of California, he had in his possession and under his custody and control a firearm having a barrel less than twelve inches in length, to-wit: a revolver; he, the said defendant, being then and there a person who had previously been convicted of a felony against the person and property of another."

In addition to the foregoing allegation in the information appellant is further charged with three prior convictions, namely, petit larceny, for which it is alleged he served a term in a state reformatory in the state of Indiana; burglary and embezzlement, for each of which he is alleged to have served terms in state prisons in California.

After being arraigned the appellant pleaded not guilty to the charge contained in the information, but admitted the three prior convictions and further pleaded once in jeopardy.

[1, 2] At the trial appellant offered in evidence a certified copy of a complaint which had been previously filed in the police court of the city of Fresno, charging him with the crime of carrying a concealed weapon, in violation of section 5 of the said Firearms Act, together with the entries from the docket of said police court, from which it appears that the appellant was convicted as charged in the complaint and was sentenced by the court to pay a fine of $25, or, in case said fine be not paid, that he be imprisoned in the county jail of the county of Fresno until the fine was duly satisfied in the proportion of one day's imprisonment to every $2 of the fine. Appellant also offered in evidence the commitment issued out of said police court, committing him to the county jail pursuant to the judgment of the court. To this offer the district attorney objected and the objection was sustained. Section 2 of the Firearms Act, in so far as it is pertinent to the issues involved here, is as follows: "On and after the date upon which this act takes effect, no unnaturalized foreign born person and no person who has been convicted of a felony against the person or property of another or against the government of the United States or of the State of California or of any political subdivision thereof shall own or have in his possession or under his custody or control any pistol, revolver or oth-

er firearm capable of being concealed upon the person. The terms 'pistol,' 'revolver,' and 'firearms capable of being concealed upon the person' as used in this act shall be construed to apply to and include all firearms having a barrel less than twelve inches in length."

The provisions of section 5 of said act, under which appellant was convicted in the police court, are as follows: "Except as otherwise provided in this act, it shall be unlawful for any person within this state to carry concealed upon his person or within any vehicle which is under his control or direction any pistol, revolver or other firearm capable of being concealed upon the person without having a license to carry such firearm as hereinafter provided in section eight hereof. Any person who violates the provisions of this section shall be guilty of a misdemeanor, and if he has been convicted previously of any felony, or of any crime made punishable by this act, he is guilty of a felony."

Appellant contends that the crime of which he was convicted in the police court is the same offense of which he was charged in the superior court and that his conviction in the police court is a bar to the present action. He relies upon section 654 of the Penal Code, which is in part as follows: "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other."

That section was referred to and construed in the case of People v. Johnson, 82 Cal. App. 411, 256 P. 273, 274. In that case the defendant was charged with the crime of practising medicine without a license. He attempted to plead once in jeopardy and to prove in support thereof a former charge of abortion. In that case the court said: "The fact that the evidence may have been the same in both cases and that the proof in the former case may have been sufficient to warrant a conviction in the latter does not necessarily establish the claim that the defendant had been once in jeopardy or had been acquitted of the second charge. An acquittal or a conviction upon one charge is not a bar to a conviction upon another, if the evidence required to support the former is not sufficient to warrant a conviction upon the latter without proof of any additional fact. Ebeling v. Morgan, 237 U. S. 625, 59 L. Ed. 1151, 35 S. Ct. 710 [see, also, Rose's U. S. Notes]. 'The true test is: * * * Could the defendant have been convicted upon the first indictment upon proof of the facts, not as brought forward in evidence, but as alleged in the record of the second.' State v. Nash, 86 N. C. 650, 41 Am. Rep. 472; People v. Brannon, 70 Cal. App. 225, 233 P. 88; People v. Mehra, 73 Cal. App. 162, 238 P. 802. The alleged fact that the defendant committed the offense of practicing medicine without a license does not even tend to show that he committed the crime of abortion."

In the case of People v. Day, 199 Cal. 78, 248 P. 250, 252, the indictment contained two counts, the first of which accused the defendant of the crime of assault with caustic chemicals; the second count charged her with the same offense, different phraseology having been adopted. The defendant was convicted on count 1 and acquitted on count 2 and contended that an acquittal on count 2 would operate as an acquittal of the charge contained in count 1 because, as she claimed, the offenses therein charged were identical. In upholding the judgment of the lower court the appellate court said:

"It may be conceded that, if the two counts stated precisely the same offense, an acquittal upon one count would operate as an acquittal upon the other count. * * * It is not the great similarity in most of the facts constituting separate offenses, but the presence of a fact necessary in one offense and absent in another, that determines whether offenses are separate. Murphy v. United States (C. C. A.) 285 F. 801, 814; Gavieres v. U. S., 220 U. S. 338, 342, 55 L. Ed. 489, 31 S. Ct. 421 [see, also, Rose's U. S. Notes]; Morey v. Commonwealth, 108 Mass. 433.

"This is the test used to determine the validity of a plea of once in jeopardy interposed to a subsequent indictment after an acquittal or conviction upon one indictment."

The test to be applied to a plea of former jeopardy is again stated in the case of People v. Nelson, 70 Cal. App. 476, 233 P. 406, 407, in which the court said: "It has repeatedly been held that one test applicable to determine the identity of the offense is to ascertain if the evidence which is necessary to support the second information was admissible under the former, and was sufficient if believed by the jury, to have warranted a conviction of that crime."

The fact that the same testimony is necessary to establish both the offense with which the defendant is charged and the one upon which he bases his claim of former jeopardy is not the test. In the case of In re O'Connor, 80 Cal. App. 647, 252 P. 730, 732, it is said: "But where, as here, entirely separate and distinct offenses are charged in two counts, and one is not necessarily included within the other, a prosecution for one is no bar to a prosecution for the other, even though the same testimony may be applicable to both."

It will be noted that the elements of the offense of which the appellant was convicted in the police court are entirely different from those contained in the charge of which he was later convicted in the superior court. The failure of the accused to procure a license to carry such weapon is an element of the offense charged under section 5 which is en-

tirely lacking in the offense charged under section 2. On the other hand, the essence of the crime denounced by section 2 of the act under consideration is that the accused should be a "person who has been convicted of a felony against the person or property of another or against the government of the United States or of the state of California or any political subdivision thereof." From a comparison of these two sections of the act the conclusion is inevitable that the complaint in the police court charged an offense entirely different from that of which the appellant was convicted in the superior court; that the elements of the two offenses were materially different; and that therefore he was not placed in jeopardy nor did the court err in sustaining objections to the proffered evidence.

[3] The appellant next contends that the information does not charge the commission of a public offense, in that it does not sufficiently inform him as to the place where and the time when he was formerly convicted of the felony, nor the court in which such conviction was obtained, nor the name of the penal institution in which he was confined. The charging part of the information which is hereinabove quoted follows the language of the statute and we think that in this case such allegation is sufficient. It was so held in the case of People v. Bertolani, 69 Cal. App. 137, 230 P. 675. The defendant in that case was prosecuted under section 2 of the Firearms Act and the information in that case alleged: "The said L. Bertolani * * * being then and there an unnaturalized foreign-born person, did willfully, unlawfully," etc. The court said: "Every fact necessary to constitute the offense defined by the act in question is charged in the information. It therefore sufficiently charges a public offense." It will also be noted that the foregoing case was decided in 1924, prior to the amendments to sections 951 and 952 of the Penal Code allowing greater latitude in criminal pleadings.

[4] Appellant earnestly contends that the court erred in permitting the introduction in evidence of a copy of certain records of the state prison at Folsom, together with a copy of the minutes of certain meetings of the board of prison directors of that institution. The records so received in evidence disclose the fact that the appellant had, in May, 1921, been committed to the state prison at Folsom by the superior court of Los Angeles county, after a conviction in that court of the crime of embezzlement. A resolution of the board of prison directors discloses that the length of the confinement of appellant under the commitment from Los Angeles county was, on the 11th day of June, 1926, fixed at six years. Other minutes record the proceedings of the board of directors in granting a parole. There is also attached to this exhibit a "descriptive card" containing a minute physical description of appellant with detailed statements as to his personal history, from which it appears that he was what is known in prison parlance as a "third termer." To this is also annexed a photographic reproduction of his finger prints and photographs showing a profile and a front view of the appellant.

Appellant urges that the introduction of this record was prejudicial error. In order to prove that the appellant was "a person who had previously been convicted of a felony" as alleged in the information, it was competent to introduce portions of the records of the prison within which he had been confined. Section 969b of the Penal Code provides as follows: "For the purpose of establishing prima facie evidence of the fact that a person being tried for a crime or public offense under the laws of this state has been convicted of an act punishable by imprisonment in the state prison of this state, and has served a term therefor in any penal institution, or has been convicted of an act in any other state, which would be punishable as a crime in this state, and has served a term therefor in any state penitentiary or reformatory, or has been convicted of an act declared to be a crime by any act or law of the United States, and has served a term therefor in any penal institution, the records or copies of records of any state penitentiary or reformatory or federal penitentiary in which such person has been imprisoned, when such records or copies thereof have been certified by the official custodian of such records, may be introduced as such evidence."

[5] His conviction of the prior offense could have been proven without the introduction of the extraneous matters contained in the prison records. However, all of the records above referred to were offered in evidence as one exhibit and the objection thereto was general, upon the ground that the same was incompetent, irrelevant, and immaterial. In presenting his objection counsel for the appellant, in referring to the proffered exhibit, said: "It contains a lot of surplus matter not pertaining to any conviction whatsoever." But he failed to point out in his objection or at any time during the trial, to what surplus matter he referred. Nor did he differentiate between that portion of the exhibit which was material and competent and that which should have been excluded. In fairness to the court and counsel, we think he should have pointed out whatever portions of the exhibit were objectionable.

[6] Appellant next contends that it was error for the court to permit the people to introduce evidence of his prior conviction of embezzlement (which had been admitted by appellant when he entered his plea) in order to prove that he was a person who had been previously convicted of a felony as alleged in

the information. Ordinarily it would be error to refer to any such conviction, and a violation of the provisions of section 1025 of the Penal Code; but in this case the prior conviction is of the essence of the crime with which the appellant was charged and is a part of the res gestae. In the case of People v. Forrester, 116 Cal. App. 240, 2 P.(2d) 558, 559, after quoting from section 1025 of the Penal Code, the court says: "If the foregoing provisions of section 1025 of the Penal Code apply to the offense of which the defendant was convicted in this action, it would be impossible ever to convict the defendant on this charge. For the offense described in the indictment includes, as a substantive part of the offense, the fact that the person charged with having in his possession the prohibited firearm is a person 'who has been convicted of a felony against the person or property of another,' etc. Notwithstanding the fact that the defendant upon his arraignment admitted the prior conviction, as separately stated in the indictment, he pleaded not guilty to the principal offense and thereby put in issue the alleged fact that, at the stated time and place, he had in his possession the described firearm, he having been theretofore legally convicted of a felony, to wit, burglary, etc. Considering the two statutes together, we are satisfied that the provisions of section 1025 of the Penal Code were not intended to apply to a case where the fact of former conviction is an integral part of the present offense concerning which the defendant is brought to trial. If any additional ground of reconcilement of the two statutes should seem to be necessary, the fact may be noted that the Firearms Act of 1923 is of much later date than said section of the Penal Code, and is of necessity, pro tanto, a repeal of said section 1025, Penal Code."

[7] Lastly, the appellant contends that the court erred in adjudging appellant to be an habitual criminal. Section 644 of the Penal Code provides in part as follows: "Every person convicted in this state of any felony who shall have been previously twice convicted upon charges separately brought and tried, and served a term therefor in any state prison and/or federal penitentiary, either in this state or elsewhere, of the crime of * * * grand theft * * * shall be adjudged an habitual criminal." The crime of embezzlement, says appellant, is not enumerated among the felonies, two previous convictions of which are necessary to authorize an adjudication that the accused is an habitual criminal. However, this contention is answered by the provisions of section 490a of the Penal Code. "Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor." It will be noted that appellant's former conviction of embezzlement occurred in 1925. At that time the crime of embezzlement was a separate and distinct crime from that of theft. However, in 1927 (St. 1927, p. 1046), the definition of embezzlement, larceny, and other similar offenses, were consolidated in section 484 of the Penal Code and designated as the crime of "theft." All of the elements of the crime formerly designated as embezzlement are now incorporated and included in the crime of theft and the designation of the word "theft" in section 644 of the Penal Code must be construed as including the crime which was formerly designated as embezzlement. We find no error in the record prejudicial to the rights of appellant.

The judgment and order appealed from are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

126 Cal.App. 698

KRETZSCHMAR et al. v. JANSS INV. CO. et al.

Civ. 7420.

District Court of Appeal, Second District, Division 1, California.

Oct. 10, 1932.

1. Vendor and purchaser ⇐49.

Under option contract whereby vendor reserved rights of way for public utilities and easement for drainage pipes or conduits, vendor's dedication of drainage easement under which county constructed flood control ditch *held* unauthorized.

2. Vendor and purchaser ⇐351(6).

Purchaser's damages for vendor's unauthorized dedication of drainage easement *held* erroneously limited to costs of constructing bridge over storm drain, proper measure of damages being diminished value of land because of easement.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Fred Kretzschmar and another against the Janss Investment Company and others, in which defendants filed a cross-complaint. From a judgment for plaintiffs, defendants appeal.

Reversed.

Gibson, Dunn & Crutcher, of Los Angeles (Paul Watkins and Keith Bullitt, both of Los Angeles, of counsel), for appellants.

Maynard J. Givens, of Los Angeles, for respondents.

TAPPAAN, Justice pro tem.

The judgment from which this appeal is taken, gave to respondents the sum of $1,750, and provided that appellants take nothing by their cross-complaint.

The action as instituted by respondents was one for fraud. The appellants filed an answer to respondents' complaint and also a cross-complaint by which they sought to quiet title, as against respondents, to the lot or parcel of land involved in the cause of action as alleged by respondents in their complaint. The various transactions had by appellants in reference to the real property here involved were had with respondent Josie Kretzschmar. It would appear that her husband, Fred Kretzschmar, was joined in the proceeding merely by reason of his marital relationship.

The facts from which this controversy arose present but few conflicts of evidence and are as to most of the material issues undisputed. The evidence introduced at the trial was in large part documentary. Respondent Josie Kretzschmar on February 14, 1924, entered into a written *option* to purchase from appellants a certain lot or parcel of real property for the sum of $2,500 upon terms in said option specified. This instrument contained the following clauses: "It is understood that the Janss Investment Co. will reserve the right to grade or fill said property, and to construct street improvements, rights of way for public utilities, drainage, etc., right to impose such reasonable building restrictions and use restrictions on the respective lots of said tract as it may in its judgment deem most beneficial to such lots; that the property described in this option will be sold only subject to such restrictions and reservations and *also to any rights of way or other easements now of record.*" (Italics ours.) It appears from the record here that the lot upon which this option was given was much lower than the other lots in the same tract and that running across it there was a so-called *wash* where flood waters from lands above it at times flowed. It also appears that the price named in the option was less than that of the other lots in the tract. Appellant desired to purchase the lot with the view to making use of it as a garden and later placed there improvements useful for that purpose. Respondent Josie Kretzschmar testified: "The only representations which the agents of Janss Investment Company or any of its representatives made regarding this property other than what was contained in the written instrument itself was that we could put any building on there except a dairy or pig farm."

On April 22, 1924, appellants dedicated to the Los Angeles County Flood Control a strip of land through the lot upon which respondent held the above referred to option, and on the same day such dedication was duly recorded in the office of the county recorder of Los Angeles county. There is nothing in the record to show that respondents knew of this contemplated dedication nor that they knew that a work of the kind which was thereafter constructed upon this easement was to be placed upon the lot, until the time that it was actually constructed, some two years later.

The next day after the dedication above referred to, the parties to the option made and entered into a formal contract of sale for the lot in question. This contract contained the following paragraphs which are pertinent to this inquiry: "The buyer shall have immediate possession of said property * * * provided the buyer shall faithfully perform each and every obligation herein undertaken by him, * * * the seller shall deliver to the buyer * * * a deed of grant for said property, together with a certificate of title * * * showing the title to said property to be vested in the grantor named in said deed, free and clear of incumbrances, except the conditions, restrictions and reservations herein described. * * * 5. A perpetual easement is hereby reserved to the seller and its successors and assigns, in and over said real property, for the construction, maintenance and operation therein or thereon of drainage pipes or conduits and pipes, conduits, poles, wires and other means of conveying to and from lots in said tract gas, electricity, power, water, telephone and telegraph service, sewage and other things of convenience to the owners of lots in said tract." The lot agreed to be sold to respondents was described in this contract as "Lot number 11, * * * according to a map of said tract filed for record in Map Book 93 at pages 12, 13 of the records of said county." This map so referred to was the one that dedicated the right of way or easement to the Los Angeles County Flood Control and was placed of record the day before the contract was signed. The contract also contained the following clause: "The buyer hereby certifies that he has personally inspected the property herein described, has examined and checked map of same and knows that this property is the identical property he selected and purchased."

Respondents entered upon the lot so agreed to be sold and expended in the improvement thereof for the purpose of gardening thereon the sum of $2,000 before they had actual notice of the dedication of the easement to the flood control. Some two years after respondents went into possession of the lot in question, the flood control entered upon the lot and constructed across it, upon the easement granted by appellants, a storm drain. This easement as granted had a width of 75 feet and there is evidence that in parts of its length through the lot that earth had been

taken from the ditch and placed along the easement so that the space occupied was 100 or more feet across. The right of way had erected along it a wire fence some 5 or 6 feet in height. These works so erected cut the lot into two parts, leaving the improvements erected by respondents upon one part and this part completely cut off from the other part of the lot, by the ditch, banks of earth, and two wire fences.

[1] Appellants' first contention is that "The right to create the drainage easement was specifically reserved in both the written option and the written contract." This contention is based upon certain parts of the clauses of the option and contract of sale hereinbefore quoted. In the option there is a reservation of "rights of way for public utilities, drainage, etc.," while in the contract of sale the following is found: "A perpetual easement is hereby reserved to the Seller * * for the construction, maintenance and operation therein or thereon of drainage pipes or conduits. * * *" It will be noted that the words just quoted from the option are but a part of a general clause covering the right of the grantor of the option to improve the tract of which the lot in question was a part, and that read in conjunction with the rest of the paragraph would not convey to the general reader the thought that a work of the scope and magnitude of the flood control ditch was to be constructed, but rather that it had reference to improvements contemplated by the appellants in their development of the tract. There is no evidence in the record that appellants at any time told respondents of this proposed improvement to be constructed by a public agency nor that respondents were informed or knew that such a work was contemplated; one that would take the major part of the lot that they were about to purchase, and render the larger part left remaining, inaccessible.

The contract of sale which respondents accepted referred to the map upon which the easement was shown, but there is no evidence that respondents ever saw this map nor that their attention was ever called to it. This map was filed for record but a few hours before this contract was presented to respondents. It would seem that in common justice that appellants should have at this time by some act on their part directed respondents' attention to the material change that had been made in the lot by the dedication of this easement. The contract reserved the right to construct drainage pipes and conduits upon the property. Appellants cite authorities to the effect that conduit may mean canal or ditch. This may be true in some cases when the surrounding circumstances justify the use of the word in its broadest sense, but here when read in connection with the contract as a whole, no such meaning can be attached to the term. The option, when entered into, defined the limits of the contractual relation of the parties, and respondents were justified in standing upon its terms. Respondents never consented to any change or modification of this option. The property covered by the option did materially change in character and appellants had knowledge of this change, but failed to call it to the attention of respondents and so deprived them of the right to withdraw from the purchase. The instant case is one where one is induced to enter into a contract by "the suppression of that which is true, by one having knowledge or belief of the fact." Civ. Code, § 1572, subd. 3. The instant case differs from those cases where a deed is given as the closing incident of a purchase of land and constitutes an expression of the terms of the agreement reached in the transaction by the parties. Here the contract, in so far as an agreement of the parties upon the subject-matter had been reached, was evidenced by the option made some months before the contract of sale was delivered. The respondents were justified in relying upon this option and a duty rested upon the appellants to inform them of any material changes in the subject-matter which had taken place subsequent to the option. Hargrove v. Henderson, 108 Cal. App. 667, 292 P. 148. In view of the fact that this case must be reversed upon another ground, further consideration of this phase of the case is deemed to be unnecessary here.

[2] Appellants attack the finding of the trial court as to the damages allowed respondents, contending that there is no evidence to sustain the finding of damages in the sum of $1,750. The court's finding in this regard is as follows: "That it is true that the giving, granting, or dedicating of the easement or right of way to the Los Angeles County Flood Control by the defendants, to and over the plaintiffs' property and the construction of the ditch thereon as aforesaid, has damaged the plaintiffs' said real property hereinabove described and has and does now prevent the ingress and egress of plaintiffs and both of them to the easterly portion of their said real property and the building and improvements therein situated and that by reason thereof the plaintiffs have been damaged in the sum of $1,750.00, *the approximate cost of a bridge to cross the said easement or right-of-way on plaintiffs' property.* (Italics ours.) The only testimony offered at the trial on the subject of damages is that of respondent Fred Kretzschmar. He testified to the fact of the erection of the barrier by the flood control and that he was thereby cut off from access to a part of the lot in question; to the value of the improvements placed upon the property; and that he could cross the wash from one part to the other before the flood control was erected. He testified: "I have had an estimate of $1,750.00 as the cost of a bridge across the ditch and two bids of $233.00

and $250.00 for leveling off the dirt on either side of the ditch. If I had a bridge across the ditch I could go back and forth but $1,750.00 would not completely eliminate my damage."

From the finding made by the court and from the evidence offered at the trial, it is obvious that the measure of damages adopted by the court was confined solely to the cost of a bridge. There is no evidence as to the kind or character of the bridge or as to whether it was one reasonably necessary for the use required of it. There can be found in the record no evidence as to the detriment caused to the land involved by the structure complained of by respondents. The damages suffered must arise from the diminished value of the land by reason of the easement granted by appellants. The record here discloses no evidence upon this subject. "The real question in all such cases is whether or not the property, if it had been as represented, would have been of substantially greater value than its actual value in its real condition." Spreckels v. Gorrill, 152 Cal. 383, 390, 92 P. 1011, 1015. In the case of Rogaff v. Bartles, 115 Cal. App. 429, 1 P.(2d) 517, will be found a discussion on this subject, together with a collection of the authorities thereon.

Inasmuch as there is no evidence to support the finding on the subject of damages the cause must be reversed. From an examination of the record it appears that there was offered at the trial evidence of a substantial nature to support the court's findings on the issues presented by the cross-complaint. The questions presented upon this phase of the case were largely as to matters of fact which are not the subject of review here.

The judgment appealed from is reversed for the reason herein stated.

We concur: HOUSER, Acting P. J.; YORK, J.

BAUMGARTEN v. CALIFORNIA PACIFIC TITLE & TRUST CO. et al. *

PEAK v. BAUMGARTEN et al. (JOHNSON et ux., Interveners).

Civ. 8189.

District Court of Appeal, First District, Division 1, California.

Sept. 28, 1932.

Rehearing Granted Oct. 28, 1932.

1. Assignments ⇐58.

Order on escrow holder to pay part of fund due drawer to another *held* not legal assignment thereof pro tanto, where never accepted by drawee.

2. Assignments ⇐50(1).

Order on escrow holder to pay part of fund due drawer to another operates as equitable assignment, taking precedence over subsequent assignments and judgment liens as between drawer and payee, where given for adequate consideration, with intent to effect assignment, though no fund was in escrow holder's possession at time.

3. Assignments ⇐9.

Money to become due in future on happening of contingency may be assigned.

4. Assignments ⇐55.

Advancement of price of realty to purchaser and satisfaction of latter's indebtedness to lender constituted adequate consideration for purchaser's order on escrow holder to pay amount of such advancement and indebtedness from fund due purchaser.

5. Assignments ⇐55.

Antecedent indebtedness constitutes valuable consideration sufficient to support equitable assignment.

6. Assignments ⇐137.

Evidence *held* to justify trial court's finding that real estate purchaser's order on escrow holder to pay another amount of purchase price advanced and other indebtedness from amount deposited by lessee was intended as assignment.

7. Assignments ⇐49.

Assignment will be held to have occurred, where it clearly appears that drawer and payee of either negotiable or nonnegotiable bill intended to transfer title to chose in action, though assignor delivered order on debtor to assignee.

8. Assignments ⇐59.

Real estate purchaser, assigning part of sum deposited by lessee in escrow to persons advancing purchase money, could not revoke assignment.

9. Assignments ⇐85, 86.

Real estate purchaser's assignment of part of sum deposited by lessee in escrow to persons advancing purchase money took precedence over subsequent assignments to, and levies of execution under judgment for, another.

10. Assignments ⇐131.

Complaint, in action for amount deposited in escrow by lessee, *held* to state sufficient facts to support judgment for plaintiff on theory of equitable assignment of part of fund to plaintiff by lessor.

The complaint alleged agreement of lease, deposit of lessee's check for $18,000 in escrow, assignment of $16,500 of fund to plaintiff, execution and delivery

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 16 P.2d 332.

of order, directing payment thereof to plaintiff by escrow holder, contemporaneous indorsement of check, and execution of assignment and order in consideration of money advanced to lessor at his instance and request to purchase realty.

11. Assignments ⇐131.

Failure of complaint to allege that defendant's order on escrow holder to pay plaintiff part of fund was in effect when action therefor was commenced, and that plaintiff was owner and holder of assignment, *held* not fatal, in view of allegation that he was owner of, and entitled to possession of, sum in dispute.

12. Parties ⇐7(2).

One to whom purchaser of realty assigned part of sum, deposited in escrow by lessee, for benefit of both assignee and another, in consideration of advancement of purchase money, could sue for entire amount assigned; being trustee of express trust to extent of latter's interest (Code Civ. Proc. §§ 367, 369).

13. Parties ⇐7(2).

Person with whom or in whose name contract is made for another's benefit is trustee of express trust, and may sue with like effect as if principal (Code Civ. Proc. §§ 367, 369).

14. Trial ⇐397(5).

Findings by trial court as to assignment and judgment liens alleged in cross-complaint *held* unnecessary, in view of conclusions as to validity of previous assignment to plaintiff.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by E. A. William Baumgarten against the California Pacific Title & Trust Company, George Peak, and others, in which defendant Peak filed a cross-complaint against E. A. William Baumgarten and others, and Axel A. Johnson and wife intervened. From a judgment for plaintiff, cross-complainant appeals.

Affirmed.

A. Don Duncan, of San Francisco, for appellant.

Bianchi & Hyman, of San Francisco, for interveners.

Arthur L. Shannon, of San Francisco, for respondent.

OGDEN, Justice pro tem.

This action arises out of a controversy involving several conflicting claims to a sum of $16,500 held in escrow by the defendant California Pacific Title & Trust Company, a corporation, which will for the sake of brevity be hereinafter referred to as the title company. The trial court, after deducting the expenses of escrow, awarded the entire balance of the fund to the respondent. From this judgment the defendant and cross-complainant George Peak has appealed. None of the other parties to the action below, except the interveners Johnson and wife, have appealed, and, as the appeal of the latter has been dismissed, we are concerned on this appeal only with the respective claims to the fund of the appellant and the respondent.

Respondent claims the fund as assignee thereof of the Blackmore Investment Company, a corporation. Appellant bases his claims thereto both as assignee and as a judgment creditor of the same company. Both the purported assignment and the levies of execution upon which appellant's claims are based are admittedly subsequent in point of time to the assignment claimed by respondent.

The facts in so far as they have any bearing upon the points involved in this appeal, are substantially as follows: The interveners Johnson and wife owned a vacant lot adjoining the building of the Pacific Nash Motor Company on Van Ness avenue in the city and county of San Francisco. The latter being desirous of increased building space, the following real estate transaction was promoted and consummated. The Blackmore Investment Company purchased from the Johnsons their lot for $15,000 cash, giving for the balance of the purchase price a promissory note secured by a second incumbrance upon the property, placed a building loan thereon as a first incumbrance, with the proceeds of the loan erected a building thereon, and leased the premises to the Pacific Nash Motor Company. The agreement of lease between the Blackmore Investment Company and the Pacific Nash Motor Company provided for the deposit in escrow by the lessee of the sum of $18,000 to be paid to the lessor, upon the completion and acceptance of the building and the execution of the lease, to apply on the last year's rental under the lease. Accordingly, on October 9, 1926, the Pacific Nash Motor Company deposited with the title company its check, drawn on the Wells Fargo Bank and Union Trust Company, in the sum of $18,000, payable to the order of the Blackmore Investment Company, together with instructions that the check be delivered to the latter upon the completion and acceptance of the building and the execution of the lease. Why this deposit was not made in the form of cash as required by the agreement does not appear, but apparently no objection was made to the form of the deposit.

As the transaction for the purchase of the lot was originally contemplated, the $15,000 cash payment due the Johnsons as down pay-

ment was to be derived from this deposit of $18,000. This arrangement, however, not being satisfactory to the Johnsons, who insisted upon immediate payment, it became necessary, in order that the transaction be consummated, for the Blackmore Investment Company to raise the required sum of $15,000.

The Blackmore Investment Company was a corporation, the entire capital stock of which, with the exception of a few qualifying shares, was owned by one F. P. Mozingo, who was its secretary and apparently in sole control of the affairs of the corporation. Actively participating in the promotion of the transaction was one J. L. Stewart, a licensed architect, and acting as such in the designing of the building. The respondent, Baumgarten, was employed by Stewart as a draughtsman, on a salary and commission basis, in connection with the construction.

According to the testimony of respondent, and as corroborated by that of Stewart, Mozingo explained to them both that he could not raise the $15,000 necessary to pay the Johnsons on the purchase price of the lot, and suggested that they, Stewart and Baumgarten, advance that sum to the Blackmore Investment Company for that purpose, stating that, if they would do so, he would turn over to them the deposit of the Pacific Nash Motor Company above referred to. This was thereupon agreed to, respondent giving Stewart his check for $6,000, which Stewart, in company with Mozingo, took to his bank, where he, with respondent's $6,000 check and an additional $9,000 of his own money, purchased a cashier's check in the sum of $15,000, which he gave to Mozingo. This check was deposited by Mozingo with the title company for payment to the Johnsons. At the time of agreeing to make the advance, Stewart told Mozingo that respondent wanted something in writing about the assignment of the Pacific Nash Motor Company deposit, and also that the fee of the structural engineer in connection with the construction of the building amounting to $1,500, for which he (Stewart) had become obligated, was due and should be paid. Accordingly Mozingo agreed to make the order in the amount of $16,500 to take care of both the advance and the engineering fees. Stewart further suggested to him that the order be made payable to respondent, as he was the one who wanted it.

Thereupon the following order was executed by Mozingo on behalf of the Blackmore Investment Company, one copy being delivered to the title company and the other to Stewart, who delivered it to respondent:

"San Francisco, California
"November 15, 1926.

"California Pacific Title Insurance Co., 148 Montgomery Street, San Francisco, California

"Gentlemen:—For, and in consideration of certain moneys heretofore advanced to the Blackmore Investment Company, and for certain other services heretofore performed for the benefit of the Blackmore Investment Company you are herewith instructed to pay the sum of Sixteen Thousand Five Hundred ($16,500.00) Dollars to E. A. Wm. Baumgarten. This said sum of $16,500.00 is to be paid out of the deposit heretofore made with you by the Pacific Nash Motor Company to secure a lease to be entered into between the Blackmore Investment Company and the Pacific Nash Motor Company and which deposit amounts to the sum of Eighteen Thousand ($18,000.00) Dollars.

"The balance due out of the deposit of $18,000.00 namely $1,500.00 is to be paid to George Peak for services rendered in full, for negotiating the lease herein above referred to.

"It is understood, and you are hereby instructed to disregard any other orders, instructions, or demands on this said deposit of $18,000.00 without the written consent of said E. A. Wm. Baumgarten being first had and obtained.

"Yours very truly,
"Blackmore Investment Company,
"Per F. P. Mozingo, Secretary."

Thereupon, although the exact time thereof does not appear, Mozingo indorsed in blank on behalf of the Blackmore Investment Company the check on deposit with the title company.

On May 23, 1927, and again on June 13, 1927, Mozingo, on behalf of the Blackmore Investment Company, instructed the title company to cancel and disregard the above order in favor of respondent. On June 20, 1927, he directed the title company to cancel his indorsement of the check, and subsequently executed a purported assignment of the fund and check to appellant. Mozingo claimed, as his reason for doing so, that Stewart had been amply repaid for the $15,000 out of excessive and secret architect's fees received from the contractor. No sufficient evidence to support this contention was, however, produced at the trial.

The building was completed and accepted and the lease executed, and thereupon, on June 10, 1927, the title company cashed the check. Subsequently the $1,500, less the title company's charges, was paid to appellant's assignee pursuant to the second paragraph of the order. Due to the several conflicting claims to the balance of the $16,500 the title company refused to disburse it, and respondent thereupon brought this action for its recovery.

A considerable portion of appellant's briefs is devoted to a discussion of his version of the circumstances under which the advance of $15,000 was made and the order upon the title company executed and to the contention that Stewart by "padding" the contract price has been more than compensated for any ad-

vances made. Appellant's contentions as to these matters are based upon conflicting testimony at variance with that of respondent and Stewart and which upon this appeal it must be assumed were determined by the trial court adversely to appellant.

[1] The above order, being one for the payment to respondent of a part only of the whole fund due the drawer, and never having been accepted by the drawee, cannot be said to constitute a legal assignment, pro tanto, of the obligation due the Blackmore Investment Company or of any part thereof. Donohoe-Kelly Banking Co. v. S. P. Co., 138 Cal. 183, 71 P. 93, 94 Am. St. Rep. 28; Fidelity Sav., etc., Ass'n v. Rodgers, 180 Cal. 683, 182 P. 426; Guggenhime & Co. v. Lamantia, 207 Cal. 96, 276 P. 995, 997; Harlan v. Gladding, McBean & Co., 7 Cal. App. 49, 93 P. 400.

[2] However, it has been repeatedly held that, where an order, such as the one at bar, is given for a valuable and adequate consideration, and with the intent to effect an assignment, it will as between the payee and the drawer operate as an equitable assignment taking precedence over subsequent assignments and judgment liens. Wheatley v. Strobe & Wilcoxson, 12 Cal. 92, 73 Am. Dec. 522; Pierce v. Robinson, Adm'r, 13 Cal. 116; Pope v. Huth, 14 Cal. 403; Curtner v. Lyndon, 128 Cal. 35, 60 P. 462; McIntyre v. Hauser, 131 Cal. 11, 63 P. 69; Fidelity Sav., etc., Ass'n v. Rodgers, supra; Dunlap v. Commercial Nat. Bank, 50 Cal. App. 476, 195 P. 688.

[3] It is immaterial that there was no fund actually in the possession of the title company at the time of the execution of the order. The subject of the assignment was not the check or any particular fund of money, but was the right of the Blackmore Investment Company to receive the sum of $18,000 upon compliance with the terms of the escrow. Money to become due at a future time upon the happening of a contingency may be the subject of an assignment. Pope v. Huth, supra; Bridge v. Kedon, 163 Cal. 493, 126 P. 149, 43 L. R. A. (N. S.) 404; Smitton v. McCullough, 182 Cal. 530, 189 P. 686; Bank of Yolo v. Bank of Woodland, 3 Cal. App. 561, 86 P. 820; Union Collection Co. v. Oliver, 23 Cal. App. 318, 137 P. 1082.

[4, 5] The order was given for valuable and adequate consideration, to wit, the advance of $15,000 by Stewart and respondent and the satisfaction of the indebtedness of the Blackmore Investment Company to Stewart in the sum of $1,500 on account of engineering fees. An antecedent indebtedness constitutes a valuable consideration sufficient to support an equitable assignment. Smitton v. McCullough, supra.

[6] That the order was intended by the parties as an assignment is in accord with the evidence. The agreement of Mozingo was to "turn over the deposit." At the time of the delivery of the order, Stewart said to Mozingo, "Now it is understood that $16,500 of this money goes to Baumgarten and $1500 goes to Peak," and the latter replied, "Yes, I will turn over the money to you fellows and I get the building." In January of 1927, it was suggested to respondent by an official of the title company that he procure another order on a regular form of the title company. After signing this additional order, Mozingo stated to respondent, "Now you got it all, it is all yours now." By indorsing the check, the Blackmore Investment Company divested itself of any further control over the fund. The concluding paragraph of the order specifically agrees and instructs the drawee to disregard any other orders, instructions, or demands on the fund without the written consent thereto of the payee. The trial court was amply justified in determining, as we must assume it did, that an assignment was intended.

[7] The situation at bar therefore comes within the rule as stated in Guggenhime & Co. v. Lamantia, supra, that: "Although neither a negotiable or nonnegotiable bill of itself constitutes an assignment, if it clearly appears from the entire transaction that it was the intention of the drawer and payee to transfer title to a chose in action, an assignment will be held to have taken place, and the nature of the transaction is not changed because the assignor in the course of the transaction may have delivered to the assignee an order upon the debtor."

[8, 9] An assignment having taken place, it was beyond the power of the assignor to revoke it, and Mozingo's subsequent attempts to do so were ineffectual. It likewise takes precedence over the subsequent assignments and levies of execution which form the basis of appellant's claims to the fund. Title Ins., etc., Co. v. Williamson, 18 Cal. App. 324, 123 P. 245, 247.

[10] Appellant contends that the complaint does not state, nor do the findings of the trial court find, sufficient facts to support a judgment on the theory of an equitable assignment. The complaint alleges the agreement of lease; the deposit thereunder in escrow of the check of the Pacific Nash Motor Company in the sum of $18,000; the assignment to respondent of "the sum of $16,500 of said fund of $18,000"; the execution and delivery of the order directing the payment to respondent of the sum of $16,500 and the contemporaneous indorsement of the check; and that the "assignment and order" were made in consideration of moneys advanced to the Blackmore Investment Company, at its instance and request, to be used, and which were actually used, in the purchase of the real property therein mentioned. It also contains a second count containing the usual al-

legations found in actions to quiet title. A general and special demurrer was filed by appellant and overruled by the trial court. Although it is true that the adequacy of the consideration is not definitely shown, there being no averment as to the amount of money advanced, the case was, as stated by appellant in his briefs, tried on the theory of an equitable assignment. The matter of the true consideration and its sufficiency and adequacy was fully gone into by all the parties, apparently without objection, upon the trial and determined to be as found by the trial court upon competent evidence, "moneys advanced and services rendered to Blackmore Investment Co., at its instance and request, of the value of $16,500." Both the evidence and the findings of fact show the assignment to be just and reasonable and the consideration therefor adequate.

The complaint is contended to be further defective, in that it alleges an assignment of "the sum of $16,500 of said fund of $18,000," whereas in fact there was at the time of the assignment no fund in existence. The trial court properly found the assignment to be of all of the assignor's "right, title and interest in and to its said claim against Pacific Nash Motor Company and the fund represented by said check, to the extent of $16,500 thereof." And this is what the complaint, reading it in its entirety, alleges in effect. From the facts alleged it definitely appears that the subject of the assignment was neither the check nor a portion of any existing fund of money, but was rather a chose in action, to wit, the claim of the Blackmore Investment Company against the Pacific Nash Motor Company.

[11] The failure of the complaint to allege that, at the time of the commencement of the action, the order was in force and effect, and the plaintiff was the owner and holder of the assignment, is not fatal. It is alleged that the plaintiff is the owner of, and entitled to possession of, the sum of money in dispute. His ownership in the assignment at the time of the commencement of the action is by "fair intendment" shown. Irish v. Sunderhaus, 122 Cal. 308, 54 P. 1113.

[12, 13] Respondent is not limited in his recovery to the sum of $6,000, which was the extent of his personal contribution to the consideration for the assignment. The Blackmore Investment Company received, for the assignment, adequate consideration of the value of $16,500. The assignment was made to respondent for the benefit of both respondent and Stewart. In so far as the extent of Stewart's interest therein is concerned, respondent is the trustee of an express trust, and entitled to sue thereon in his own name. Section 369, Code Civ. Proc. The rule that every action must be prosecuted in the name of the real party in interest (section 367, Code Civ. Proc.) is subject to the further rule that a person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust which permits him to sue with like effect as though he were the principal. Earl Fruit Co. v. Herman, 90 Cal. App. 640, 266 P. 592.

[14] Appellant complains that the findings of the trial court fail to find on the allegations of his cross-complaint. He does not, however, point out in his briefs the issues raised thereby which are not determined in the findings, nor does he point out in what manner he has been prejudiced from any failure to find thereon. However, in view of the conclusions reached by the trial court as to the validity of the assignment in favor of respondent, admittedly prior in point of time to the alleged assignment and judgment liens upon which appellant relies, findings as to the latter became immaterial and unnecessary. 2 Cal. Jur. 1032.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

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